

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA,

GEORGE H. SMITH,
REPORTER.

VOLUME 62
WITH
NOTES ON CAL. REPORTS

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

[No. 8,668.— Department One.]
November 6, 1882.

CHARLES H. CONDEE ET AL. v. HIRAM M. BARTON.

CHANGE OF CONCLUSIONS OF LAW BEFORE ENTRY OF JUDGMENT.—The declaration of the general conclusion of law from the facts found is the rendition of the judgment in so far that when entered the judgment entered may relate to such rendition for certain purposes; but this does not make the conclusions of law first announced final and beyond the reach of the Court so as to preclude the Court from changing the conclusions of law at any time before the judgment is entered.

JUDGMENT, WHEN FINAL.—A judgment is not final until it is recorded.

REAL ESTATE BROKER — COMMISSIONS — ESTOPPEL.—A real estate broker is not estopped from claiming his commissions because the memorandum of agreement between himself and the defendant describes the defendant as owner of the property to be sold.

APPEAL by defendant from judgment of the Superior Court of the County of San Bernardino, and from an order vacating and setting aside the decision and conclusions of law in favor of defendant and thereupon deciding and filing conclusions of law in favor of plaintiffs. **ROLFE, J.**

Action on contract. The complaint set forth the execution

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of an agreement in writing, its performance by plaintiff, and a breach thereof by defendant.

The agreement was as follows:

"Memorandum of agreement made and entered into this twenty-eighth of January, A. D. 1882, by and between H. M. Barton of the first part and Condee & Marshall, parties of the second part, witnesseth that whereas the said party of first part is the owner of two hundred and twenty acres of land in Lugonia district, known as the Barton tract, in San Bernardino County, State of California, together with twenty-two shares of water in Sunnyside division of the North Fork ditch of the Santa Ana River, and is desirous of selling the same through the agency of the said Condee & Marshall.

"Now, therefore, it is hereby agreed between the parties hereto that the said tract of land together with the water rights shall and is hereby placed in the hands of the said Condee & Marshall, as agents for sale, on the following terms, to wit,—the tract is to be platted and mapped and advertised, and sold in such tracts as the said Condee & Marshall shall see fit, and all realized over fifty-five dollars per acre shall be retained by said Condee & Marshall as commission for the sale of said tract of land and water rights, and the said Barton agrees to receive not less than one quarter cash down on each sale made by Condee & Marshall, and upon receipt of said payment the said Barton agrees to execute a bond for a deed allowing the balance, three fourths, to be paid in equal payments of one, and two, and three years, at ten per cent. per annum interest; interest payable semi-annually; and it is further agreed that the said Condee & Marshall shall have one year from date hereof to affect the sale of said tract of land and water right as above agreed.

"Dated at San Bernardino, January 28, 1882.

"H. M. BARTON,

"CONDEE & MARSHALL."

Defendant's bill of exceptions shows the following facts: In this case, on this third day of July, 1882, the Court signed and filed findings of fact and conclusions of law. The conclusions of law are in the following words, to wit: "As conclusions of law, the Court decides that the plaintiffs are not

entitled to any judgment against the defendant, but that the defendant should have judgment against plaintiffs for his costs and disbursements in this action expended and incurred."

Immediately upon the announcement by the Court of its decision and the filing of the said findings and conclusions of law, the plaintiffs made their motion, to wit: The Court having filed its findings in this case, plaintiffs move the Court for judgment in their favor on the findings of fact as filed, and to set aside the conclusions of law therein made, and give judgment for plaintiffs as prayed for. Thereupon the Court ordered that entry of judgment be stayed till said motion was heard. Subsequently, on September 4, 1882, upon argument of said motion, and before the Court ruled on it, the defendant objected to its being allowed, on the grounds: 1. That the Court having filed its findings of fact and conclusions of law, and made its decision, that the action of the Court can not be reviewed except upon a motion for a new trial or appeal from the judgment. 2. That the findings of fact do not support a judgment for plaintiffs.

The Court afterwards, on September 5, 1882, made and caused to be filed this order and decision: "In the above-entitled cause, the Court having heretofore filed its findings of fact and conclusions of law, and thereupon the plaintiffs, by their attorney, having moved the Court for judgment in their favor upon the facts as found by the Court, and the same having been fully considered by the Court, it is now ordered that the aforesaid conclusions of law in favor of the defendant be vacated and set aside, and upon the facts so found as aforesaid, the Court decides and finds as conclusions of law, that plaintiffs are entitled to judgment against the defendant for the sum of four thousand four hundred dollars, together with costs of this action. Let judgment be entered accordingly."

Thereupon judgment was entered for plaintiffs. After decision in department, a petition for hearing in bank was presented and denied.

Satterwhite & Curtis, for Appellant.

The bill of exceptions shows: After the Court had signed

and filed findings of fact and conclusions of law, or in other words, made its decision, it could not change its conclusions of law or decision except upon a motion for a new trial. Or if the point could not be reviewed on motion for new trial, then the only remedy would be an appeal from the judgment. When the trial is by the Court, the filing of findings of fact and conclusions of law, is the rendition of the judgment. (C. C. P., §§ 632, 633.)

We call the Court's attention to the fact, that no other order for judgment is necessary but the findings and conclusions of law. That is the decision which authorizes judgment to be entered by the Clerk. (C. C. P., § 633.) This talk, therefore, by lawyers or Courts, about the "order for judgment being entered in the minutes," is entirely gratuitous in a case like this. The decision of the Court is the judgment. (*Gray v. Palmer*, 28 Cal. 416; *Cal. State Tel. Co. v. Patterson*, 1 Nev. 150.)

"The judgment is not always rendered immediately after the rendition of the verdict, or even after the findings of fact by the Judge, because a special verdict may be returned, and in such a case it frequently happens that what judgment shall be rendered thereon is reserved for argument. So after the facts have been found by the Court, what conclusion of law (judgment) follows may be reserved for argument." (*Gray v. Palmer*, 28 Cal. 420.)

When the jury return a general verdict, that is the rendition of the judgment, and the Clerk must enter judgment in conformity thereto within twenty-four hours. (C. C. P., § 664.) A special verdict leaves the rendition of the judgment to the Court. (C. C. P., § 634.) Therefore, we say that when a special verdict is returned, or findings of fact filed, without any conclusions of law, the case is open to the Court to render whatever judgment it believes is correct. But when a general verdict is returned, or findings of fact and conclusions of law are filed, the Court can not vacate or set either aside, except upon a motion for new trial under Code of Civil Procedure, Sections 633, 657. (27 Cal. 688; 38 id. 528; 42 id. 507; 43 id. 452; *Los Angeles Co. Bank v. Raynor*, 9 P. O. L. J. 743; 51 Cal. 507.)

Henry M. Willis and C. W. C. Rowell, for Respondents.

A new trial is a re-examination of an issue of fact. (Code C. P., § 656.) When the facts are found by the Court correctly, why ask for a re-examination of the issues of fact? *Qui bono*. It is urged that Subdivision 7 of Section 657, C. C. P., applies. Such is not my construction. That means such an error of law in the admission or rejection of testimony or giving an instruction as would or might have produced a change in the verdict of the jury or decision of the Court. A change in the facts found or established by proper evidence on trial. (*Gambert v. Hart*, 44 Cal. 542; *Martin v. Matfield*, 49 id. 42.)

When no errors in the admission or rejection of testimony or instructions given are assigned, and it is conceded the facts are properly found, but the Court at first comes to a wrong conclusion, it is the duty of counsel and proper practice to call the trial Court's attention to its error and have it corrected before final judgment. The trial Court has full control over its records until an appeal is prosecuted to this Court. (*Browner v. Davis*, 15 Cal. 9; *Swain v. Naglee*, 19 id. 127; *Heyeler v. Hendsell*, 27 id. 491; *Branger v. Chevalier*, 9 id. 172; *Leviston v. Swan*, 33 id. 480; *Estate of Schroeder*, 46 id. 305; *Mulliken v. Hull*, 5 id. 245.)

When the findings of fact are defective they may be corrected on motion. (*Pralus v. Jefferson G. & S. M. Co.*, 34 id. 558; *Hathaway v. Ryan*, 35 id. 188; *Cowing v. Rogers*, 34 id. 648.) If the trial Court can correct an error of fact on its being pointed out, why not an error of law?

The COURT:

We know no principle that would estop the plaintiffs from claiming their commission, because the "memorandum of agreement" describes the defendant as owner of the property to be sold.

We can see no objection to the practice of changing the conclusions of law, based upon the finding of facts at any time before judgment is entered. The declaration of the general conclusion of law from the facts found, is the rendition of the judgment in so far, as that, when entered, the

judgment entered may relate to such rendition for certain purposes. But this does not make the conclusions of law first announced final and beyond the reach of the Court. There is no judgment which is final until a judgment is recorded.

Judgment and order affirmed.

[No. 7,518.— Department One.]
November 8, 1882.

ROWENA G. STEELE v. BOARD OF SUPERVISORS
OF MERCED COUNTY.

SERVICE OF NOTICE BY MAIL — APPEAL — NOTICE OF APPEAL — DISMISSAL OF
APPEAL.— On the authority of *Reed v. Allison*, 10 P. C. L. J. 239, appeal
dismissed.

APPEAL by defendants from the judgment of the Superior Court of the County of Merced. MARKS, J.

Petition for writ of mandate to compel the Board of Supervisors of Merced County to award the county printing to the plaintiff. The petition for the writ was filed in the Superior Court of Merced County on August 27, 1880. Defendants demurred to the writ; the demurrer was overruled, and defendants declining to answer, judgment was given against them. The notice of appeal was dated November 5, 1880.

As appears from return of service indorsed thereon, it was served on the sixth day of November, 1880, on the plaintiff, Rowena G. Steele, personally, at the county of Merced, by the Sheriff of that county. The affidavit of service of the notice upon the plaintiff's attorney is in the words and figures following:

"State of California, County of Merced, ss.: Zue G. Peck, being duly sworn, deposes and says: he is a white male citizen over the age of twenty-one years, and he is clerk in the office of Frank H. Farrar, District Attorney of Merced County, California. That, as such clerk, he did, on the eighth day of November, A. D. 1880, deposit in the United States post-office in the town of Merced, county of Merced, State of California,

a sealed envelope with a six-cent United States postage stamp imprinted thereon, containing a true and correct copy of the annexed notice of appeal, and directed to Mrs. Laura DeForce Gordon, 29 Montgomery Block, San Francisco, California.

"That affiant is informed and believes, and so states the facts to be, that said Laura DeForce Gordon is the attorney of record for the plaintiff in the action wherein the annexed notice of appeal is given, and that her place of business is at 29 Montgomery Block, in the City and County of San Francisco, State of California.

ZUE G. PECK."

Respondent moved to dismiss the appeal on the ground that no service of the notice of appeal was shown in the transcript on appeal.

Laura De Force Gordon, for the motion.

This appeal should be dismissed, as there is nothing in the transcript to show or prove service of "Notice of Appeal," which must be shown. (*Hildreth v. Gwindon*, 10 Cal. 490.) The alleged service on Rowena G. Steele by the Sheriff personally is nugatory and void. (C. C. P., § 1015; *Grant v. White*, 6 Cal. 55; *Abrahams v. Stokes*, 39 id. 150; *Whittle v. Renner*, 55 id. 395; *Prescott v. Salthouse*, 53 id. 221.) The only proof offered is a pretended service shown by the affidavit of Zue G. Peck, which affidavit is manifestly insufficient in the following particulars:

1. It does not show that the residence or place of business of the parties giving notice is in a different place than that of the respondent's attorney, to whom they thus attempt to give notice. Service by mail can only be made where the persons making the service and the person to whom it is to be made, reside, or have their places of business, in different places, between which there is a regular communication by mail. (C. C. P., § 1012; *Moore v. Besse*, 85 Cal. 184; *Schenck v. McKie*, 4 How. Pr. 246.)

2. The affidavit of Peck fails to show a single step towards a valid service of "Notice of Appeal." It does not show that the mailing of the notice was done at the request of the appellants or their attorney, or on their behalf. Without some authority to do so, he had no right to mail the notice, and it should be disregarded. (*McMillan v. Reynolds*, 11 Cal. 379.)

3. It does not show that the postage was paid. The affiant's statement there was "a six-cent U. S. postage-stamp imprinted upon the envelope," inclosing "annexed Notice of Appeal," does not indicate whether that amount was sufficient to pay the postage on the same, nor does he state that the said stamps were uncanceled.

4. The affidavit of the mailing of the notice does not show that the notice of appeal mentioned in said affidavit was the notice of appeal in this cause, or to what cause it did refer.

5. The affidavit fails to state that, at the time of the mailing of the notice, the residence or place of business of the plaintiff's attorney was in the City and County of San Francisco, to which place he swore he had addressed the said notice on the eighth day of November, 1880, although the affiant says he "believes" that on the fifteenth day of November, 1880, the date on which the jurat is made to the said affidavit, that the place of business of plaintiff's attorney is in the said City and County of San Francisco; but there is nothing in this affidavit of mailing notice that even pretends to show that the residence of plaintiff's attorney was in San Francisco at the date of mailing the notice. There is an interval of seven days between the time of mailing notice and the making of the affidavit that "affiant believes the place of business of plaintiff's attorney to be in San Francisco." It is wholly immaterial where plaintiff's attorney resided seven days after the mailing of the notice. Where did she reside or have her place of business on the eighth of November, 1880, the date of mailing of the notice? (*Moore v. Besse, supra.*)

6. The affidavit contains no mention that there is a regular communication by mail between the place of business of the person giving notice and the person to whom the notice is given, as is positively required by the statute (C. C. P., § 1012.) Nor does it show that there is any communication by mail whatever, which renders the pretended service fatally defective, and must be so regarded. (*People v. Alameda T. P. Road Co.*, 30 Cal. 182.) The affidavit of service is ineffectual, if not strictly in compliance with the statute. (*People v. Alameda R. Road Co.*, and cases cited, 30 id. 182; *Dall v. Smith*, 32 id. 475.) "The appeal should show due service." (*Franklin v. Reiner*, 8 id. 341.) "Unless it affirmatively ap-

pear in the record that a copy of the notice of appeal has been served upon the adverse party or his attorney, the Supreme Court cannot take jurisdiction of the case. (*Hildreth v. Gwindon*, 10 id. 490.)

Frank H. Farrar and P. D. Wigginton, contra.

The Court:

The motion to dismiss the appeal in this case is sustained on the authority of *Reed v. Allison*, 10 P. O. L. J. 239, and cases cited therein.

Appeal dismissed.

[No. 7,166.—In Bank.]

November 9, 1882.

PIERRE PRIET ET AL. v. CHARLES HUBERT ET AL.

COUNTY WARRANT — DUPONT STREET COMMISSION.—Action brought under the fifteenth section of the Act to authorize the widening of Dupont Street in the City and County of San Francisco (Statutes 1875-6, p. 433). Hunter, one of the defendants, was the owner of a lot of land, and plaintiffs had a leasehold interest therein. The Dupont Street Commissioners assessed the damages to the lot at ten thousand nine hundred and thirty-two dollars in favor of Hunter, "and to all owners and claimants, known and unknown." A warrant (No. 92) was drawn on the Dupont Street Fund in favor of Hunter for the ten thousand nine hundred and thirty-two dollars, and was by him indorsed to one Tibbey, who was Secretary of the Board of Commissioners. Afterwards, the Board ascertaining that there was a lease of the lot, and a doubt or dispute about the value thereof and of the damages, drew another warrant (No. 114), the one in controversy, payable out of the same fund and for the same amount, and deposited it with the defendant Reynolds, as County Clerk, and notified the defendant Hubert, as Treasurer of the City and County, of the drawing and depositing thereof, and of the description of the lot of land covered by warrant No. 114. Afterwards Hubert, through a deputy, paid in full to Tibbey warrant No. 92. The Court below held the payment was to Hunter, received by his authorized agent, and was in full satisfaction of the award and of warrant No. 114, and denied relief as against the defendants Hubert, Treasurer, and Reynolds, County Clerk. In this Court, *Held*: If the finding, that warrant No. 92 was delivered to and left with Tibbey by defendant Hunter, "with power and authority from said Hunter to deliver the same to defendant Hubert, Treasurer, and collect and receive from him the amount expressed therein," means that there was an

actual agreement between Hunter and Tibbey, to the effect that the latter should collect the warrant, either for himself or Hunter, the evidence does not support the finding. The evidence clearly shows that the warrant was to be left with Tibbey, "to be placed in the hands of the County Clerk" until such time as the dispute between Hunter and the plaintiffs should be determined.

WHEN PAYMENT BY TREASURER IS VIOLATION OF OFFICIAL DUTY.—The payment by the Treasurer, with full knowledge of the facts, to Tibbey of the moneys which he himself had set apart for the payment of warrant No. 114 was made in violation of his official duty.

EFFECT OF UNAUTHORIZED PAYMENT.—Such payment to Tibbey of the money which should have been reserved for distribution in accordance with the decree, herein, was not a payment to Hunter; nor could the plaintiffs be deprived of their interest in warrant No. 114, or the proceeds thereof, by the circumstance that the Treasurer had paid a like sum to another person upon another warrant in which the plaintiffs had no interest.

PARTIES — BILL IN EQUITY — EFFECT OF DECREE IN THIS CASE.—Section 15 of the Act, provides that a party in interest may in a case like this proceed against the Treasurer by a bill in equity; all persons in interest, if known, being made parties. And it was the intent of the Legislature that the decree of the Court should adjudicate the conflicting claims and provide for a just and proper distribution between the claimants and should conclusively determine the duty of the Treasurer to pay to the parties adjudged to have an interest in the warrant the sum decreed to be the value of such interest.

DIRECTIONS AS TO PROCEEDINGS AND DECREE.—In this case directions given as to the proper proceedings to be taken, and decree to be entered by the Court below.

APPEAL by plaintiffs from the judgment in the Twelfth District Court, City and County of San Francisco, in favor of the defendant Charles Hubert, and from the order denying plaintiff's motion for a new trial. Appeal by defendant David Hunter from the judgment in said Court against him in favor of the plaintiffs, and from the judgment in favor of the defendants Charles Hubert and Thomas H. Reynolds, and also from the order denying a motion for a new trial. **DANGERFIELD, J.**

This is an action brought by plaintiffs to have determined the respective interests of the plaintiffs and the defendant David Hunter in a warrant, No. 114, drawn by the Board of Dupont Street Commissioners in the City and County of San Francisco upon the City and County Treasurer to pay the damages assessed under the Act of March 23, 1876 (Stats. 1875-6 p. 433), and deposited with the defendants Thomas H.

Reynolds, as Clerk of the City and County, under the provisions of Section 15 of the Act.

The Court below gave judgment in favor of the plaintiffs against the defendant David Hunter for the sum of one thousand six hundred and fifty dollars as damages; and judgment in favor of the defendants Charles Hubert and Thomas H. Reynolds as against both plaintiffs and the defendant Hunter.

The other facts are stated in the opinion of the Court.

D. H. Whittemore, for Plaintiffs (Appellant and Respondent).

He, after a statement of the evidence and argument upon the fact, concluded: "We are satisfied with our judgment against Hunter, and he is greatly to blame for placing it in Tibbey's power to get the money — ours as well as his own — and he is clearly responsible to us. It is only in the event that the judgment between Hunter and Hubert is reversed, that we ask to have the judgment between plaintiff and Hubert reversed."

H. J. Tilden, for David Hunter, Appellant.

Warrant No. 92 was never issued by the Commissioners. Issue is to send out, to put in circulation for use. (Webster's Dict.) Nor was there any authority for the drawing of warrant No. 92. It was never delivered to Hunter, but was kept by H. S. Tibbey, the Secretary of the Commissioners to be deposited with the County Clerk as required by said Act. Nor was it indorsed. Indorsement consists in writing one's name on a negotiable instrument, and delivering it to another person with intent to pass the title. (Civil Code, §§ 3108, 3123; Story on Promissory Notes, § 120, a; *Marston v. Allen*, 8 M. & W. 499.)

Certainly the evidence does not show that Hunter delivered it to Tibbey, or intended to pass the title to him or any one; nor is it negotiable. A negotiable instrument is one for a fixed amount and payable absolutely, and not from any particular fund. (3 Kent, side page 76; Story on Bills of Exchange, § 46; Civil Code, § 3095.) Warrants drawn on the County Treasurer are not negotiable. (*People v. Gray*, 23 Cal. 125; *Dana v. San Francisco*, 19 id. 486; *Argentina v. San Francisco*, 16 id. 275; *Martin v. San Francisco*, id. 285.)

Tibbey was acting in his official capacity as Secretary of the Dupont Street Commissioners at the time and in the matter of the signing of said warrants by Hunter, and in retaining warrant No. 92; and he retained it as such Secretary, in obedience to a law binding both on Tibbey and on defendant Hunter, in order that said Commissioners could deposit it with the County Clerk. Tibbey did not retain the warrant as indorsee. Hunter had no reason to suppose that the Commissioners would not perform their duty and comply with the provisions of said Act, and deposit said warrant with the County Clerk.

If the Treasurer had paid the warrant in good faith, and without notice of the facts, there might be some excuse for the payment; but the Treasurer had notice of the drawing of warrant No. 114 for the award of damages to said lot No. 2, block No. 118; he was the Treasurer of the Dupont Street Commissioners, was served with written notice of the drawing of warrant No. 114 for the damages to said lot, and registered the warrant on July 14, 1877. (See Civil Code, §§ 18 and 19; *McClure v. Town of Oxford*, 94 U. S. 432; *Christy v. Sullivan*, 50 Cal. 338; Wade on Notice, § 439; *Commercial Bank of Rochester v. Colt*, 15 Barb. 506.)

If warrant No. 92 had been a negotiable instrument, the payment, under the circumstances of this case, would not have been valid.

The rule is that a payment is valid only when made *bona fide*, without any knowledge of facts which justly impair or destroy the rights of the holder. (Story on Bills of Exchange, § 450; *Redington v. Woods*, 45 Cal. 421; *Dresser v. Missouri R. R.*, 93 U. S. 93; Civil Code, § 3164.)

The Court erred in rendering a money judgment against defendant Hunter and in favor of the plaintiff, because, as stated above, this is an equitable action in the nature of a special proceeding for the just distribution of warrant No. 114, as provided by section 15 of said Act, and not an action for damages.

I respectfully submit that the judgment should be reversed and a judgment entered distributing the warrant No. 114 between the plaintiff and defendant David Hunter.

J. F. Cowdery and W. C. Burnett, for Respondents Hubert and Reynolds.

Warrant No. 92 was issued by the Board of "Dupont Street Commissioners" under their official seal, used by the Board to verify their official acts (Stat., § 4), April 20, 1877, for ten thousand nine hundred and thirty-two dollars, for the award for damages, etc., to David Hunter, or order, signed by the President and Secretary of the Board; and there was not from that time any power in the Board to issue another warrant for the identical damages. (Stats., §§ 11, 14, 15.)

There was but one "Dupont Street Fund," and that was created by the statute, and consisted of all the moneys arising from the sale of bonds, and no subdivisions thereof are provided for by the statute; and all of said moneys, whether placed in bags, boxes, or anywhere else in the Treasurer's office, were simply moneys in gross of the "Dupont Street Fund," and were payable upon the presentation of warrants as they came in.

Warrant No. 92 was drawn to David Hunter, or order, and indorsed by him, "Received payment, David Hunter." The principles of "indorsements," mentioned in appellant's points and authorities, do not reach the case of an admission of payment.

McKINSTRY, J.:

The action was brought under the fifteenth section of an Act to authorize the "widening of Dupont street." (Stats. 1875-76, p. 433.) The section reads:

"In all cases, when the owner or owners of any subdivision of land taken for the widening of said street, or of any improvements destroyed or injured, is or are unknown, or is or are known to be laboring under any legal disability, and in cases where there are liens or incumbrances, or leases, or conflicting claims, or disputes or doubts about the title of any lot or subdivision of land, which can not be adjusted between the parties in interest, in all such cases it shall be the duty of the Board of Commissioners to draw a warrant on the Treasurer of said city and county, payable out of said Dupont Street Fund, for the amount awarded in each case as the

value of the respective lots of land taken for said street, or for damages awarded on account of improvements destroyed or injured by reason of the widening thereof, as fixed in said report, and to deposit said warrant with the County Clerk of said city and county; and thereupon, and on proof of the same, the said Board shall be entitled to be put in possession of such lots of land as shall be taken for said street in the same manner as provided in Section 16 of this Act, and the title to said lots of land shall thenceforth be vested in said city and county as effectually as if the same had been conveyed by deed executed by the true owners thereof. Said Board shall also notify the said Treasurer of the drawing of said warrant, and furnish him with a description of the lot referred to by said warrant; and the parties in interest in said lot may proceed against the Treasurer by bill in equity for an adjudication to settle the conflicting claims to the same, or to provide for its just and proper distribution, in which suit all parties in interest or dispute shall be made parties, if known. On entry of a final decree of Court in such action, the said County Clerk shall deliver the warrant to the party or parties entitled thereto, according to the order of the Court. The only requisition upon the Treasurer shall be to answer whether he has the money in the 'Dupont Street Fund' to pay the warrant when presented."

The Court below found that the Dupont Street Commissioners assessed the damages for the lot described in the complaint at ten thousand nine hundred and thirty-two dollars, and assessed the same in favor of David Hunter, one of defendants, "and to all owners and claimants, known and unknown."

The Court also found "that on the twentieth day of April, 1877, the Board of Dupont Street Commissioners drew a warrant, such as was provided for in such cases by said Act of the Legislature, in favor of said David Hunter, for said sum of ten thousand nine hundred and thirty-two dollars, gold coin, payable out of the Dupont Street Fund, provided for in said Act, and being for the award and assessment aforesaid, which warrant was numbered ninety-two (92), and was in the words and figures as set out by copy in the amended answer of defendants, Hubert, Treasurer, and Reynolds, County

Clerk, of the City and County of San Francisco, filed herein on the eighteenth day of September, 1879, and was signed by the President, and countersigned by the Secretary of said Board, as were all other warrants ever drawn by that Board, and indorsed as follows, viz.: 'No. 92, \$10,982. Warrant on Dupont Street Fund, in favor of D. Hunter.'

"That afterwards, on the twenty-seventh day of April, 1877, said defendant, Hunter, indorsed said warrant No. 92 as follows, viz.: 'David Hunter,' which indorsement was witnessed in writing, as follows, viz.: 'Indorsement correct, H. S. Tibbey;' and at the same time last aforesaid, said Hunter further indorsed said warrant No. 92, as follows, viz.: 'Received payment, David Hunter;' which indorsement last aforesaid was then, and had been for years last preceding that time, and still is the usual indorsement acknowledging receipt of money due upon warrants upon the treasury of said City and County of San Francisco.

"That at the time last aforesaid, said warrant No. 92 was delivered to said Hunter, and by him delivered to and left with one Henry S. Tibbey, with power and authority from said Hunter to deliver the same to defendant Hubert, Treasurer, as aforesaid, and collect and receive from him the amount expressed therein of ten thousand nine hundred and thirty-two dollars, gold coin.

"That afterwards, on the ninth day of July, 1877, said Board found that there was the said lease of said lot, and a doubt or dispute about the value thereof, and of any damages to the leasehold interest thereunder caused by the widening of Dupont street under said Act of the Legislature, drew another warrant, No. 114, payable out of said fund, for the same amount of ten thousand nine hundred and thirty-two dollars, for which said warrant No. 92 had been drawn, as aforesaid, and so awarded to said lot of land, as hereinbefore stated, and deposited the same with defendant Reynolds, County Clerk, and on the fourteenth day of July, 1877, notified defendant Hubert, Treasurer, of the drawing and deposit thereof, and of the description of the lot covered by said warrant No. 114.

"That on the thirtieth day of August, 1877, said Tibbey presented said warrant No. 92 pursuant to his power and

authority aforesaid, to said defendant Hubert, Treasurer, who paid the same to him on that day out of the money in the Dupont Street Fund to its full amount of ten thousand nine hundred and thirty-two dollars, gold coin, and marked the said warrant No. 92 'paid' and filed the same in his office.

"That at the time of such payment defendant Hubert had no notice, nor had he ever received any notice that said warrant No. 92 was drawn for the value of the identical lot and damages for which warrant No. 114 was drawn.

"That said Hunter and said plaintiffs are the only persons who have ever claimed any part of said award of ten thousand nine hundred and thirty-two dollars, and said Hunter is the only person who has ever claimed the whole thereof."

If the finding, that warrant No. 92 was delivered to and left with one Henry S. Tibbey (Secretary of the Dupont Street Commissioners), by defendant Hunter, "with power and authority from said Hunter to deliver the same to defendant Hubert, Treasurer as aforesaid, and collect and receive from him the amount expressed therein of ten thousand nine hundred and thirty-two dollars, gold coin," means that there was an actual agreement between Hunter and Tibbey to the effect that the latter should collect the warrant, either for himself or for Hunter, the evidence does not support the finding. The evidence clearly shows that the warrant was to be left with Tibbey "to be placed in the hands of the County Clerk" until such time as the dispute between defendant Hunter and the present plaintiff should be determined. As there was nothing on the face of No. 92 to indicate that it represented the award for the property in which the plaintiff claims an interest, it may be that Hunter, by indorsing it as he did, clothed Tibbey with its ostensible ownership, and that those ignorant of the real arrangement between the parties might assume Tibbey to be the owner. It may be that, by reason of such indorsement, the Treasurer would have been justified in paying the warrant to Tibbey — *had he been in a position to defend the payment of warrant No. 92 to any one.*

The moneys awarded for the lot of land described in the complaint, and improvements thereon, were not paid to Hunter or to any one authorized by Hunter to receive them, Hunter, personally, has never received them, and, if he is to be

treated as having received them it is because he is estopped by his indorsement of warrant No. 92 from denying that Tibbey was authorized to receive them for him. But such estoppel could only be asserted by the Treasurer in case he had paid to Tibbey the sum called for by the warrant, in ignorance of the *fact* that Tibbey was not authorized to receive the money. The evidence shows, beyond dispute, that the Treasurer paid to Tibbey the sum called for by No. 92 in violation of his official duty, and with full knowledge that 92 represented the amount of damages allowed for the property to which the present plaintiff asserted a claim, and that he paid 92 with the money which he himself had set aside for the payment of 114, then on deposit with the County Clerk to await the determination of this action. The payment to Tibbey of the money which should have been reserved for distribution in accordance with the decree herein, was — under the circumstances — no more a payment to Hunter than would have been a payment of the sum to a stranger, or an appropriation of it by the Treasurer himself. (To avoid any possible misapprehension it is proper here to say that the payment was made by a deputy of the Treasurer and not by that officer personally.) It is not necessary to decide whether the Treasurer would be authorized in this action to object to a decree that defendant Hunter had an interest to the extent of a certain sum in warrant 114, and its proceeds, on the ground that he had already paid inadvertently to Hunter a like or greater sum. As the case is presented it appears the Treasurer has never paid to Hunter or to his order any portion of the amount awarded to the property in which plaintiff claims an interest as lessee.

Certainly the plaintiff here, who, beyond all question, is entitled to an interest in warrant 114, and in the proceeds thereof, to the extent of one thousand six hundred and fifty dollars, could not be deprived of his claim against the treasury by the circumstance that the County Treasurer had paid a like sum to another person upon another warrant. Plaintiff had no connection with the receipt for, or indorsement of warrant 92 by defendant Hunter, nor did the law make the latter the agent of plaintiff to receive any warrant awarded to

property in which the plaintiff was interested. Plaintiff had no interest in 92 or in any other warrant than 114; the only warrant deposited with the County Clerk.

The decree of the Court below should have adjudicated the conflicting claims of plaintiff, as lessee, and of defendant, as lessor, in warrant No. 114, and have provided "for its just and proper distribution." (§ 15.) At first view we were inclined to the opinion that the office of the Court would have been discharged by declaring the interest of each in the warrant No. 114, leaving any defense which the Treasurer might have against the payment of warrant 114 to be asserted when its payment should be demanded. But Section 15 provides that a party in interest "may proceed against the Treasurer by bill in equity," and a fuller consideration of its terms satisfied us that the Legislature intended that the decree in an action like the present should be binding upon the Treasurer, and conclusively determine his duty to pay to each of the parties adjudged to have an interest in the warrant the sum decreed to be the value of such interest.

As there is but one warrant, the decree hereafter to be entered should provide (the parties being properly indemnified) for the appointment of an officer of the Court to receive it, for the parties in interest, from the County Clerk, who, on the entry of final decree, must deliver the warrant to the party or parties entitled thereto, according to the order of the Court (§ 15), and for a distribution of the amount collected upon the warrant by such owner.

Judgment reversed and cause remanded with direction to the Court below to enter a decree in accordance with the views expressed in the foregoing opinion.

MORRISON, C. J., and McKEE, ROSS, SHARPSTEIN, and MYRICK, JJ., concurred.

[No. 8,443.— Department One.]

November 10, 1882.

R. S. BAKER v. E. DICKSON ET AL.

FORCIBLE ENTRY — POSSESSION.— Plaintiff was in possession, through his servant and employee, of the premises in question, when the defendants, after entering peaceably thereon, forcibly ejected the servant therefrom.

Held: It was not necessary that plaintiff should be there in person; the employee's possession was that of the employer; it does not require the actual personal presence of the employer to constitute possession in him.

APPEAL from a judgment for the plaintiff, and from an order denying a motion for new trial, in the Superior Court of the County of San Bernardino. SEPULVEDA, J.

C. W. C. Rowell and H. M. Willis, for Appellants.

Brunson & Wells and Waters & Gibson, for Respondents.

Ross, J.:

This is a clear case. The evidence sufficiently shows that on the fourteenth day of September, 1881, the plaintiff was in the possession of the property described in the complaint — the Temescal Tin mine, situated in San Bernardino County — and had been in such possession since the third of January of the same year. He was not there in person, nor was it necessary that he should be. He was there by and through his servants and employees. But their possession was his possession. It does not require the actual, personal presence of the employer to constitute possession in him. It would be strange if it did.

On the fourteenth of September the plaintiff was in the possession of the premises through an employee of the name of West. During the evening of that day, one of the defendants — Hoag — went to the house occupied by West and wanted him to "go out prospecting." The next morning Hoag returned and wanted West to go off prospecting with him. West declined, and while they were standing talking, the other defendants — Haight, Dickson, and Wyman — came up in a light wagon. They pretended to be hunters; and having inquired for water for their horses, and being directed by

West to a spring some four hundred yards from the house, they drove in that direction. West remained around the house during the day and until late in the afternoon, when he went about a hundred yards below to see about his saddle-horse. While he was gone, Dickson, who had been stationed in the vicinity, took possession of the house, and on West's return, was sitting in the door, and forbade his entering. On his way back, West was passed by Hoag, who was on horseback, and who rode hurriedly to the house, dismounted, and going to the kitchen door, said to West as he attempted to enter: "Young man, you can't get in here; the ranch is jumped." West passed to the other door, and Dickson forbade his entering there. On being asked what he would do if he did, Dickson replied: "You come in, and I will d—d quick show you what I will do." Dickson and Wyman were armed. The "jumpers" proceeded to load West's personal effects in the wagon and hauled them off, and as Hoag started with the wagon, he said to Dickson: "If any one comes fooling around here, shoot h—l out of him." West, deeming discretion the better part of valor, saddled his horse and rode away. Thereupon the plaintiff demanded of defendants restitution of the premises, which demand being denied, he commenced the present action against them for the detention thereof, and was properly awarded judgment in the Court below.

If the defendants have rights in the property in question, the law affords ample means for their assertion and vindication; but it does not sanction such proceedings as are disclosed by the record in this case.

Judgment and order affirmed.

McKINSTY and McKEE, JJ., concurred.

[No. 6,774.—In Bank.]

November 10, 1882.

JAMES CAMP ET AL. v. REBECCA C. GRIDER ET AL.

FORECLOSURE OF MORTGAGE AGAINST HOMESTEAD — PRESENTATION OF CLAIM — ESTATES OF DECEASED PERSONS — SUBSEQUENTLY ACQUIRED TITLE INURES TO MORTGAGES — PUBLIC LAND — HOMESTEAD — STATUTORY CONSTRUCTION.— The title to public land subsequently acquired by a mortgagor, inures to the benefit of his prior mortgage.

Sections 1475 and 1500, Code of Civil Procedure, must be so construed as to give effect, if possible, to both sections, and this can be done by limiting Section 1500 to all mortgages and liens other than liens or incumbrances on the homestead which liens and incumbrances on the homestead are, by Section 1475, specifically required to be presented for allowance against the estate.

The purpose of the Legislature in requiring the presentation of such liens and incumbrances on the homestead for allowance against the estate, was to preserve the homestead if possible.

APPEAL by defendant from the judgment of the District Court of the Eighth Judicial District, in and for the County of Del Norte. HAYNES, J.

Action to foreclose a mortgage. The facts are stated in the opinion of the Court. After the decision in bank, a petition for rehearing was presented and denied.

William Gibbons and L. F. Cooper, for Appellant.

No action could be brought to enforce the lien of said mortgage against said homestead: 1. Until the claim secured by such mortgage has been presented as other claims against the estate; and, 2. Until it is shown that there are no funds in the estate to pay any portion of said claim. (C. C. P., § 1475.)

The foregoing section and Section 1500, which provides that a claim secured by mortgage need not be presented if recourse against any other property of the estate be waived, were in full force and effect at the time plaintiffs commenced their action; and if plaintiffs were to be controlled by the Code at all, the Code, as it stood at the time of commencing the action, controls them. If the law, as it stood at the time the contract was made, is to control, it would be much easier and pleasanter for appellant. (*Harp v. Calahan*, 46 Cal. 233.)

Section 1475, of the Code of Civil Procedure, directs the presentation of claims secured by mortgage only when a homestead has been duly set apart by the Court; it is special or particular in its provisions; it does not interfere with the operation of Section 1500; said last named section has a large field of usefulness reserved. "It is a familiar rule in construing statutes that where there are two laws upon the same subject, they must be so construed as to maintain both, if it

can be done without destroying the evident intent and meaning of the latter Act."

The law does not favor a repeal by implication, and unless the former Act be referred to, or is clearly repugnant, to the provisions of the latter, both must stand. (*Merrill v. Gorham*, 6 Cal. 42.) Considering Sections 1475 and 1500 as two sections of the same Act, we contend that they must be so construed as to give some effect, if possible, to each section. (*People v. Waterman*, 31 Cal. 413; *Langenour v. French*, 34 id. 92.)

Section 1859, of the Code of Civil Procedure, directs that: "In the construction of a statute, the intention of the Legislature, and in the construction of the instrument, the intention of the parties is to be pursued if possible, and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular interest will control a general one that is inconsistent with it." (*People v. Wells*, 11 Cal. 838.)

It certainly is proper that Section 1475 of the Code of Civil Procedure should be construed to govern the procedure in the matter of enforcing claims against a homestead, and Section 1500 as applicable to all other secured claims. Both sections are thereby given force and effect: the province of neither is invaded. The note calls for interest at one per cent. per month, payable two years after date. After maturity, only legal interest can be charged.

James E. Murphy, for Respondent.

Was it necessary to present the note and mortgage to the administratrix for her approval or rejection before commencing suit to foreclose? We claim that no such presentation was necessary, provided that plaintiffs in their complaint expressly waived all recourse against any property belonging to the estate, as was done in this case.

Section 1500 of the Code of Civil Procedure is as follows: "No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case; An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject

thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fee shall be recovered in such action unless such claim be so presented." This was the law when the note and mortgage were made, and though repealed July 1, 1874, it was re-enacted April 15, 1876, which was long before the mortgagor, Grider, died, and before the notice of the administratrix was published or this suit commenced.

At the time this contract was made there was no law of any kind requiring a mortgage against a homestead to be presented to the administrator. Section 1475, upon which the appellants rely, went into effect on the first day of July, 1874, and cannot be held to apply to this contract. To do this would be to give it a retroactive effect, which is unconstitutional, and also against an express provision of the Code of which this Section 1475 is a part. (*Hibernia Savings and Loan Society v. Hayes*, 56 Cal. 297.)

Section 1500 of the Code of Civil Procedure distinctly provides as follows: "An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented."

We claim that there is no conflict between this section and Section 1475, but that both must be construed together, as conferring upon a mortgagee a double remedy, either of which he may pursue: 1. He may proceed under Section 1500, foreclosing only and expressly waiving all recourse against the estate; 2. He may prove up his claims before the administrator, as provided in Section 1475, Code of Civil Procedure, in which case, if the estate is sufficient to pay the mortgage, he gets it all, otherwise he takes his percentage out of the estate and forecloses for the residue. He can pursue either of these remedies. (*Hibernia Savings and Loan Society v. Jordan*, 5 Pac. Coast L. J. 381.) See also for an able exposition of this doctrine the opinion of Mr. Justice McKee, in the *Hibernia Savings and Loan Society v. Hayes*, 56 Cal. 300-303.

We contend that Section 1500, Code of Civil Procedure,

should govern, because: 1. It is a later enactment than Section 1475, and must be held to modify and control the general section last named; 2. It is special in its character, designating in what manner liens may be collected without presentation to the administrator or executor, i. e., by expressly waiving all claim for a balance against the estate.

The mortgaged premises having been selected and filed on by the mortgagor as a homestead subsequent to the giving of the mortgage, and the same also having been by the order of the Probate Court all set aside to the widow as a homestead, it was no longer a part of the estate, and the administratrix, as such, had no interest therein.

The presentation of this claim to the administratrix for allowance or rejection would have been entirely a needless and an idle form, no action on part of the administratrix in the premises could have affected in any manner the estate; because the mortgaged premises were no longer a part of the estate; while the authority of an administrator is limited to the allowance or rejection of such claims as are against the estate. (*Harp v. Calahan*, 46 Cal. 233; *Schadt v. Heppe*, 45 id. 433; *Whitmore v. S. F. Savings Union*, 50 id. 145; *Christy v. Dana*, 42 id. 175.)

While Section 1475 provides that "If there be subsisting liens they must be presented as other claims against the estate." It must be remembered that this section applies to such liens against the homestead as are intended to be made a claim against the estate.

We ask the Court to carefully read the clause of Section 1475 immediately following the paragraph quoted, to wit: "If the funds of the estate be adequate to pay all claims against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed, and the liens or incumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment."

It is respectfully submitted that if this section controls Section 1500, it would be an attempt to compel a mortgagee to proceed against property other than his security to collect his debt, and as plaintiff's contract was made more than two

years before the passage of Section 1475, it could not under any consideration have a retroactive effect and compel the plaintiff in this case to abandon his security, and, in violation of his contract, to pursue an expensive, slow, and uncertain proceeding to collect his debt. (Code Civil. Pro., § 3.)

Ross, J.:

L. B. Grider, on the twenty-fifth of June, 1872, executed to the plaintiffs his promissory note for the sum of twenty-three hundred and twenty dollars. To secure its payment, he and his wife, Rebecca C. Grider, joined in the execution to the plaintiffs of a mortgage upon certain property, a part of which the husband was at the time cultivating, but the title to which was then in the Government of the United States. Grider afterwards, in the year 1873, obtained the title to the property. The title thus acquired by him inured to the benefit of his mortgagors. (*Christy v. Dana*, 42 Cal. 179; *Kirkaldie v. Larrabee*, 31 id. 445; *Clark v. Baker*, 14 id. 612.) Subsequently, to wit, on the twenty-first of October, 1874, Grider filed, pursuant to the statutes of the State, a declaration of homestead on the mortgaged premises, and on or about the twenty-sixth of February, 1878, died in the county of Del Norte, leaving as his sole heir his widow, the defendant Rebecca C. Grider. On the first of June thereafter letters of administration upon the estate of the deceased were duly granted by the Probate Court of said county to the said Rebecca, who duly qualified as administratrix and entered upon the discharge of the duties of her office. On the twenty-first of June, 1878, the Probate Court, after due proceedings had, set off the said premises to the said Rebecca as a homestead. The present action was instituted to foreclose the mortgage. The complaint does not aver, nor do the findings show, that the mortgage claim was ever presented to the administratrix for allowance, but the plaintiffs in their complaint allege that "they expressly waive any and all recourse against any other property of the estate of the said L. B. Grider, deceased, other than the premises described in said mortgage;" and they contend, that having thus waived all recourse against any other property of the estate, they are entitled to maintain this action without presentation of the mortgage claim, by

virtue of Section 1500 of the Code of Civil Procedure, which is, and since March 15, 1876, has been, as follows: "No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint."

The appellant, who was the defendant in the Court below, relies on Section 1475 of the same Code, which from March 24, 1874, to April 16, 1880, read thus: "If the homestead selected and recorded prior to the death of the decedent be returned in the inventory appraised at not exceeding five thousand dollars in value, or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, the Probate Court must, by order, set it off to the persons in whom title is vested by the preceding section. If there be subsisting liens, or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate. If the funds of the estate be adequate to pay all claims allowed against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionally with other claims allowed, and the liens or incumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment."

Both of the sections quoted were in force at the time of Grider's death and at the time of the commencement of the present action. They should be so construed, as to maintain both, if possible. This can be done by limiting the operation of Section 1500 to all mortgages and liens other than liens or incumbrances on the *homestead*, specifically required to be presented by Section 1475. (*Gonzales v. Wasson*, 51 Cal. 297; *Langenour v. French*, 34 id. 92.)

The purpose of the Legislature in providing, by Section 1475, that if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate, was undoubtedly

to preserve the homestead if possible. That purpose is as clearly shown as can be by the language employed in the section: "If the funds of the estate be adequate to pay all claims allowed against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionally with other claims allowed;" and this is followed with the express declaration that "the liens or incumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment."

Judgment reversed and cause remanded, with directions to the Court below to sustain the demurrer to the complaint.

MORRISON, C. J., and THORNTON, MYRICK, and McKINSTRY, JJ., concurred.

McKEE, J., dissented.

[No. 10,786.— Department One.]
November 13, 1882.

THE PEOPLE v. SUMPTER E. DOGGETT.

EVIDENCE OF CHARACTER — MURDER — INSTRUCTIONS.— A defendant charged with crime has the right to have the jury instructed, that in determining whether or not he is guilty beyond a reasonable doubt, his good reputation as to the traits involved in the charge, if proved, should be weighed as any other fact established, and that it may be sufficient to create a reasonable doubt as to his guilt.

APPEAL from a judgment of conviction, and from an order denying a motion for new trial, in the Superior Court of the City and County of San Francisco. FREELON, J.

Davis Louderback and C. H. Parker, for Appellant.

A. L. Hart, Attorney General, for Respondent.

Ross, J.:

The Court below refused to give the following instruction requested by the defendant:

"The law at the outset clothes the defendant, in a criminal

case involving the charge of murder, with the presumption of innocence; and when the proof tends to overthrow this presumption, and to fix upon such defendant the presumption of such a crime, the latter is permitted to support the original presumption of innocence by proof of good character for peace and quietness; and the good character of the defendant for peace and quietness is itself a fact in the case. It is a circumstance tending in a greater or less degree to establish his innocence. And therefore in the present case, the good character of the defendant, if proved to your satisfaction, is to be considered by you in connection with the other facts and circumstances of this case in determining the guilt or innocence of the defendant." It is conceded by the Attorney General that the instruction so requested correctly states the law, and that unless the general charge of the Court covers the same point, the case must be sent back for a new trial.

The Attorney-General, however, claims that the effect of the instruction requested and refused, was embodied in the following portion of the Court's charge: "I think I have neglected to charge the jury in regard to character, under the decisions of our Supreme Court. And those decisions are the law of this State, and of this case. Good character, when proved, is a fact to be considered by the jury, just the same as any other fact in the case is to be considered as bearing upon the question of the guilt or innocence of the accused. It has been held before, and is now held in other tribunals, that good character was only applicable in doubtful cases to turn the scale, when the jury was in doubt from the other evidence as to whether a defendant was guilty or not. And our Supreme Court has said, that it goes in with the mass of all the other proof, to be considered by the jury in connection with all the evidence in the case, as a substantive fact bearing, or tending to bear, upon the question of guilt or innocence."

Omitting some comments that might justly be made on this part of the charge, it is safe to say that it would be a favorable construction of it to hold, that by it the Court told the jury that the good character of the defendant, if proved, was a circumstance in the case for their consideration in making up their verdict. But that, as was held in *People v. Bell*, 49.

Cal. 489, would not be adding anything to the mere fact of letting the testimony in regard to good character in.

The defendant had the right to have the jury instructed, that in determining whether or not he was guilty beyond a reasonable doubt, his good reputation as to traits involved in the charge, if proved, should be weighed as any other fact established, and that it might be sufficient to create a reasonable doubt as to his guilt. (*People v. Bell, supra*; *People v. Raina*, 45 Cal. 202; *People v. Ashe*, 44 id. 291.)

Judgment and order reversed, and cause remanded for a new trial.

McKINSTRY, J., and MORRISON, C. J., concurred.

[No. 7,266.—Department One.]

November 13, 1882.

CHARLES W. DAVENPORT v. HIS CREDITORS.

CREDITOR NEED NOT NECESSARILY BE A JUDGMENT CREDITOR.—Under the Insolvency Act of May 4, 1852, it was not required that a creditor should be a judgment creditor, in order to give him a status in court to oppose the application of an insolvent for a discharge.

OPPOSITION BY CREDITOR TO DISCHARGE OF INSOLVENT.—The setting aside by the Court in which it was rendered of a judgment recovered by Van W. against D., on the ground that no notice was given to D.'s attorneys, does not prevent Van W. from opposing, as a creditor under the Insolvency Act of May 4, 1852, the application of D., under that Act, for a discharge, when the opposition filed by Van W. and the schedules filed by D. in the insolvency proceedings show that he is a creditor of D.; and it is error for the court, on motion, in the insolvency proceeding, to dismiss the opposition of Van W. on the ground that he has no status in Court on which to make such opposition.

TRIAL BY JURY OF ISSUE OF FRAUD.—Under Section 20 of the Insolvency Act of May 4, 1852, the issue upon the question of fraud on the part of the insolvent should have been tried by a jury.

APPEAL by Isaac S. Van Winkle, an opposing creditor, from an order dismissing his opposition to the discharge of the plaintiff, and also from the order of final discharge of the insolvent. HALSEY, J.

Proceeding in insolvency. The judgment against the in-

solvent referred to in the opinion was recovered after the commencement of the insolvency proceedings. The other facts are stated in the opinion of the Court.

G. F. & W. H. Sharp, for Appellant.

Issue having been joined upon the question of fraud, it was the duty of the Court to summons a jury to try the issue. The matter could not be tried on affidavits or upon a motion. Independent of his judgment, the appellant was a creditor of insolvent in an amount exceeding forty thousand dollars, and upon his claim alone, not reduced to judgment, he could oppose a discharge. A creditor is not bound to be a judgment creditor. (Ins. Law of 1876, § 20.) The opposition of appellant to respondent's discharge alleges acts of fraud, and appellant was entitled to a trial. (Ins. Law of 1876, § 28.)

Du Brutz & Dickenson, for Respondent.

Van Winkle's claim, as a creditor, could be investigated at any time. Before he could oppose discharge, he must prove his claim, that a condition precedent; having no claim proven and not offering to prove any, he was not a creditor, and had no status in the Insolvent Court. (Ins. Law of 1876, § 1020.)

Before invoking the Insolvent Law, he should have submitted himself to it; which fully appears he never did. The motion to dismiss was properly made, and on proper grounds: Van Winkle appeared in response thereto, and made no effort to prove his claim.

Ross, J.:

More care on the part of counsel in regard to references made in briefs would save the Court much time and labor. In this case, the counsel for both sides refer to the Insolvency Act of 1876, as the one under which the proceedings were had, and, by number, to sections not found in that Act at all. The Act of 1876 has nothing to do with the case. The proceedings were had under the Act of May 4, 1852. Davenport filed in one of the late County Courts a petition praying to be adjudged an insolvent. Accompanying the petition was a schedule, in which Van Winkle was named as one of his creditors. Van Winkle's claim against Davenport was

based on some partnership transactions between the parties. Within ten days after the appointment of an assignee of the insolvent's estate, Van Winkle filed in writing his opposition to the discharge of the insolvent, and an application for the revocation of the appointment of the assignee, on the ground of fraud alleged to have been committed by Davenport. In his opposition Van Winkle charged distinct acts constituting the alleged fraud on the part of Davenport, consisting, among other things, of the alleged fraudulent receipt and appropriation of a considerable portion of opponent's funds; and further charged that in an action between the parties in one of the then District Courts of the State, an account had been stated of the partnership affairs, by which it had been ascertained and found that there was a large indebtedness due from Davenport to opponent, for which judgment was entered. Davenport filed an answer, by which he put in issue the averments of fact contained in the opposition of Van Winkle. The judgment entered against Davenport in favor of Van Winkle was afterwards set aside by the Court in which it was entered, on the ground "that no notice was given" to Davenport's attorney, and subsequently Davenport moved in the insolvency Court to dismiss Van Winkle's application for the revocation of the appointment of the assignee and his opposition to the discharge of the insolvent, on the ground that he, Van Winkle, had "no status in Court on which to make such opposition." That motion was granted, and an order of discharge was subsequently entered.

The idea of the party making the motion, and of the Court in granting it, seems to have been that Van Winkle ceased to be a creditor of Davenport when the judgment entered in the District Court was set aside. But that was not at all so. If the facts stated in Van Winkle's opposition were true, he was a creditor; for in that it was distinctly charged that Davenport was indebted to him in the sum of seventeen thousand two hundred and eighty-one dollars, received by him in a fiduciary capacity. Besides, in the schedule filed by the petitioner himself, Van Winkle is named as one of his creditors. Issues having been raised upon the question of fraud on the part of the insolvent, it became the duty of the

Court, by virtue of Section 20 of the Act of May 4, 1852, to summon a jury for the purpose of deciding on that accusation.

Judgment and order reversed, and cause remanded for further proceedings in accordance with the views here expressed.

McKINSTRY and McKEE, JJ., concurred.

[No. 7,404.—Department One.]

November 13, 1882.

GEORGE DOUGHERTY v. JACOB ROSENBERG ET AL.

STATUTE OF FRAUDS — AGREEMENT.—Agreement which may be performed within a year is not within the Statute of Frauds. The complaint alleged that the plaintiff being about to commence separate suits against R. (defendant's testator), B., and H., for the enforcement of certain assessment liens against each of their several lots of land owned by them respectively, R. verbally promised plaintiff that in consideration that the plaintiff would not bring the suit to enforce the lien against the lot owned by him, but would "altogether forbear" to bring such suit, and would commence and prosecute suits against B. and H. for the enforcement of the assessments against their lots respectively, and succeed in recovering final judgments in such suits against B. and H., he, the said R., would, upon such final recovery, pay to the plaintiff the amount of the assessment against the lot owned by him.

Held: Such agreement is not void under the provision of the Statute of Frauds requiring a writing for agreements that by their terms are not to be performed within one year from the making thereof.

ID.—CONSTRUCTION OF AGREEMENT.—The agreement of the plaintiff was "altogether," not "always," to forbear, and an agreement to refrain altogether for an indefinite time is not within the operation of the statute.

ID.—The promise of the plaintiff was "altogether" to forbear to bring suit to foreclose the lien against the lot of R. until he should recover final judgments against B. and H., events which might occur within the year.

ID.—The statute does not declare void a contract which may not be performed within a year, or which is not likely to be performed within that period. It includes only agreements which, fairly and reasonably interpreted, do not admit of a valid execution within the year.

APPEAL by the plaintiff from the judgment of the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco.
DWINELLE, J.

Action on contract. The facts are stated in the opinion of

the court. After decision by Department No. 1, a petition for hearing in bank was filed and denied.

J. C. Bates, for Appellant.

The promise is not within Statute of Frauds. Section 3156, Subdivision 1, Hittell's Digest, is substantially the same as Section 1624, Civil Code, which provides for different cases. "An agreement that, by its terms, is not to be performed within a year from the making thereof," must be in writing, and subscribed by party to be charged.

Said section does not provide that a contract that can not be performed, or may not or is not likely to be performed within a year, but one that by its terms is not to be performed within one year. Parsons, in his work on Contracts, vol. 8, pp. 35, 36, says the rule may be thus stated: "If the executory promise be capable of entire performance within one year, it is not within the clause of statute." The following cases from this Court are somewhat in point, and those from other States are very strong in our favor: *Feeny v. Daly*, 8 Cal. 85, and cases cited; *Barringer v. Warden*, 12 id. 311; *Stark v. Raney*, 18 id. 622; *McLaren v. Hutchinson*, 22 id. 187; *Kent v. Kent*, 62 N. Y. 564; *Moore v. Fox*, 10 Johns. 243; S. C., 6 Am. Dec. 338; *Plemp-ton v. Curtiss*, 15 Wend. 336; *McLees v. Hale*, 10 id. 428; *Trustees Baptist Church v. B. F. Ins. Co.*, 19 N. Y. 307; *Artcher v. Zeh*, 5 Hill, 203; *Lockwood v. Barnes*, 3 id. 130; S. C., 38 Am. Dec. 694; *Blake v. Cole*, 22 Pick. 97; *Kent v. Kent*, 18 id. 569; *Russell v. Slade*, 12 Conn. 455; *Burney v. Ball*, 24 Ga. 516; *Wiggins v. Keizer*, 6 Ind. 254; *Ellicot v. Peterson*, 4 Md. 488; *Soggins v. Heard*, 31 Miss. 429; *Peters v. Westborough*, 19 Pick. 364; S. C., 31 Am. Dec. 142; *Foster v. McO'Blenis*, 18 Mo. 91; *Suggett v. Cason*, 26 id. 225; *Blanding v. Sargent*, 33 N. H. 245; *Esty v. Aldrich*, 46 id. 129; *Broadwell v. Getman*, 2 Denio, 87; *Gadsden v. Lance*, 1 McMull. (S. C.) Eq. 92; *Thompson v. Gordon*, 3 Strobb. (S. C.) 188; *Thouvenin v. Lea*, 26 Tex. 614; *Blanchard v. Weeks*, 34 Vt. 592; *Rogers v. Brightman*, 10 Wis. 65.)

James M. Taylor and Cope & Boyd, for Respondents.

This agreement is void under the Statute of Frauds. It is

an entire agreement. One part of it can not be separated from the other. All parts of it must stand or fall together. One of its covenants or stipulations is, that plaintiff shall "always forbear to bring or commence any suit or proceeding to enforce said lien," and this stipulation, if valid, binds plaintiff's representatives as well as himself. (2 Para. on Cont. 531-533; 1 id. 127 and 131.)

It is a continuing obligation to always forbear. The Statute of Frauds in force on the twentieth day of May, 1870, the time said agreement is alleged to have been made, provided as follows: "Section 12. In the following cases, every agreement shall be void, unless such agreement or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party charged therewith: Every agreement that by the terms is not to be performed within one year from the making thereof." (Statutes of 1850, p. 267; Brown on Stat. Frauds, 509.)

It will be observed that this statute is different from the English statutes, and the statutes of several of the States. Those statutes provide in effect that no action shall be brought upon any agreement that is not to be performed within one year from the making thereof. (Brown on Stat. Frauds, 503-538.)

Our statute makes the agreement void. The statute affects the entire agreement between the parties—not a part of it. If any part of it is not to be performed within a year, the entire agreement is void.

This is the natural import of the language used in the statute, and the Court will not, by a forced and unnatural construction, compel the defendants to perform those stipulations of the agreement which are to be performed on their part when the stipulations of the agreement which are to be performed by the plaintiff are vitiated by the statute and can not be enforced.

If plaintiff, contrary to his agreement, had brought suit, or should hereafter bring suit, to enforce the alleged lien, defendants could not set up the agreement to always forbear to bring such suit, because it is void.

In the case of *Broadwell v. Getman* (2 Denio, 87), the defendant could have performed within a year all the stipula-

tions of the agreement to be performed on his part; but the plaintiff who sought to enforce the agreement against the defendant, was not to perform all its stipulations on his part within the year, and in the opinion of the Court, at page 89, it is said: "As this agreement was made in January, 1841, and could not be completely executed until the close of the season of 1842, it was within the statute, and not being in writing and signed, was void. Upon this point it would seem difficult to raise a doubt upon the terms of the statute. An agreement is an entire thing, and where that can not be completely executed, on both sides, until more than a year has elapsed, the case falls within the express words of the enactment. It is also within the spirit."

The following authorities are applicable to the question under consideration: *Main v. Walters*, 5 East. 10 (new ed., Vol. 3, p. 21.) (In this case the word agreement is construed to mean, "that which is to show what each party is to do or perform.") *Saunders v. Wakefield*, 4 Barn. & Ald. 608; *Sears v. Brink*, 3 Johns. 215; S. C., 3 Am. Dec. 475; *Stephens v. Winn*, 2 Nott & McC. (S. C.) 372; *Henderson v. Johnson*, 6 Ga. 391; *Taylor v. Pratt*, 3 Wis. 695; *Pitkin v. Long Island R. R. Co.*, 2 Barb. Ch. 230, 232; *Roadwell v. Getman*, 2 Denio (N. Y.), 87; *Frary v. Sterling*, 99 Mass. 461; *Lockwood v. Barnes*, 3 Hill (N. Y.), 128; S. C., 38 Am. Dec. 694; *Holloway v. Hampton*, 4 B. Mon. (Ky.) 415; *Fuller v. Reed*, 38 Cal. 109, 110; *Patten v. Hicks*, 43 id. 509, 511; *Swift v. Swift*, 46 id. 266.

McKINSTRY, J.:

The complaint alleges that plaintiff, being about to commence separate suits against Michael Reese (defendant's testator), J. W. Brittain, and D. V. B. Henarie for the enforcement of certain assessment liens against each of three several lots of land owned by said persons respectively. Reese (on the twentieth day of May, 1870) verbally promised plaintiff, that in consideration that plaintiff would not bring the suit to enforce the lien against the lot owned by him, but would "altogether forbear" to bring such suit, and would commence and prosecute suits against Brittain and Henarie for the enforcement of said assessments against their lots respectively,

and succeed in recovering final judgments in said suits against Brittain and Henarie, he, the said Reese, would, upon such final recovery in said suits, pay to the plaintiff the amount of said assessment on the lot so owned by him, to wit, the sum of nine hundred and ninety-seven dollars and sixty-eight cents, and interest thereon, etc.

The defendants demurred. The Court below sustained the demurrer, and, plaintiff declining to amend, rendered the final judgment in favor of defendants, from which plaintiff has appealed. It is claimed by respondents that the agreement set forth in the complaint is void under the statute of frauds, in force when the agreement was made. The twelfth section of the statute reads: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof expressing the consideration, be in writing, and subscribed by the party to be charged therewith: 1. Every agreement that by its terms is not to be performed within one year from the making thereof." (Stats. 1850, p. 267.)

It is urged, that if any part of the agreement is not to be performed within a year, the entire agreement is void; that where, by its terms, it can not be completely performed "on both sides" (*Roadwell v. Getman*, 2 Denio, 89) until more than a year has elapsed, the case falls within the express words of the enactment. And — applying these principles to the case — it is said one of the promises of plaintiff is, by its terms, not to be performed within the year, to wit, the promise "always to forbear" to bring the suit. But the agreement of plaintiff was "altogether," not "always," to forbear, and an agreement to refrain altogether for an *indefinite* time is not within the operation of the statute. (Browne on the Statute of Frauds, 279.) As we construe the agreement, however, the promise of plaintiff was altogether to forbear to bring suit to foreclose the lien against the lot of Reese until he should recover final judgments in the actions against Brittain and Henarie — events which might occur within the year. Such was the evident intent of the parties. There is nothing in their language to indicate they intended, in case Reese did not pay when final judgments should be entered against Brittain and Henarie, the plaintiff should *further* forbear. It can not be said, therefore, that by its terms the contract was

not to be performed within the year. The statute does not declare void a contract which *may* not be performed within a year, or which is *not likely* to be performed within that period. It includes only agreements which, fairly and reasonably interpreted, do not admit of a valid execution within the year. (Browne on Stat. of Fraud, 273.)

Judgment reversed and cause remanded, with directions to the Court below to overrule the demurrer.

Ross and McKee, JJ., concurred.

[No. 3,585.— Department One.]
November 13, 1882.

N. F. WOOD v. E. V. FORBES, ADMINISTRATRIX ETC., ET AL.

DISMISSAL OF APPEAL — AFFIDAVIT — VERBAL STIPULATION.

APPEAL from Superior Court of Butte County. Motion to dismiss appeal on ground of failure to file transcript. Affidavits were filed by the appellant tending to show a verbal stipulation, extending the time within which the transcript might be filed. Counter-affidavits were filed by the respondents.

Burt & Hamilton and Lusk & Turner, for Appellant.

Gale & Jones, for Respondents.

The Court:

The motion to dismiss the appeal must prevail. If it be admitted that affidavits can be considered which tend to show a verbal stipulation to extend the time to file the transcript, there are in this case affidavits more numerous and pointed to the effect that no such stipulation was made.

Appeal dismissed.

[No. 2,678.— Department One.]
November 18, 1882.

S. P. TAYLOR v. W. S. HUGHES, JUSTICE, ET AL.

CERTIORARI — FISH COMMISSIONERS — JUSTICE'S COURT.

APPLICATION for writ of certiorari to review a judgment of a Justice's Court, and adjudging the defendant guilty of a violation of Section 637, Penal Code.

The petition was as follows:

"Your petitioner would respectfully show to this Honorable Court that on or about the sixteenth day of May, 1882, a complaint was filed and a warrant issued out of the Justice's Court of the Township of San Rafael, Marin County, State of California, whereof W. S. Hughes is the Justice, against S. P. Taylor. That the said complaint charged your petitioner with having committed the crime of misdemeanor. That the act of your petitioner so constituting the alleged misdemeanor as charged in the said complaint is as follows: Said S. P. Taylor, then and there being the owner of a dam which obstructs the waters of Papermill Creek in Marin County, California, failed to construct and keep in repair sufficient fishways on such dam; the said S. P. Taylor having theretofore, to wit, on the fifth day of May, 1882, been requested to construct and keep in repair sufficient fishways on such dam by the Fish Commissioners of the State of California. That your petitioner demurred to and moved to dismiss the said complaint upon the grounds that the acts charged in said complaint did not constitute a public offense and that more than one offense is charged in said complaint. That the court thereupon overruled the said demurrer and denied the said motion to dismiss the said complaint, and thereafter such proceedings were had that the defendant was convicted of the crime of misdemeanor as charged in the said complaint. That thereafter, to wit, on the seventeenth day of June, your petitioner moved in arrest of judgment, on the grounds that the said Justice's Court had no jurisdiction in the premises; that the complaint filed herein does not state facts sufficient to constitute a public offense, and that more

than one offense is charged in said complaint. That the Court thereupon denied said motion in arrest of judgment, and thereafter, to wit, on the seventeenth day of June, 1882, sentenced your petitioner to pay a fine of fifty dollars. That the defendant, your petitioner, thereafter duly appealed to the Superior Court of Marin County on a statement of the case from the said order and judgment of the said Justice's Court overruling the said demurrer to the said complaint, and from the order denying defendant's motion to dismiss the said action, and from the order denying defendant's motion in arrest of judgment, and thereafter such proceedings were had that on the second day of October, 1882, the said Superior Court affirmed the judgment of the said Justice's Court, and a remittitur was issued forthwith to the said Justice's Court, and directing said Court to execute its said judgment. That the said Justice's Court is about forthwith to execute its said judgment. That your petitioner shows that the said Justice's Court had not any jurisdiction to try said cause or render judgment against the defendant, nor to enforce the same, for the reason that the said act so charged in the said complaint, and of which your petitioner was convicted as aforesaid, constitutes no misdemeanor or public offense, or any offense known to the law. That the said Justice's Court of the Township of San Rafael, County of Marin, exercising judicial functions, exceeded its jurisdiction in overruling defendant's demurrer to the said complaint, in denying defendant's motion to dismiss said action, and in denying defendant's motion in arrest of judgment, and in proceeding with the trial of said matter, and in convicting the defendant of a misdemeanor in doing the act charged in the complaint, and in now proceeding to the enforcement of its said judgment. That there is no further appeal in said cause from the acts of said Justice's Court; and there is not any plain, speedy, or adequate remedy to the defendant, your petitioner, other than by writ of review. Therefore your petitioner respectfully prays your Honorable Supreme Court of the State of California, under its seal, to issue to G. W. Davis, Esq., County Clerk of said Marin County, and to the Justice's Court of San Rafael Township, County of Marin, State aforesaid, and to the Justice, W. S. Hughes, thereof, a writ of re-

view directing the said Justice's Court through its proper officers and G. W. Davis, County Clerk, to transmit and certify to your Honorable Supreme Court the judgment roll and records, and a transcript of the records and proceedings, including the statement on appeal in the said action of the People of the State of California against S. P. Taylor, and prays that your Honorable Court will so order in the premises as to it may seem lawful and meet, and your petitioner will ever pray.

"NYGH & FAIRWEATHER, Att'ys for Petitioner."

Nygh & Fairweather, for Plaintiff.

No brief on file for Defendant.

The COURT:

The petition does not present a case for the issuance of a writ of review.

Writ denied, and proceedings dismissed.

[No. 8,640.— Department One.]

November 13, 1882.

THE SANTA CRUZ GAP TURNPIKE JOINT STOCK COMPANY v. THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CLARA.

MANDAMUS — CERTIORARI — PROHIBITION — PREROGATIVE — WRIT — RES ADJUDICATA.— When, upon issue of law or fact joined, a Superior Court has adjudicated the merits of an application for mandamus or other prerogative writ, such adjudication is as conclusive (except on appeal) upon this Court as it is upon another Superior Court.

ID.— ID.— ID.— ID.— ID.— APPEAL.— In issuing such writs the Supreme Court and the several Superior Courts are peers — each having original jurisdiction; whether the judgment of each is final, it is not necessary in this case to decide.

Remble: An appeal will lie in such cases from the judgment of the Superior Court.

APPLICATION for writ of mandamus.

D. B. Moody, for Plaintiff.

S. F. Leib and J. H. Campbell, for Defendant.

McKINSTRY, J.:

Rule 28 of this Court provides: "In any application made to the Court for a writ of mandamus, certiorari, prohibition, procedendo, or for any prerogative writ to be issued in the exercise of its original jurisdiction, and for which an application might have been lawfully made to some other Court in the first instance, the affidavit or petition shall, in addition to the necessary matter requisite by the rules of law to support the application, also set forth the circumstances which, in the opinion of the applicant, render it proper that the writ should issue originally from this Court, and not from such other Court—the sufficiency or insufficiency of such circumstances so set forth in that behalf will be determined by the Court in awarding or refusing the application. In case any Court, Judge, or other officer, or any board or other tribunal, in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings, and in such case it shall be the duty of the applicant obtaining an order for any such writ, to serve or cause to be served, upon such party or parties in interest, a true copy of the affidavit or petition, and of the writ issued thereon, in like manner as the same is required to be served upon the respondent named in the application and proceedings, and to produce and file in the office of the Clerk of this Court the like evidence of such service."

It may be that this Court would consider as a "circumstance" which would induce it to issue a prerogative writ, the fact that the Superior Court had refused to take jurisdiction of, or to consider, the application, upon the merits. But when, upon issue of law, or fact joined, a Superior Court has adjudicated the merits of the application, such adjudication is as conclusive (except on appeal) upon this Court as it is upon another Superior Court. In issuing writs of mandamus, certiorari, and prohibition, the Supreme Court and the several Superior Courts are peers. Both the Supreme Court and the Superior Court has original jurisdiction. (Const., Art. vi, §§ 4 and 5.) Whether the judgment of each is final—in view of the language of the sections referred to—it is not

here necessary to decide. *Semble*, an appeal will lie in such cases from the judgment of the Superior Court. (*Winter v. Fitzpatrick*, 35 Cal. 269.)

The defendant in the proceeding now here pleads that "heretofore and before the commencement of this proceeding the plaintiff commenced the same proceedings, for the same purpose, in the Superior Court of the County of Santa Clara, and on the eighteenth day of October, A. D. 1882, said proceedings in said Superior Court resulted in a judgment of said Superior Court, by it then duly given and made, that plaintiff was not entitled to such relief, and that the application therefor be denied, a true and correct certified copy of which proceeding and judgment in said Superior Court are hereto annexed, marked 'Exhibit A.'" The exhibit is made a part of the answer herein, and contains a copy of the complaint or petition in the Superior Court. It is not disputed that such complaint or petition is in all respects like the complaint filed in the present proceeding. The "exhibit" further shows that the defendant in the Superior Court (defendant here), by motion, in the nature of demurrer, moved the said Superior Court to vacate the writ, upon the ground that the complaint or petition did not state facts upon which the same should issue; further, that the motion or demurrer having been sustained by the Superior Court, with leave to amend the complaint or petition, plaintiff, in open Court, refused to amend, and thereupon a final judgment was entered by the Superior Court that the writ be denied, and in favor of defendants for their costs, etc.

If an appeal lies from the judgment of the Superior Court, the plaintiff has "a plain, speedy, and adequate remedy in the ordinary course of law." (C. C. P., § 1036.) If an appeal does not lie from the judgment of the Superior Court, the answer of defendant is a plea of a former adjudication, between the same parties, in a Court of competent jurisdiction.

The cause will be set down for trial upon the issue of fact raised by the answer. The fact will be determined by inspection of the record, but, as yet, the existence has been alleged, not proved.

ROSS and McKEE, JJ., concurred.

[No. 8,679.—Department Two.]

November 13, 1882.

**B. J. RHODES, ASSIGNEE, ETC., v. FRANCIS E. SPENCER,
SUPERIOR JUDGE, ETC.**

NEW TRIAL — VERDICT IN EQUITY CASE — CONVEYANCE IN FRAUD OF CREDITORS — PRACTICE.—In an action by the assignee of an insolvent to set aside a conveyance, a jury was impaneled to whom the issue of fraud was submitted, leaving certain other issues to be disposed of by the Court; and the trial resulted in a verdict for the plaintiff on the issues submitted. Afterwards, on motion of the defendant, the Court made an order for a new trial of the issues submitted to the jury; and refused to proceed with the trial of the remaining issues; and an application was made to this Court for writ of mandamus to compel him to proceed.

Held: The facts set forth in the petition do not entitle plaintiff to the relief prayed for.

APPLICATION for writ of mandamus to Francis E. Spencer, Superior Judge of Santa Clara County.

The plaintiff was assignee of M. Farrell, an insolvent debtor, and brought his action in the lower Court to set aside an assignment made by Farrell to one William P. Dougherty of a tract of land used as a brick-yard, "together with the implements, material, plant, stock in trade, and live-stock," used in connection therewith. On the trial special issues were, by consent, submitted to the jury, covering the issues as to fraud and notice on the part of Dougherty, and also with reference to the number of bricks received by him; and the remaining issues, referring to the value of the personal property and the damages suffered by the plaintiff, were left to be disposed of by the Court. A verdict was rendered in favor of the plaintiff, and thereupon the remaining issues were set for hearing by the Court, but before the hearing a new trial of the issues submitted to the jury was granted by the Court on the motion of the defendant.

Vincent Neal, for the Plaintiff.

Only one motion for a new trial can be made in an action, and that can only be made after all the issues have been heard. The order granting a new trial was therefore a nullity. (*Bates v. Gage*, 49 Cal. 126.)

No brief on file for Defendant.

The COURT:

We think the facts set forth in the petition do not entitle the plaintiff to the relief prayed for.

Writ denied.

[No. 7,314.— Department Two.]

November 14, 1882.

JAMES PHELAN v. CITY AND COUNTY OF SAN FRANCISCO.

CONSTRUCTION OF ORDER OF BOARD OF SUPERVISORS — SIDEWALK — STREET IMPROVEMENT — SAN FRANCISCO — ACCEPTANCE OF STREET IMPROVEMENTS.—

Section 22 of Chapter iv. of Order 697 of the Board of Supervisors of the City and County of San Francisco provides that: "No street or portion of a street shall be accepted by the Board of Supervisors except upon the report of the Superintendent of Public Streets and Highways and the committee of the Board of Supervisors on streets, wharves, grades, and squares, showing that such street or portion of a street is sewered with brick and paved and curbed with stone." Conceding that for certain purposes the sidewalk is a portion of the street, this order was not intended to require the sidewalk as well as the roadway to be sewered with brick and paved and curbed with stone.

Id.— Each requirement has reference to the object to be accomplished, that is, the sewer to be of brick, the roadway paved, and the sidewalk curbed.

Id.— The Board of Supervisors in accepting the street determined that the respective objects had been accomplished.

APPEAL by the defendant from the judgment of the Twenty-third District Court of the City and County of San Francisco, and from an order of the Superior Court of said city and county denying a motion for a new trial. THORNTON, J., of District Court; WILSON, J., of Superior Court.

Action upon contract to recover judgment against the City and County of San Francisco for street improvements made on a portion of one of its accepted streets.

Section 22 of Chapter iv. of Order 697, referred to in the opinion, is as follows: "No street or portion of a street shall be accepted by the Board of Supervisors except upon the report of the Superintendent of Public Streets and Highways

and the committee of the Board of Supervisors on streets, wharves, grades, and squares, showing that such street or portion of a street is sewered with brick and paved and curbed with stone; and no street-crossing shall be accepted except on like report showing that such crossing is so sewered, curbed, and paved with stone, and sidewalks and angular corners thereof, and suitable crosswalks, manhole and cover, cesspools, and culverts constructed. The acceptance of a street, part or portion of a street, or street-crossing, shall be by resolution."

After the work was performed the Board of Supervisors duly accepted it. The other facts are stated in the opinion.

J. F. Cowdery, City and County Attorney, for Appellant.

J. M. Wood and *J. C. Bates*, for Respondent.

The COURT:

Conceding that for certain purposes the sidewalk is a portion of the street, we can not say that Section 22 of Chapter 4, of Order 697 of the Board of Supervisors of the City and County of San Francisco, was intended to require the sidewalk, as well as the roadway, to be "*sewered with brick and paved and curbed with stone.*" As we understand, the sewer was to be of brick, and the roadway was to be paved, and the sidewalk curbed. These requirements appear to have been complied with. Each requirement was to have reference to the object to be accomplished; and the board, in accepting the street, determined that the respective objects had been accomplished.

Judgment and order affirmed.

[No. 7,503.— Department Two.]
November 14, 1882.

B. STRUEVEN v. HIS CREDITORS.

EFFECT OF INSOLVENCY ACT OF 1880 ON THE PROCEDURE IN CASES INSTITUTED UNDER ACT OF 1852 — STATUTORY CONSTRUCTION — PLEADING — INSOLVENCY.
— The Insolvency Act of 1852 under which the proceedings were commenced did not require the answer of the petitioner to the opposition of a creditor to be verified. Prior to the filing of the answer to the opposition,

the Insolvency Act of 1880, which requires the verification of the pleadings, had gone into effect. *Held*: The answer to the opposition should have been verified.

ID.—EFFECT OF PROVISIO OR SAVING CLAUSE IN REPEALING CLAUSE OF ACT.—

The provision in Section 68 of the Act of 1880, that the Act is not to affect any case previously instituted, is not intended to keep alive the former mode of procedure in conflict with the Act.

OBJECTION FOR THE FIRST TIME IN SUPREME COURT.—The objection that the opposing creditor had not proved his claim before filing his opposition can not be taken for the first time in the Supreme Court.

APPEAL by Donnelly, Dunne & Co., opposing creditors, from the judgment of the Superior Court of the City and County of San Francisco granting a discharge. **HALSEY, J.**

Proceeding in insolvency. On the seventeenth of March, 1880, the respondent Strueven filed his petition in the Superior Court asking a discharge from his debts. On the fifth of May, 1880, A. J. Donnelly and others, creditors appealing, filed their opposition in writing, alleging divers frauds, committed by petitioner, for which they claimed he should be denied his discharge. This opposition was verified. On May 14, 1880, the petitioner filed an answer to the opposition consisting of a general denial not verified, which appellants moved to strike out, and afterwards, on the twenty-second of July, the petitioner elected to file an amended answer to the opposition. This answer was not under oath.

On the twenty-sixth of July, 1880, the opposing creditors gave notice of motion to strike out this last answer, because it was not verified, and to dismiss the petition for want of answer, and on the sixteenth of August, 1880, the Court denied the motion to strike out the amended answer, to which the opposing creditors took their bill of exceptions, which sets forth the foregoing facts. On the twentieth of August, 1880, the Court entered an order discharging the petitioner from his debts, and from this order an appeal is taken.

William Matthews, for Appellants.

The Court erred in refusing to grant the motion to strike out. The Insolvent Act, approved April 16, 1880, had taken effect June 15th. Section 50, of that Act, provides that the

opposition and the answer to it shall be verified. (Statutes of 1880, p. 330.) This provision concerned procedure and the remedy merely, and therefore operated upon the pending case, and governed all pleadings filed after its passage. (*Donner v. Palmer*, 23 Cal. 40.)

The Court below seemed to think that the clause in Section 68 of the Act (Statutes 1880, 334), providing that the repeal of previous insolvent laws, "shall in no manner invalidate or affect any case in insolvency," then pending, in some way so acted to continue in force the repealed Act as to the pleadings in this case. It is submitted that no such result follows. Such a construction would give us two systems of procedure on foot at the same time.

The word "affect," as used in the section referred to, is a repetition of the word "invalidate," and is used in the sense in which it is employed in Sections 8 and 18 of the Code of Civil Procedure. But, under the previous insolvent law, the opposing creditors were entitled to an answer under oath. The Act itself was silent on the matter. (Insol. Act., § 20, Statutes of 1852, p. 73.) The Code of Civil Procedure, therefore, furnished the rule to guide the Court. (C. C. P., § 4.) Under it, answers to all verified pleadings must be verified. (C. C. P., § 446.)

H. Lowenthal, for Respondent.

This answer, or "plea," the appellants moved to strike out, and for a dismissal of all proceedings, which motion was denied. This ruling we say was proper. The record shows that appellants were not creditors of insolvent. Nor does the record show that they have proved their alleged claim, as required by said Act. This we say was necessary before they could contest the insolvent's discharge. (See Section 10, Cowdery's Insolv. L. of Act 1852.) Appellant should have applied for leave to intervene in the proceedings. (4 Cal. 337.) The Insolvent Act of 1880 in no manner affected this case, the opposition having been filed prior to the passage thereof. (See Section 68, Act 1880.) The statutes of 1852 did not provide that the opposition to a discharge should be by a verified or any petition; all that it said upon the subject is, "That any creditor (meaning of course a creditor who has proven his

claim as in § 10 provided) should deem it necessary to oppose it on the ground of some fraud having been committed by the insolvent debtor, he shall, within ten days thereafter, lay before the Court which has already taken cognizance of the case, his written opposition, stating the several grounds, etc., whereupon in case of accusation of fraud, after having received the debtor's answer, the court shall order a jury summoned, etc., for the purpose of deciding on the said accusation." (See § 20 of said act.)

And we say that an oral plea in open court received by the judge thereof, and entered of record is all that was requisite under said statute, as no form of pleadings is prescribed.

And we say that inasmuch as the statute is silent as to the manner in which the Court is to receive the answer, it is reasonable to presume from the language of the section that the answer or plea may be orally received by the court, and ordered to be recorded by the clerk, or the same may be reduced to writing and handed to the Court to be filed of record; such has been the rule laid down in all insolvency cases that ever came before the courts since the repeal of the Federal Bankruptcy Act.

The above proposition is sustained in case of *D. B. Sanborn v. His Creditors*, 37 Cal. Reports, p. 611. Again: The petition of appellants contains charges of fraud against the respondent, which, if admitted, might subject him to criminal prosecution, and we say, on that ground, the insolvent, even if the statute required a verified answer, could avail himself of his right to file an unverified plea. (See Section 446, Code Civil Procedure.)

THE COURT:

The insolvency proceedings were commenced under the Act of 1852. That Act did not require the answer of the petitioner to the opposition of a creditor to be verified. Prior to the filing of the answer in this case, the Legislature had passed the Insolvent Act of 1880, which requires verification of the pleadings. This requirement concerns procedure merely, and governs pleadings filed after its passage. According to Section 68 of the Act of 1880, that Act is not to affect *any case* previously instituted; but there is no indication of an in-

tention to keep alive the former mode of procedure in conflict with the Act. The court erred in dismissing the opposition and in making a decree of discharge.

The objection that the opposing creditor had not proved his claim before filing his opposition is taken too late, when taken in this Court for the first time.

Judgment reversed and cause remanded for further proceedings.

[No. 8,534.— In Bank.]
November 14, 1882.

A. E. FRAZER ET AL. v. THE SUPERIOR COURT OF
SAN FRANCISCO.

SETTLEMENT OF STATEMENT ON MOTION FOR NEW TRIAL.—Mandamus to a Superior Judge to compel him to settle plaintiff's statement on motion for new trial. The statement did not set forth any of the evidence, but simply referred to the reporter's notes and directed that they should be inserted in full.

Held: Such a statement is not a proper one, and the Court may disregard it.

APPLICATION for writ of mandamus to the Superior Court of the City and County of San Francisco. WILSON, J.

E. W. McGraw, for Plaintiff, cited C. C. P., §§ 274, 648; 2 Hittell's Codes, § 10,648; 3 id., § 10,274; *Kimball v. Semple*, 31 Cal. 659; *Hess v. Winder*, 30 id. 349; *Loucks v. Edmondson*, 18 id. 203.

McAllister & Bergin, for Defendant.

The COURT:

This is an application for a writ of mandamus to compel the Hon. T. K. Wilson, a Superior Judge of the City and County of San Francisco, to settle plaintiff's statement on motion for a new trial. When the statement was served on the attorneys for the adverse parties, and before any amendments thereto were proposed, defendants "protested against the pretended statement on motion for a new trial which had been served upon them, that it is utterly insufficient and fails

to set forth any proper statement of the case. It merely amounts to a reference to the reporter's notes, without incorporating said notes in the proposed statement." The learned Judge, in denying the motion to settle the so-called statement, placed his refusal on the ground that "the proposed statement is wholly insufficient, as a proposed statement on motion for a new trial, and must be disregarded." We think the motion to settle the proposed statement was properly denied. It does not set forth any of the evidence in the case, but simply refers to the reporter's notes. Its language is: "All of which" (the facts in the case) "will more fully appear from said statement of the facts which reads as follows (insert reporter's notes in full)." Such a statement is not a proper one, and the Court may disregard it. (*People v. Getty*, 49 Cal. 584; *People v. Sprague*, 53 id. 422.)

Application denied.

[No. 10,754.—In Bank.]

November 15, 1882.

THE PEOPLE v. ALVINO F. PICO.

LARCENY — EVIDENCE — VARIANCE AS TO SEX.—A variance as to the sex of the animal charged to be stolen, is immaterial.

ID.— ID.— ID.— HORSE — DEFINITION.—At common law the word "horse" was used in its generic sense, and was held to include all animals of the horse species, whether male or female; and the Legislature of this State, in using the word "mare" (in Sec. 487, Penal Code), did not intend to modify or change the common law rule, but inserted the word, possibly, for more definiteness.

ID.— ID.— INSANITY — GENERAL REPUTATION.—Insanity is not to be proven by general reputation.

ID.— ID.— ID.— HEARSAY.—For the purpose of showing the insanity of the defendant, a witness testified to his throwing away a suit of clothes; but on cross-examination it appeared that the witness had no personal knowledge of the clothes being thrown away, or of the reason therefor; he knew of the circumstances only by hearsay. *Held:* The testimony was properly stricken out.

ID.— ID.— ID.— OPINION OF FAMILY.—Evidence that the defendant was always treated by his family as an imbecile or an insane person is inadmissible.

ID.— ID.— ID.— OPINION OF ACQUAINTANCES.—Witnesses were examined for the purpose of showing the sanity of defendant, and from their examination it appeared that they were acquainted with him and had more or less opportunity for acquiring knowledge on which to base an opinion.

Held: The witnesses having shown themselves, respectively, to have been acquainted with the defendant, the determination of the question as to whether that acquaintance was of an intimate character was within the discretion of the Court below, with the exercise of which, there being no abuse, this Court will not interfere.

Id.—Id.—Id.—INSTRUCTION—LARCENY—DEFINITION—FELONIOUS INTENT.

—The Court instructed the jury: "It is further claimed that although the jury may believe the defendant took the animal in question; yet, unless at the time of such taking he then intended to steal the same, he must be acquitted. I instruct you that if the defendant wrongfully and unlawfully and without the knowledge and consent of the owner of this animal, or of any person who could give such consent, or as a mere trespasser and wrong-doer, drove away said horse, not then intending to steal the same, but that thereafter, while still in such wrongful possession of said horse, he feloniously sold the same and appropriated the proceeds of such sale to his own use, such taking, sale, and appropriation constitute, upon the part of the defendant, the crime of larceny as fully and completely as though such felonious intention had existed in the defendant at the first taking of such animal." *Held:* The instruction was correct.

Id.—Id.—Id.—INSANITY—DEFINITION—REASONABLE DOUBT.—The Court instructed the jury: "The standard of accountability is this: Had the party sufficient mental capacity to appreciate the character and quality of the act? Did he know and understand that it was a violation of the rights of another, and in itself wrong; did he know that it was prohibited by the laws of the land, and that its commission would entail punishment and penalties upon himself? If he had the capacity thus to appreciate the character and comprehend the possible or probable consequence of his act, he is responsible to the law for the act he has committed and is to be judged accordingly. The defense of insanity is a defense which may be and sometimes is resorted to, in cases in which the proof of the overt act is so full and complete that any other means of avoiding conviction, and escaping punishment, seems hopeless. While, therefore, this was a defense to be weighed fairly, fully, and justly, and when satisfactorily established must recommend itself to the sense of humanity and justice of the jury, they are to examine it with care, lest an ingenious counterfeit of this mental infirmity shall furnish immunity to guilt." "In all other matters excepting that of insanity, defendant is entitled to every reasonable doubt." The Court also refused to give instructions embodying the converse of these propositions.

Held: The instructions were correct, and it therefore follows that the instructions asked for and refused were incorrect.

Id.—Id.—INSANITY.—When a defendant is brought up for judgment on conviction it is not error for the Court, where it entertains no doubt as to his sanity, to refuse to submit the issue of insanity to a jury, under Sec. 1368, Penal Code.

APPEAL from a judgment of conviction and from an order denying a new trial, in the Superior Court of the County of Santa Clara. BELDEN, J.

A. W. Crandell, for Appellant.

A. L. Hart, Attorney-General, for Respondent.

MYRICK, J.:

The defendant was by information accused of grand larceny, in that he "did feloniously take and steal one roan horse," the property of one S. P. Stockton. The plea was not guilty. The defendant was convicted as charged.

1. It appears from the bill of exceptions that on the trial the people gave evidence tending to prove that the defendant took from the Normal School grounds in San Jose, a roan mare, harness and buggy, belonging to S. P. Stockton, and after using the same in the public streets of San Jose, and declaring that the mare belonged to one Archer, left the harness and buggy by the side of a street, and sold the mare for ten dollars and appropriated the proceeds to his own use. The defendant moved the Court to instruct the jury to acquit him, on the ground of variance, in that he was charged with stealing a horse, while the proof showed the animal taken was a mare.

This was refused. Although the Courts of some of the States have held, under a statute similar to that of this State (Section 487, subdivision 3, Penal Code), where both words "horse" and "mare" are used, the proof must agree with the indictment as to the sex of the animal, yet, as at common law the word "horse" was used in its generic sense, and was held to include all animals of the horse species, whether male or female, we are of opinion that the Legislature of this State, in using the word "mare," did not intend to modify or change the common law rule, but inserted the word possibly for more definiteness.

2. The defendant introduced evidence tending to prove that he was insane before, at, and after the taking, and at the time of the trial. No suggestion was made by counsel then or at any time before or during the trial, that defendant was not then in a condition to be tried. The District Attorney, during the trial, inquired of counsel for defendant if he asserted that defendant was then insane, to which one of the defendant's attorneys replied that they did not, and the other

stated that they claimed he was at the time of the alleged offense and still was insane. The bill of exceptions states that, "it did not then or at any time during the trial appear to the Court that there was any doubt that defendant was not sane." The defendant's attorney asked a witness: "What do you say as to his general reputation, whether sane or insane?" An objection was sustained. Insanity is not to be proven by general reputation. The ruling was correct.

3. For the purpose of showing the insanity of the defendant, a witness testified to his throwing away a suit of clothes. On cross-examination it appeared that the witness had no personal knowledge of the clothes being thrown away, or of the reason therefor—he knew of the circumstance only by hearsay. This testimony was, on motion, stricken out. It needs no authority, save well-known principles, to show the correctness of this ruling.

4. A witness was asked if the defendant was always treated by his family as an imbecile or an insane person. Objection to this was sustained. This ruling was correct. How he was treated by his family would not tend to prove insanity; they may have been mistaken as to the condition of the subject and as to their mode of treatment; besides, the answer would be but the opinion of one person based on the opinions of others.

5. Persons were examined as witnesses on behalf of the people for the purpose of showing the sanity of defendant. Their examination showed that they were acquainted with him, and had more or less opportunity for acquiring knowledge on which was to base an opinion. The opinions of these witnesses were objected to on the ground that they had not shown themselves intimate acquaintances of the defendant. The witnesses having shown themselves respectively to have been acquainted with the defendant, the determination of the question as to whether that acquaintance was of an intimate character was within the discretion of the Court below, with the exercise of which, there being no abuse, this Court will not interfere.

6. The Court instructed the jury that the misdescription as the sex of the animal was immaterial, and was no variance. Also, as follows: "It is further claimed that although the jury may believe the defendant took the animal in question,

yet unless at the time of such taking he then intended to steal the same he must be acquitted. I instruct you that if the defendant wrongfully and unlawfully, and without the knowledge and consent of the owner of this animal, or of any person who could give such consent, but as a mere trespasser and wrong-doer drove away said horse, not then intending to steal the same, but that thereafter, while still in such wrongful possession of said horse, he feloniously sold the same and appropriated the proceeds of such sale to his own use, such taking, sale, and appropriation constitute, upon the part of the defendant, the crime of larceny as fully and completely as though such felonious intention had existed in the defendant at the first taking of such animal."

"It is further claimed on the part of the defendant that if he did in fact take, sell, and appropriate the proceeds of said property as claimed by the prosecution, he is not to be held criminally accountable for so doing by reason of his insanity at the time of such appropriation and taking.

"The standard of accountability is this: Had the party sufficient mental capacity to appreciate the character and quality of the act? Did he know and understand that it was a violation of the rights of another, and in itself wrong? Did he know that it was prohibited by the laws of the land, and that its commission would entail punishment and penalties upon himself? If he had the capacity thus to appreciate the character and comprehend the possible or probable consequences of his act, he is responsible to the law for the act thus committed and is to be judged accordingly."

"The defense of insanity is a defense which may be, and sometimes is, resorted to in cases in which the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. While, therefore, this was a defense to be weighed fairly, fully, and justly, and when satisfactorily established must recommend itself to the sense of humanity and justice of the jury, they are to examine it with care, lest an ingenious counterfeit of this mental infirmity shall furnish immunity to guilt."

"In all other matters except that of insanity, defendant is entitled to every reasonable doubt."

The defendant asked the Court to give instructions em-

bracing the converse of the propositions contained in the foregoing instructions. The instructions given by the Court are correct; it therefore follows that the instructions asked for and refused were incorrect. (*People v. M'Donell*, 47 Cal. 134; *People v. Dennis*, 39 id. 625; *People v. Coffman*, 24 id. 230; *People v. Myers*, 20 id. 518.)

7. After the verdict of conviction, the Court fixed January 23, 1882, as the day for sentence. On that day the Court heard evidence upon the question of the defendant's insanity at that time, and the Court being in doubt upon that subject, continued the time for sentence to January 27, 1882, and directed that two competent physicians make an examination of him, and report as to defendant's insanity at that time. On the 27th, the two physicians having examined the defendant, were not fully determined whether he was sane or insane, and no report was made by them, and the time for passing sentence was postponed to January 30th. On that day defendant's counsel moved the Court to summon a jury to try the question of the present sanity of the defendant; the Court, then having no doubt as to defendant's entire sanity, denied the motion, refused to allow the question to be determined by a jury, and proceeded to pronounce the sentence.

These matters do not appear in the judgment, but are stated in a bill of exceptions. The appeal is from the judgment and from the order denying the motion for a new trial.

Conceding that upon this appeal we can review the action of the Court in denying the motion to submit to a jury the question of defendant's sanity, we do not see that an error was committed. The Court did not pronounce judgment so long as any doubt existed as to defendant's sanity. The object of the statute was accomplished. According to Section 1201, Penal Code, a defendant may show for cause against judgment that he is insane; and if, in the opinion of the Court, there is reasonable ground for believing him to be insane, the question of insanity must be tried by a jury. At the time of passing the sentence, the Court had no doubt as to the entire sanity of the defendant.

Judgment and order affirmed.

McKINSTRY, ROSS, SHARPSTEIN, and McKEE, JJ., and MORRISON, C. J., concurred.

[No. 7,534.— Department Two.]
November 15, 1882.

R. W. WARREN v. R. L. SCHAINWALD ET AL.

PURCHASE BY PARTNER — PARTNERSHIP — FRAUD — TRUST.— One member of a firm composed of several copartners, after the death of one of them, falsely and with the intent to prevent a proposed settlement, represented to his surviving copartners that he had become the owner of the interest of the deceased, and thus prevented a purchase by them of such interest.

Held: That he can not by compromise of a suit brought by one to whom the interest of the deceased was transferred and assigned, against all of the surviving copartners for an accounting, acquire the interest of the deceased and maintain for his own benefit a suit against the remaining members of the firm to enforce the claim for the full amount of the profits which would have been due to the estate of the deceased copartner. The purchase of the interest of the deceased was made for the benefit of the plaintiff and defendants; and, after repaying the amount expended by the plaintiff in compromising the claim, the residue of the profits should be divided among all of the surviving copartners according to their respective interests.

APPEAL from a judgment in favor of the defendants in the Superior Court of the City and County of San Francisco, and from an order denying a motion for a new trial. HUNT, J.

Action for a statement of partnership accounts. The facts are stated in the opinion of the Court.

Naphtaly, Friedenrich & Ackerman, for Appellant.

Plaintiff is not estopped from equitably claiming said interest. In purchasing said interest he occupied no fiduciary relation to the remaining partners. He was not dealing with a creditor of the firm. Until the affairs of the partnership are wound up and a balance-sheet struck, the relation of debtor and creditor between the surviving partners and the representative of the deceased partner does not arise. (*Gleason v. White*, 34 Cal. 263.)

At the time of the purchase by plaintiff the partnership affairs had not been wound up. The surviving partners were entitled to the exclusive possession of the assets, and were trustees for all concerned in the copartnership; but for what purpose? Merely to wind up the concern, collect the outstanding accounts, sell the property, pay the liabilities (if any),

and the balance (if any) divide among the survivors and the representative of decedent. They were trustees for no other purpose.

It is only in matters within the scope of the partnership business that each is the agent of the partnership. (Civil Code, Sec. 2429.) Towards each other the utmost good faith must be exercised in the management of the business. Neither one can use partnership funds in the purchase of property in his own name. If he does, he will be treated as holding in trust. (Civil Code, 2410.)

The obligations of copartners *inter sese*, whatever may be their nature and extent, refer only to the conduct of the business in which the firm is engaged. (*McKenzie v. Dickinson*, 43 Cal. 133; *Wheeler v. Sage*, 1 Wallace, 518.) This principle is not changed by Section 2411, Civil Code. The one partner can not obtain any advantage over the other in the partnership affairs. "In all proceedings connected with * * * a partnership, every partner is bound to act in the highest good faith towards his copartner." Said section imposes no greater obligations than does the common law.

It is only in matters connected with the partnership that partners are bound to act in the highest good faith towards each other, and no stronger illustration of this rule can be found than in the case of *McKenzie v. Dickinson*, where this Court holds that a partner may, with his own funds, purchase a judgment against his copartner, and enforce it by a levy upon and sale of his copartner's interest in the firm, and may become a purchaser at such sale. Hence, in matters not within the scope of the partnership business, the partners towards each other do not occupy confidential relations—they are not trustees for each other—as to those matters they deal with one another at arm's length, not only during the existence of the copartnership but after its dissolution.

The copartnership having been dissolved by the death of Louis Pokoney, in September, 1878, the effect of that dissolution was to put an end to all power of the partners or agents, except so far as necessary to close up the business. (5 Wait's Actions and Def., 140.) It was not necessary to purchase the Pokoney interest in order to close up the business. The Po-

koney interest could not have been purchased by the firm without the consent of all the surviving partners.

Chickering & Thomas, for Respondents.

Upon the death of a partner, the partnership is terminated as to future dealings; "yet for some purposes it may be said to exist, and the rights, duties and powers and authorities of the survivors remain, so far as it is necessary to enable them to wind up and settle the affairs of the partnership." (Story on Partnership, §§ 325, 344 and cases cited.) The surviving partner, in all matters connected with the dissolution of such copartnership, and with the winding up of its affairs are trustees for each other, and as a natural consequence cannot make a profit out of each other. (Civil Code, §§ 2410-2411.)

The settlement of the claim of the estate of Louis Pokoney was a necessary part of the dissolution. The affairs of the firm could not have been wound up without settling with the estate, either with or without a suit. It was a claim against the copartnership and the interest of each of the survivors therein, and differed from the claim of a copartnership creditor in the order of its payment only.

As in a creditor's claim, the surviving partners would have been the sole parties defendant. In case of suit a judgment on it would, in like manner, run against the surviving members. The satisfaction of the judgment would in like manner be made out of the joint property of the partnership. It was not, as in *McKenzie v. Dickinson*, 43 Cal. 120, a claim against an individual member or individual members of the firm, but it was at the time of its purchase by Warren, a claim against Warren himself, and the other copartners, in their capacity as joint trustees of the estate of the deceased partner. (*Heath v. Waters*, 40 Mich. 457; *Smith v. Walker*, 38 Cal. 385.) They also cited *Wheeler v. Sage*, 1 Wall. 518; *Bigelow on Fraud*, p. 234-190; C. C. §§ 1709, 1710, 2224, 2228, 2410, 2411; Story on Partnership, § 344; *Kelly v. Rogers*, 21 Minn. 151.)

The COURT:

On the eighteenth day of April, 1877, the plaintiff, Warren,

and the defendant, Schainwald, and others entered into a copartnership for the manufacture of powder, under the firm name of R. W. Warren & Co.

One Louis Pokoney was a member of the firm, and he departed this life in the month of September, 1878.

After the death of Pokoney, the surviving partners continued the business under the firm name, until the tenth day of January, 1879, at which time the entire assets of the firm were sold and transferred to the Vulcan Powder Company.

In the month of December, 1878, the plaintiff and the defendants, Schainwald and Baum, had a meeting at which one of the defendants stated that the interest of Pokoney's estate could be purchased for the sum of three thousand dollars, and the defendants expressed a willingness to purchase it at that price, but the plaintiff then and there stated that he was the owner thereof; and thereupon the defendants refrained from purchasing the same. The finding shows that the defendants were prevented from effecting such purchase by the statement of plaintiff. The Court further finds that "the statement made by the plaintiff was untrue, and was made for the purpose of preventing the proposed settlement."

The Pokoney interest was transferred and assigned to one Lilienthal, and on the fifteenth day of January, 1879, he brought a suit against the surviving members of the firm of R. W. Warren & Co. for a settlement and accounting of the partnership dealings, and thereafter, in the month of September, 1879, the plaintiff, Warren, compromised said suit by paying therein a sum less than three thousand dollars.

The object of the present suit is to charge the defendants with the profits of the business which would be due to the estate of Pokoney if such interest were still in the estate. The Court below held that after Warren was repaid the amount expended by him in compromising the Lilienthal claim, the residue of the profits accruing to the Pokoney interest should be divided among the surviving partners of the firm of Warren & Co. according to their respective interests in the business of the copartnership.

We think the judgment of the Court below was correct. It is apparent from the facts in the case that the Pokoney interest would have been purchased by the surviving partners

for their mutual benefit, if the plaintiff Warren had not prevented such purchase by misrepresentation. Under the circumstances of the case he was justly held to have purchased for the benefit of himself and the defendants, his co-partners.

Judgment and order affirmed.

[No. 8,307.— In Bank.]

November 15, 1882.

J. D. STEVENSON v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO.

JURISDICTION OF PROBATE COURT—ADMINISTRATION UPON ESTATE OF LIVING PERSON.—After administration had been granted upon the estate of a supposed deceased person, and the administration closed, and the administrator discharged, the supposed decedent appeared in person and filed his petition to vacate and annul the proceedings; and an order was made granting the motion.

Held: There is no doubt of the correctness of the action of the Court. Administration upon the estate of a living person is totally void.

APPLICATION for writ of certiorari to review an order of the Superior Court vacating and annulling all the proceedings in the matter of the estate of James Valentine. **HALSEY, J.**

The decree discharging the administrator was dated December 24, 1877. The petition of Valentine was filed February 11, 1881, and prayed that a citation should issue to the administrator to show cause why the proceedings in the matter of his estate should not be set aside and annulled. After citation to the administrator and trial, a decree was rendered adjudging that all the proceedings had in the matter of the said estate should be set aside and that the property described in said proceedings should be returned free of any and all claims or titles set up or asserted thereto, by the administrator or any one claiming under him.

L. E. Pratt and Wright & Wright, for Plaintiff.

The Probate Court had jurisdiction to grant the administration. When a petition in proper form was presented in

that Court alleging certain facts to exist, which if established by proof, would give the Court jurisdiction over the estate, then the Court had the power to inquire into the truth of those allegations and to determine the existence of those facts. When it determined the facts to be established, its jurisdiction was fixed. (C. C. P. §§ 97-98; *Central Pacific R. R. Co. v. Board of Equalization of Placer County*, 43 Cal. 365; *Hahn v. Kelly*, 34 id. 391.)

The Court loses jurisdiction to make any order in an estate after a decree of distribution other than to enforce said decree and to discharge the administrator. (*Estate of Garraud*, 36 Cal. 277; *Bell v. Thompson*, 19 id. 707.)

L. Quint, for Defendant.

That Valentine has a remedy can not in good faith be questioned. (*Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87; *Wales v. Willard*, 2 Mass. 120; *Cutts v. Haskins*, 9 id. 543; *Holyoke v. Haskins*, 5 Pick. 20; S. C., 16 Am. Dec. 372; *Smith v. Rice*, 11 Mass. 507; *Sigourney v. Sibley*, 21 Pick. 101; *Emery v. Hildreth*, 2 Gray, 228; *Allen v. Dundas*, 3 T. R. 125.)

Where then can it be found except in the Court and in the proceeding out of which the injury arose? (*State of California v. McGlynn*, 20 Cal. 233; *Hamberlin v. Terry*, 1 Smed. & Marsh Ch. 589.)

Ross, J.:

The question in this case is whether the Court in which was had administration upon the estate of a man supposed to have been dead, but who subsequently and after the administration had been closed appeared "in the flesh," and moved the entry of an order vacating and annulling the proceedings, rightly granted the motion and entered the order. We have no doubt of the correctness of the action of the Court in that particular.

Administration may lawfully be had upon the estate of a dead man, but not upon that of one in life. Until death occurs there is no "subject matter" over which it is possible for any Court to exercise jurisdiction. It is true that the Court of Probate, before issuing letters of administration, must first

determine affirmatively the question of death. But notwithstanding such determination the fact that the supposed intestate is alive may still be shown, and when shown, establishes the nullity of the entire proceedings. The authorities in support of this proposition are numerous. (Sec. 1, Williams on Executors, American notes by Perkins to page 632, and notes to page 631; Vol. vii. Robinson's Prac., p. 324; *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87; *Fisk v. Norvel*, 9 Texas, 12; *Duncan v. Stewart*, 25 Ala. 408; *Allen v. Dundas*, 3 T. R. 125.)

In *Griffith v. Frazier*, 8 Cranch. 23, Chief Justice Marshall said: "Suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the facts be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point can not bring the subject within his jurisdiction."

In *Beckett v. Selover*, 7 Cal. 226, 227, this Court said that the fact of death and the place of residence of the deceased at the time of death must be alleged in the petition for letters, and must be true in point of fact, "and when they do not both exist in point of fact the proceedings are utterly void and not voidable." Further on, the Court said: "It is apprehended that no one would insist that a grant of administration before the death of a person, however regular, could be sustained anywhere. The decision of the Probate Court, that the man was dead, would not be conclusive against him; and the fact of residence is of equal importance to give the particular Court jurisdiction, and the decision of one point is no more conclusive than the decision on the other."

This case — *Beckett v. Selover* — in so far as the question of the residence of the deceased at the time of death is concerned

was overruled, and we think rightly so, in the subsequent case of *Irwin v. Scriber*, reported in 18 Cal. 499, but it has not been disturbed as respects the question of the *fact of death*. Nor do we think it ought to be. It is a great mistake to place the fact of death and the place of residence of the supposed intestate in the same category. Until there is a death there is no subject matter for the jurisdiction of any Court. What is the subject matter? It is the appointment of a personal representative to a *decedent*, who is without one. If the subject matter exists, the question whether the Court had jurisdiction in the particular case, or not, may depend, as said by the Court of Appeals of Virginia in *Andrews v. Ivory*, 14 Gratt. 236, "upon a variety of facts; as whether the deceased resided in the county whose court made the order, or had land there; or died there; or had estate of any kind there. If, after passing upon these facts and taking cognizance of the case, the order of the Court could, at any period in any collateral proceeding, be avoided by evidence that the decedent did not reside, or die, or leave estate in the commonwealth, all the inconveniences and other evils would be produced which are referred to in *Fisher v. Bassett*, 9 Leigh, 119, and other cases before cited, and which are designed to be prevented by the principles laid down in those cases." Some of those evils are thus stated by Mr. Justice Rosevelt in the case of *Monell v. Dennison*, 17 How. Pr. 426: "To allow it (the decision upon the question of inhabitancy) to be called in question collaterally, and on every occasion and during all time, would be destructive of all confidence. No business in particular depending on letters testamentary or of administration could be safely transacted. Payments made to an executor or administrator, even after judgment, would be no protection. Even if the debtor litigated the precise point and compelled the executor to establish it by proof, the adjudication would avail him nothing should a subsequent administrator, as in this case, spring up, and, after the lapse of a fifth of a century, demand payment a second time, when a scintilla of evidence on one side remained, and all on the other had perished. A large number of titles, too, depend for their validity on decrees of foreclosure, and these decrees are often made in suits instituted by executors or administra-

tors or their assigna. Must these, too, be subject to be overhauled at any period, however remote, on the nice question of residence—a question often difficult to decide where the facts are close, and much more so, of course, where the facts are obscured by lapse of time and loss of documents and witnesses?" Such a doctrine the Court correctly held too dangerous for judicial sanction.

But here was an application by a party whose estate had been administered, upon the supposition that he was dead, to show to the Court in which the proceedings were had, the fact that he was all along alive, and the consequent non-existence of the *subject matter*, without which no jurisdiction could by possibility have attached to any Court. That it was competent for him to prove the fact we have no manner of doubt, and we are also of opinion that he sought to make the proof in the appropriate tribunal. (*State v. McGlynn*, 20 Cal. 233; *Hamberlin v. Terry*, 1 S. and M. Ch. 589.)

Demurrer sustained and proceedings dismissed.

McKINSTY and SHARPSTEIN, JJ., and MORRISON, C. J., concurred.

MYRICK, J., concurred in the judgment.

McKEE, J. concurring:

I concur. Administration of the estate of a living person is void, *ab initio* and throughout. The only jurisdiction a Probate Court has in respect to the administration of estates is over the estates of deceased persons. It has no jurisdiction whatever to administer the estates of living persons as if they were dead. Cases in support of these plain propositions abound in the books. For it has often happened that many "Enoch Ardens" have had to assert in the Courts their right to property of which they have been, in their absence, unlawfully deprived by void proceedings against them in Probate Courts. In addition to those cited by Mr. Justice Ross, the cases of *M'Pherson v. Cunliff*, 11 S. and R. 422; S. C., 14 Am. Dec. 642; *Appeal of Peebles*, 15 S. & R. 42; *Wales v. Willard*, 2 Mass. 120; *Smith v. Rice*, 11 id. 507; *Bolton v. Jacks*, 6 Robt. 166; *Morgan v. Dodge*, 44 N. H. 255; *Melia v.*

Simmons, 45 Wis. 334; and *D'Arusment v. Jones*, 4 Lea, 25, will be found instructive and conclusive upon the question involved in the present case. I know of no case opposed to the doctrine of those cases except it be the case of *Roderigas v. East River Savings Institution*, 63 N. Y. 460. In that case the Supreme Court of New York held that money paid to the administrator of a supposed decedent could not be recovered back, although it appeared that at the time of issuing the letters of administration the party was not dead. But in *Lavin v. The Emigrant Industrial Savings Bank*, 18 Blatch. 1, in the Circuit Court of the United States for the State of New York, it was decided that that case had no support elsewhere in the authorities of the English or American Courts. A living person, says the Court, can not be concluded by a Surrogate's decision that he is dead. As to him, such a decree is absolutely void, and he may claim his property as taken from him "without due process of law."

[No. 8,378.—Department Two.]

November 15, 1882.

ELIZA GARLICK v. W. R. BOWER.

VERDICT — JURY — ISSUES — NEW TRIAL — EXCESSIVE DAMAGES.—The action was brought to recover the possession of one thousand three hundred and fifty-three sacks of wheat, or the value thereof, alleged to be one thousand seven hundred and fifty dollars, and one hundred and fifty dollars, damages and costs. The defense was a general denial and justification under a writ of attachment. The action was tried before a jury, and the following verdict was rendered: "We, the jury in this cause, find a verdict for the plaintiff, Mrs. Garlick, and assess her damages at one thousand eight hundred dollars." On motion of defendant the Court set aside the verdict and granted a new trial on the ground that the verdict was against law, and the evidence, and on the ground that the damages were excessive, etc.

Held: 1. The verdict in failing to find the value of the property did not cover the issues submitted to the jury.

2. The verdict for one thousand eight hundred dollars damages was a verdict for damages in excess by one thousand six hundred and fifty dollars, of the damages claimed by the plaintiff.

3. For these reasons the verdict was against law and the evidence, and it was properly set aside by the Court on the motion of defendant for a new trial.

APPEAL by plaintiff from an order of the Superior Court of the County of Kern, granting a new trial. BRUNDAGE, J.

Action to recover the possession of a quantity of wheat in sacks, or the value thereof and damages and costs. The facts are stated in the opinion.

S. Solon Holt and George V. Smith, for Appellant.

J. W. Freeman and R. E. Arick, for Respondent.

Under the pleadings, the verdict and judgment should have been for a return of the property taken, or for its value. (Section 667, C. C. P.) The verdict was not for the return of any number of sacks of wheat, as claimed in the complaint, nor was the estimate upon the number of sacks taken by the Sheriff, but simply for the sum of one thousand eight hundred dollars. Under Section 662, C. C. P., the Court was justified in vacating the verdict without an application by the defendant.

The COURT:

This was an action to recover possession of one thousand three hundred and fifty-three sacks of wheat or the value thereof (alleged to be one thousand seven hundred and fifty dollars), and one hundred and fifty dollars damages and costs. The answer contained a general denial and the defense of justification by attachment. The case was tried by the Court sitting with a jury, and the trial resulted in the following verdict: "We, the jury in this cause, find a verdict for the plaintiff, Mrs. Garlick, and assess her damages at one thousand eight hundred dollars." On motion of the defendant the Court below set aside the verdict and granted a new trial, on the grounds that the verdict was against law and the evidence, and the damages were excessive, etc., and from the order granting a new trial, the plaintiff appeals.

The verdict did not cover the issues submitted to the jury. The value of the property was not found. Besides, the damages assessed were one thousand six hundred and fifty dollars in excess of the damages claimed by the plaintiff. The verdict was therefore against law and the evidence, and there

was no error committed in setting it aside. When the verdict was rendered by the jury it would have been proper for the Court to have called their attention to the fact that it was incomplete, and remanded them to put it in proper form; but having omitted to do that it was not error afterwards to set it aside, on the motion for a new trial made by the defendant.

Order affirmed.

[No. 8,552.— Department Two.]

November 16, 1882.

MOSES HOLLAND v. M. M. GREEN.

FORCIBLE ENTRY AND DETAINER — COMPLAINT — PLEADING.— The complaint alleged "that on the twenty-sixth day of January, 1882, the defendants unlawfully entered upon said land, and turned this plaintiff out of the possession thereof, by threats and menacing conduct, and ever since that time, said defendants have and still do hold the possession thereof, by threats of violence against this plaintiff." *Held:* Sufficient.

ID.— UNLAWFUL ENTRY — GOOD FAITH.— In such an action a lease to the defendant from a third person is not admissible in evidence.

APPEAL from a judgment for the plaintiff and from an order denying a motion for a new trial in the Superior Court of Los Angeles County. **HOWARD, J.**

The lease from Mary L. Gould referred to in the opinion was offered "for the purpose of showing the good faith of the entry of " the defendant.

Will D. Gould & James H. Blanchard, for Appellants.

The complaint jointly alleges two offenses: the defendants "unlawfully entered" upon the land in question, and that they "hold possession thereof by threats of violence." "The combining of principles applicable to the different elements of the cause of action leads to uncertainty and confusion; the two ideas should have been kept separate and distinct." (*Fogarty v. Kelly et al.*, 24 Cal. 320.)

There is no finding how the entry was made. It is alleged to have been unlawful. "One who has the title and present right of possession, may always take peaceable possession of what he claims to be his own." (*Phoenix Mill and Mining Co.*

v. *Lawrence et al.*, 55 Cal. 144; *Potter v. Mercer*, 53 id. 674; *Dennis v. Wood*, 48 id. 364; *Powell v. Lane*, 45 id. 678; *Townsend v. Little*, id. 676; *Shelby v. Houston*, 38 id. 410-22.)

Bicknell & White and *Chas. J. Ellis*, for Respondent.

All the questions involved in this appeal are discussed in the case of *Voll v. Hollis*, 60 Cal. 569.

The COURT:

The first ground upon which appellants rely for a reversal of the judgment below is that the complaint is substantially defective. The averment is "that on the said twenty-sixth day of January, 1882, the defendants unlawfully entered upon said land, and turned this plaintiff out of the possession thereof, by threats and menacing conduct, and ever since that time said defendants have and still hold the possession thereof by threats of violence against this plaintiff." We think that the above averment brings this case within Section 1159, C. C. P., which provides that "every person is guilty of a forcible entry * * * who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession."

2. The second finding is that the defendants "then and there by force, threats, and menacing conduct toward the plaintiff, turned him out of the possession of said land, and ever since that time the defendants have and still do hold possession of said land;" and the evidence in this case was sufficient to support the finding.

3. The Court did not err in excluding evidence of a lease from Mary L. Gould to one of the defendants. (*Voll v. Hollis*, 60 Cal. 569.)

Judgment and order affirmed.

[No. 8,052.—In Bank.]
November 16, 1882.

SPRING VALLEY WATER WORKS v. ANTONE
SCHOTTLER ET AL.

RULES OF BOARD AS TO NOTICE NO PART OF RECORD ON CERTIORARI.—Appeal from a judgment of the Superior Court of the City and County of San Francisco, denying the application of the Spring Valley Water Works for a writ of review, and confirming the action of the Board of Equalization of the city and county above named. The writ was sued out to review the action of the Board of Equalization in raising the assessment of the franchise of the Water Works above named, from five thousand dollars to five million dollars, and to have it vacated and set aside as being in excess of the jurisdiction of the Board. It was contended by appellant that no notice as required by law was given to the Water Works, inasmuch as it was not given in accordance with a rule prescribed in advance by the board.

Held: On the authority of *Garretson v. Supervisors*, 9 P. C. L. J., 685, these rules are no part of the record and proceedings to be brought up on certiorari.

WAIVER OF OBJECTIONS TO FORM OF NOTICE—DISCRETION OF BOARD AS TO TIME OF NOTICE.—An application having been made by a taxpayer of the city and county, to the Board of Equalization, that the valuation of the franchise of the company be raised from five thousand dollars to fourteen million dollars. Notices to appear and show cause before the Board of Supervisors at their chambers in the New City Hall, on Friday, June 24th, at ten o'clock A. M., why the assessment of the Spring Valley Water Works should not be raised to fourteen million dollars, addressed to the President and Secretary of the Spring Valley Water Works, were served on June 23d and 24th on these officers by leaving them (the notices) "at the office of the Spring Valley Water Works, at its principal place of business in the City and County of San Francisco." It also appears from the record that a notice addressed "to the Spring Valley Water Works Company, Charles Webb Howard, President, and William Norris, Secretary," was served on the twenty-fourth of June, 1881. This notice bore date the day just named, was entitled "In the matter of the equalization of the assessment of the Spring Valley Water Works Company," and the tenor of it was to inform and notify the Water Works Company that the petition to have the assessment on its franchise raised, then on file with the Board of Equalization, would be taken up and acted on by the board at its chambers at the New City Hall, on Saturday, June 25, 1881, at ten o'clock A. M., and it was thereby cited to appear and then and there show cause why the petition referred to should not be granted. This notice issued by an order of the Board made on the twenty-fourth of June, 1881, and was served on the same day by leaving it at the office of the Company as stated with regard to the notice first mentioned. On the twenty-fourth of June, 1881, the Board took up the application to increase the valuation of the franchise of the Spring Valley Water

Works. Charles N. Fox Esq., attorney, then appeared and protested on behalf of the Spring Valley Water Works against a consideration of the application made in reference to said Water Works at that time for want of jurisdiction on the part of the Board, inasmuch as the Board had adopted no rule prescribing the form and manner of notice, and therefore any further action by the Board would be in violation of law, and that sufficient time was not allowed the Spring Valley Water Works as contemplated by law to prepare and present its case. He (Fox) stated that a notice had been served upon the Secretary of the Company on the afternoon of the preceding day, at four o'clock, just at the time of the closing of the office, to appear before the Board this morning. Afterwards, on the same day, Mr. Fox reiterated his objections to the Board's proceeding, and stated that the President of the Company was out of town when the notice was served on the Secretary, and the notice to the President to appear was not received by him until this morning—meaning the morning of the 24th. The Board determined the question of jurisdiction adversely to the contention of Mr. Fox. He (Fox), then requested that the hearing of the case be postponed until the next day (Saturday) or the Monday following, so as to give the Company an opportunity for preparation and consultation. A like request for postponement on behalf of the San Francisco Gas Light Company was also made (the cases of these two companies were heard together), and on motion, further action in the cases of the Spring Valley Water Works and the San Francisco Gas Light Company was postponed until the forenoon of the next day, Saturday, twenty-fifth of June, at ten o'clock. On the next day (twenty-fifth of June) at the request of R. P. Clement, Esq., who appeared on behalf of the San Francisco Gas Light Company (the case of the Company last named being heard with that of the Spring Valley Water Works), and requested a further postponement of the cases of both companies until two o'clock on that day, for the purpose of allowing the respective counsel to have a consultation with the officers of the companies as to these cases. The cases of the above mentioned companies were afterwards on same day taken up for hearing, when the attorneys were called on to make an admission as to the value of the stock of the companies mentioned. Thereupon Mr. Fox stated that on yesterday he agreed, if ever the case reached that point, that he would admit that the market value of the stock (referring to the Spring Valley Water Works stock) on the seventh day of March, 1881, was par, reserving the right to object to its relevancy, but that on reflection he declined to appear for the Water Company further than to make the point made at the preceding meeting, to the jurisdiction of the Board for want of notice to the Company, and to repeat that no notice had been yet given the Company. After this the Board proceeded to act upon the case of the Spring Valley Water Works, and raised the assessment.

Held: 1. That Section 3681 of Political Code providing for the giving of notice by the Clerk of the County Board of Equalization in certain cases, has no application to this case.

2. The appearance of the company on the notices served, waived all objections to the mere form of the notice.

3. The reasonableness of the time given by the notice to show cause in

cases where the law prescribes no definite time, must in a great measure be left to the discretion of the Board.

4. The notice under all the circumstances in this case was not as to time unreasonable.

FRANCHISES DEFINED — FRANCHISE OF SPRING VALLEY WATER WORKS. — The Spring Valley Water Works was a corporation prior to the seventh day of March, 1881, organized and existing under the laws of this State, having its principal place of business and doing business in the city and county of San Francisco. All corporations organized under the laws of this State, are, by the general law, vested with certain powers by express grant. They are invested with further powers by the particular act under which they are incorporated, or by the title of the code under which they are incorporated, or by the title of the code under which they are formed. The Spring Valley Water Works is a corporation formed and doing business under an Act passed April 14, 1858, for the formation of corporations for business and commercial purposes, and an Act passed April 22, 1858, entitled "An Act for the incorporation of water companies." Under the laws of the State this corporation has power to have succession by its corporate name for a period of time (which must not exceed fifty years), to sue or be sued in any Court, to make and use a common seal and alter the same at pleasure, to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require, to appoint such subordinate officers and agents as the business may require, to make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and the transfer of its stock, as well as all power necessary to the exercise of the expressly granted powers. It has also the power under the Act of 1858, to purchase or to appropriate and take possession of, and to use and hold, all such lands and waters as may be required for the purposes of the company, upon making compensation therefor. This last power enables the corporation to purchase the land and waters required for its business against the will of the owner, by availing itself of the provisions of the laws for the condemnation of land; in other words, to acquire such lands by the exercise of the power of eminent domain. It has the right also under the Act of 1858, subject to the reasonable direction of the Board of Supervisors, to use so much of the streets, ways, and alleys of the City of San Francisco, as may be necessary for laying pipes for conducting water into the city, or any part of it, and also the right to furnish water to the inhabitants of the City and County of San Francisco, and, as this court has recently determined, to the city also. The water so furnished is to be paid for at rates to be fixed each year in a mode established by law. A further power or right inhering in this company by the laws of the State, was the power or right to divide its capital stock into a number of shares which are personal estate, each share representing a minute fractional part of such stock, and each share capable of ownership, of being sold and bought and transferred by a simple process, of passing by will, or to one's heirs after his death through the medium of an administration, and each share securing to the owner a right to participate in the profits and property of the company. The before mentioned powers, or privileges, were supplemented by further grant, which inured to the advantage of

the petitioner, which will be found in the third section of the Act of 1858, by which all the privileges, immunities, and franchises that might be thereafter granted to any individual, or corporation, relating to the introduction of fresh water into the City and County of San Francisco, or into any city or town in this State for the use of the inhabitants thereof, were also granted to all companies incorporated before or after the passage of that Act.

Held: 1. Franchises are special privileges conferred by Government on individuals and which do not belong to the citizens of the country generally by common right.

2. The common right refers to the right of citizens generally at common law. Such rights of citizens, though frequently spoken of as franchises, are not the franchises here meant; and it may be conceded that where such rights are granted to corporations, they are not franchises. But independent of the right to exist as a corporation and to exercise powers in its corporate capacity, there are privileges granted to the Water Works, which do not by the common law, belong to citizens generally; such as the right to lay down pipes in the streets, ways, and alleys of a city, and to collect rates for water furnished. Conceding that the Constitution by Section 19 of Article xi. grants this right to every person, it does not follow that it is not a franchise. They are vested by a grant of the sovereign power and not by the common law; and the generality of the grant does not deprive them of the character of franchises.

3. The right to collect rates for use of water supplied to the City and County of San Francisco or the inhabitants thereof which the appellant has possessed at least ever since the Act of 1858 went into effect, is expressly declared to be a franchise by the Constitution of the State in the second Section of Article xiv. thereof.

4. The very existence of a corporation as such, is a franchise, and it exercises its franchise in every act which it performs as a corporation. A corporation, whose existence is a franchise, may possess powers and privileges, which, in themselves, are not franchises; but it usually owns along with such privileges some that are franchises; but whether the powers be entirely of the kind which are franchises or not, its existence and right to employ its corporate powers is a franchise.

FRANCHISES TO BE TAXED. — It was the intention of those who framed and ratified the Constitution to place such franchises in the category of property to be taxed. The word "*franchises*," as used in the first section of Article xiii., is used generally without any qualifying words, and is intended to embrace all franchises of the character above referred to, whether vested in individuals or bodies politic.

Id. — CONSTRUCTION OF CONSTITUTION. — The clause "and all other matters and things real, personal and mixed, capable of private ownership" in Section 1 of Article xiii., does not qualify the word "*franchises*," which preceded it. The words used show clearly that they were intended to add something to what preceded them, to refer to kinds of property not previously mentioned, not to qualify anything. They constituted a declaration that in enumerating the property to be taxed it was not intended to confine the enumeration to "moneys, credits, bonds, stocks, dues, franchises," but to include all other kinds of property, and that by no con-

struction of the word property, as used in the section were any kinds of property to be left out.

1d. — FRANCHISES ARE PROPERTY. — All these rights exist until the legislative authority has acted so as to impair them or take them away; and until such legislation is enacted, the rights of property remain unimpaired. Shares of stock, whether real or personal estate, are property.

CHARTER OF CORPORATIONS. — In this State, the charter is the statute or statutes granting and defining the powers of the corporation, under which it is constituted and exists, together with the instruments required to be executed by the provisions of such statute or statutes. These are sometimes called the constating instruments. Such franchises are legal estates, not mere naked powers, and are powers coupled with an interest, which vest in the corporation by virtue of its charter or constating instruments.

POWER OF STATE TO TAX FRANCHISE. — There can be no doubt of the power of a State to tax the franchise at its assessed value. There may be more difficulty in arriving at its value than that of a parcel of land or personal chattels, but still its value may be estimated, and such value may exceed the value of the tangible property of the corporation.

1d. — MODE OF TAXATION. — In this State, the Constitution having declared that franchises are property, and that all property in the State not exempt from taxation shall be assessed in proportion to its value, to be ascertained as provided by law (Const., Art. xiii., Sec. 1), it would seem to follow that the tax must be according to a valuation made by the officer appointed for that purpose. If the State can impose a tax on the franchise of a corporation in the nature of an excise or duty, it does not exclude the taxation by a valuation made by an Assessor.

1d. — CASES APPROVED. — The cases of *Burke v. Badlam*, 57 Cal. 594; and *San José Gas Co. v. January*, id. 614, cited with approval.

POWER OF BOARD TO EQUALIZE ASSESSMENT OF FRANCHISE. — By the several provisions of the Political Code, the power to act on each and every assessment is conferred on the board, and to increase or lower it so as to make it conform to the true value in money of the property mentioned therein, and the Board has full power to act on the assessment of the franchise and increase or lower it as provided in Section 3673, Penal Code.

MODE OF EQUALIZING ASSESSMENT OF FRANCHISE APPROVED. — In this case the Board of Supervisors, in the exercise of its power of equalization, assessed the franchise of the Water Works by taking the aggregate of the market value of the shares of stock in the company on the seventh of March, 1881, and deducting therefrom the value of the real and personal property of the company, and held the difference to be the value of the franchise. The market value of the shares was shown to the Board by the testimony of witnesses.

Held: This mode of arriving at the value of the franchise, is within the power vested in the Board of Supervisors, acting as a Board of Equalization.

WENT OF LEGISLATURE TO REQUIRE TAXATION OF FRANCHISES SHOWN. — On the same day on which the Legislature enacted § 3608 of the Political Code, declaring that shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corpo-

ration which they represent, and prohibiting the taxation of such shares of stock, it repealed § 3640 of the same Code which required the assessment to every person owning, or having the control thereof, of all shares of stock in corporations, and provided that in the case of stock in any corporation having its principal place of business in this State, the assessable value of each share should be ascertained by taking from the market value of its entire capital stock, the value of all property assessed to the corporation, and dividing the remainder by the entire number of shares into which the capital stock was divided.

Held: By this section which was repealed, the whole property of the corporation, including franchise and other assessed property, would have been taxed by taxing the shares to each owner of shares in the manner indicated by its provisions. But by declaring, in Section 3608, that shares of stock were not to be taxed because they possessed no intrinsic value over and above the value of the property of the corporation which they stand for and represent, and as taxing of the shares and property both, would be double taxation, and therefore the shares should not be assessed, but the property should, no doubt it was their intention to tax everything in the shape of property owned by the corporation; that everything entering into and giving value to the shares, should be taxed. It can not be doubted that the Legislature in acting on the subject of revenue and taxation during the session of 1881, did not intend to leave the system in relation to so important a matter in such a shape, that so large an amount of property as indicated by the difference between the market value of the shares of corporations and the value of the tangible property of such corporations, should escape taxation. To come to any other conclusion, would be to impute to that body a most culpable dereliction of duty.

GOOD-WILL NO ELEMENT OF VALUE OF STOCK.—Good-will does not enter into or form an element in the value of the shares of stock in a trading corporation.

JURISDICTION OF BOARD IN THIS CASE.—The Board of Supervisors in its capacity of a Board of Equalization, had jurisdiction of the person and subject-matter in the matters involved in this cause.

APPEAL by plaintiff from the judgment of the Superior Court of the City and County of San Francisco. **ALLAN, J.**

Application for writ of review. The facts are stated in the opinion of the Court. After the decision, a petition for rehearing was presented by the plaintiff. Similar petitions were also presented by the Nevada Bank of San Francisco, The Pacific Coast Steamship Company, and the Bank of California, as being parties interested in the questions involved though not parties to the action. All of the petitions were denied.

Fox & Kellogg, for Appellant.

The Board of Equalization had no jurisdiction to raise this

assessment. Because the Board had never by rule prescribed any manner of giving notice of intention to increase the assessment, as provided by law. (Political Code, § 3673.) Because notice of such intention was not given as required by law. (Political Code, §§ 3673 and 3681; *Patten v. Green*, 13 Cal. 325; *People v. Reynolds*, 28 id. 112.) There was no evidence before the Board of Equalization as to the value of the property described in the assessment upon which it acted, and in the absence of such evidence it had no power to increase the assessment. (*People v. Reynolds*, 28 Cal. 107.)

The company had no "property" liable to assessment, of the character of that upon which this increased valuation was placed. This increase of valuation was placed upon "franchise" or "franchises." Whether the company had any franchise or franchises which constituted property, or not, was a fact which must be determined from an examination of the statutes of the State, as every franchise is the creature of statute, and can be held or enjoyed only by virtue of legislative grant.

It is not pretended that the appellant does not possess one or more franchises, in the broad sense of that term, for in that broad sense, the term "franchise" embraces every privilege, the right to enjoy which depends upon permission of the sovereign, or the mode of exercising which is prescribed or regulated by law. In this broad sense the term is synonymous with the word "liberty," and signifies a royal privilege, or a privilege granted by the government. (2 Blackstone's Com. 37.)

It may be a privilege granted to one, to many, or to all; but to be a subject of taxation in this State, and therefore liable to assessment at any sum whatever, it must be a franchise or privilege, "capable of private ownership," and therefore not common to all. "All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership," etc. (Const. Art. xiii, § 1.) Ex-

actly the same definition of the term "property" is found in the Revenue Act. (See Political Code, § 3617, Sub. 1.)

In making up the assessment, the revenue officers seem to have taken it for granted that because franchises may be property, they are *ex necessitate* liable to assessment, and to have overlooked the provision of the Constitution and the statute, that they can only be property, and subject to taxation, when "capable of private ownership." According to their theory, the elective franchise, the freedom of speech, the freedom of the press, the most valuable of all franchises, are liable to assessment and subject to taxation. But these, and a hundred other franchises, are not "capable of private ownership," and therefore not "property," and not being property, are not subject to taxation.

We submit that nothing but "property" is subject to assessment and taxation, in the form now under consideration, under the Constitution or laws of this State. Only those "franchises" can be classed as "property * * capable of private ownership," which are defined by the Supreme Court of the United States, in *Bank of Augusta v. Earle*, 13 Pet. 519, as being "Special privileges conferred by government on individuals, which do not belong to the citizens of the country generally, or by common right." Wherever we find a franchise held to be property, we find it to be of the class thus clearly defined by the highest tribunal in the land. Of these are street railroads, turnpike roads, bridges, ferries, wharves, and the like.

But the appellant in this case possesses no such franchise. There is no right or privilege which it can name, or upon which it can place its hand and say, "This is mine," none that is or can be held by it in "private ownership." It owns no franchise; it simply enjoys the privileges conferred by law. Its privileges are these and these only: 1. The right of corporate existence. This is a privilege granted by the Legislature to all the people of the State, and any five of its inhabitants may enjoy that franchise at any time, when they see fit to incorporate for any purpose for which men may contract or associate themselves together. (Civil Code, § 286.) 2. The right to acquire property, when it is absolutely necessary, and can not otherwise be acquired for certain of its corporate uses,

by condemnation. This is a right which can never be exercised without enormous cost, proportioned to the value of the thing acquired, and which is not, and can not be, held in private ownership. It is a right held in common by all corporations organized for the purpose of supplying cities and towns with water as well as many others, and there is no limit to the number of corporations which may organize and actually engage in the business of supplying the same city or town. (See Statute, 1858, p. 218; Code of Civil Procedure, § 1237.)

3. The right to lay and maintain pipes in the streets and to collect water rates. Like the two preceding, so of this. It is not a right which is or can be held "in private ownership." By the statute of 1858, above cited, and under which the appellant is organized, it is a right guaranteed to every corporation organized for the purpose of supplying water in cities and towns, with no limitation upon the number that may engage in the same business in the same city or town. By the Codes the same right is also guaranteed to any corporation organized for such purpose; but under them it could only be exercised when thereunto authorized by ordinance of the city. But by the same sections of the Code the city authorities were prohibited from granting any exclusive privilege of the kind. (See Civil Code, §§ 548, 549.)

But since the passage of both the Statute and the Code, the people in the majesty of their power, have taken away even the limitations of those laws, by which the right to exercise the privilege was limited to corporations, and now it is a right common to every person in the State whether incorporated or not.

By Sec. 19, Art. ii, of the Constitution, it is provided: "In any city where there are no public works owned and controlled by the municipality, for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this State, shall, under the direction of the Superintendent of Streets, or other official in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connec-

tions therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

Thus it will be seen that under the Constitution of the State it is impossible that there should be a franchise of this kind—that is "capable of private ownership." It is one which belongs to everybody, and whoever sees fit to use it need not even say to the municipal authorities, "by your leave." All they have to do is to be subject to general regulations for damages and indemnity for damages, and to supervision of the Street Superintendent, as to the mode and manner of using the street. It is true that Art. xiv. of the Constitution declares the right to collect water rates to be a franchise which can only be exercised by authority and in the manner prescribed by law. But that does not militate against the proposition that is a privilege common to all, and not "capable of private ownership." It is declared to be a franchise solely for the purpose of making it subject to regulation by law, and without giving it the character of property or private ownership.

These are all the franchises, if they can be called such, enjoyed by the appellant. They are all franchises which are enjoyed by every inhabitant of the State, which are not "capable of private ownership," and therefore not liable to assessment under the law.

The right to lay pipes in the streets is a privilege which can not be granted by the State, free from municipal regulation. The streets of the city are not subject to the control of the State. (*People v. Lynch*, 51 Cal. 15.)

A franchise must be by grant of the sovereign to the subject, or be held by that prescription which presumes a grant. It must be in relation to a subject over which the sovereign has control. If it be a matter over which the municipality has control, it ceases to be a franchise, and becomes only a license, for a municipal body has no power to confer a franchise. It lacks the element of sovereignty. (*Davis v. The Mayor*, 4 Kernan (14 N. Y.), 506.)

The Legislature of Illinois granted to the Chicago City Railway Company the right to lay and maintain tracks and run cars thereon in such of the streets of the City of Chicago as should be designated by the municipal authorities. This was held not to be a franchise, but a mere license—that it did not come within any definition of a franchise. (*C. C. R. W. Co. v. The People*, 73 Ill. 548.)

The right to distribute or sell water is certainly not a franchise. Water has always been distributed and sold in this city by divers methods, and the right of any man to do it has never been questioned. The defendant is not engaged in the collection of tolls for the use of its property, but its business is to procure, store up, and sell water. Its water is a commodity, an article of merchandise, and it has the same right to sell it as any other person engaged in trade or commerce. So held in regard to the identical business in which this defendant is engaged. (*Heyneman v. Blake*, 19 Cal. 595.) We therefore respectfully submit that there was, in the item upon which the Board acted, no property subject to assessment, or to increase of valuation.

F. G. Newlands, for Appellant.

Had the Board of Supervisors jurisdiction of the subject-matter; or, in other words, are the rights and privileges enjoyed by the Spring Valley Water Works under the Constitution and the general law of its incorporation and the acts amendatory thereof and supplementary thereto, "franchises," within the meaning of Article xiii of the Constitution, and as such "property" subject to taxation, and, if so, has the law provided the mode of ascertaining their value?

The term "franchise," in its broad sense, means "exemption from constraint or oppression; liberty; freedom" (Webster). In this sense the right to vote is termed a "franchise;" so also the right of trial by jury, freedom of speech, and freedom of the press are termed "franchises." The declaration of the Constitution that the word "property" includes "franchises," certainly was not intended to apply to those general privileges and rights which society has guaranteed and secured to individuals. The "franchises" declared by the Constitution to be property, must be those special privileges, exclusive in

their nature, conferred by the Government on individuals, and having the incidents and attributes of property; that is to say, they must be capable of private ownership, of assignment, and of being inherited. In this sense they are included in that division of property called "incorporeal hereditaments;" they are things without body, capable of being inherited, such as the right of "ferry," or the right of "fishery," or the right to maintain a "toll" road, conferred upon the grantee, his heirs or assigns. It is evidently in this sense, that the word is used in the Constitution, for in it the word "property" is declared to include "moneys, credits, * * * franchises, and all other matters and things real, personal, and mixed, capable of private ownership." The last words attach to and qualify all the taxable things referred to in the above quotation. Those franchises only which are "capable of private ownership" are to be assessed and taxed. If this is not so, then the Assessor must assess to each individual, and value the right to vote, the right of trial by jury, the rights of freedom of speech and of the press, and all other franchises and privileges which, in the struggle of the ages, have been secured to individuals by constitutional or legislative enactment. None of these are natural rights. It may be doubted whether man, considered as a member of society, has any natural rights; he has only those rights which society gives or permits him to enjoy; he has not the right to live, or to freely utter his sentiments, or to vote, or to be tried by his peers, save so far as society has conferred or allowed him to enjoy the right. He lives, moves, and acts with the consent or by sufferance of society. So that in this sense no man exercises or enjoys any rights or privileges which are not either the free gift of the sovereign power or the result of its unwillingness to restrain, whether that power be, as in Russia, a despotic Czar, or as in England, the Crown and Parliament, or as in America, a sovereign people acting through the Constitution which contains their fixed and permanent will, or through the Legislature which, as their representative, deals with the matter subjected to its discretion. Obviously the taxing power was not intended to be applied to such rights and privileges.

Assuming, then, that the word "franchises" as used in the

Constitution, was not intended to be applied to those rights which are conferred by the Government upon individuals generally, and which are made by the Government of common rights and general enjoyment, but that it applies only to those rights and privileges exclusive in their nature, which are conferred by the Government upon individuals or corporations, which are capable of private ownership, which are subject to the dominion of the owners, which can be sold or given away or devised by them, and which come within the full meaning of the term "incorporeal hereditaments," the question arises as to whether or not the Spring Valley Water Works owns any "franchises" of the latter class. The Supreme Court of this State (*San Francisco v. S. V. W. W.*, 48 Cal. 531) say: "We are to ascertain the rights, privileges, powers, duties, and obligations of the Spring Valley Water Company by reference only to the general law under which it was incorporated," and also "the Legislature can neither pass a special Act granting powers or privileges to a particular corporation created under the general law which are not enjoyed by all other like corporations under the same law, nor pass a special Act limiting, or burdening with peculiar conditions, the rights or powers acquired by a particular corporation from the general law." That case overruled the case of *California State Telegraph Company v. The Alta Telegraph Co.*, 22 Cal. 398, and in effect held that the Spring Valley Water Works could not become the grantee either directly or indirectly, either by direct grant or by the assignment to it of a grant already made, of any exclusive or special privileges conferred by the Government, and which could not be exercised without a grant from the Government. This Court will take judicial notice of the Constitution and of the general laws under which the petitioner was incorporated, and inasmuch as it has declared that Water Companies have not the capacity to acquire any rights or privileges from the Government save such as are contained in the Constitution and the general laws, no presumption will be indulged as to the ownership by the petitioner of any "franchises" or privileges conferred by the sovereign other than those contained therein.

The Constitution of 1863 declared (Art. iv., § 31): "Corporations may be formed under general laws, but shall not be

created by special act except for municipal purposes; all general laws and special acts passed pursuant to this section may be altered from time to time or repealed." The general laws under which the petitioner was incorporated, are an Act passed April 14, 1853, for the formation of corporations for business and commercial purposes; and an Act passed April 22, 1858, entitled "An Act for the Incorporation of Water Companies." Under these Acts, the petitioner has the following rights and privileges:

1. The right to be a corporation—that is to say, the right as an artificial being, to act under an artificial name, and to exercise certain powers and duties of a natural person, among others, to sue and be sued, and to purchase, hold, sell, and convey real and personal property. Under the Act of 1853, any three or more persons could associate themselves together and form a water company, by signing and filing the proper certificate. This was a privilege made by the laws of common right and general enjoyment. All persons could exercise it. Under the Civil Code, § 286, "Private corporations may be formed for any purpose for which individuals may lawfully associate themselves," and any five persons may associate themselves together and form such corporation. It appears, then, that the right to be a corporation, is simply a privilege conferred by the general law upon any number of persons, not less than three in the one case, or five in the other, whoever they may be, who may wish to associate themselves together, to exercise, as an associated body, under an artificial name, certain powers, and perform certain duties of a natural person. In other words, a corporation is a bundle of faculties. Could the faculty of a natural person to sue and be sued, or his faculty to acquire and possess property, be assessed as property? The right to the things sued for, which constitute choses in action or the property acquired and possessed, could be assessed both to natural and artificial beings, but not mere faculties or powers. The right to be a corporation is simply the right to exist at the will of the creator. Can the right to exist, either as a natural or artificial being, be valued as property?

2. Under the Act of 1858, water companies are granted the privilege of exercising the power of eminent domain; but they

exercise this privilege simply as the agents of the State, for the purpose of serving a public use, to which their powers and property are delegated. This agency may be revoked at any time. It is a naked power—not a power coupled with an interest. Can the agency of the agent, whether natural or artificial, be assessed as property? Besides, this agency is not conferred on water companies alone, but upon every corporation or individual in charge of a public use. (C. C. P., §§ 1237 and 1263.) So that the right of exercising the right of eminent domain, for the purpose of supplying the city with water, has been made, by general laws, a matter of common right and universal enjoyment. This privilege of exercising the right of eminent domain is not property owned; the corporation exercising the privilege, can not assign it. “The State determines certain uses to be public, and then, since the State must act through agents, delegates the task of ascertaining what particular property is necessary to a use, and what is just compensation to a private proprietor. * * * The supplying of water to the inhabitants of a city is a public use. * * * But in the proceedings provided by law for the ascertainment of the property necessary for this use, and its value, the corporation takes no part, other than to initiate them. * * * A water company, having commenced such proceedings, can not sell and transfer its right to prosecute them, or to take private property to another water company, nor can the latter purchase such right.” (*Mahoney v. S. V. W. W.*, 52 Cal. 159.) All persons, both natural and artificial, who have in charge that use which has been determined by the sovereign power to be a public use, act only as the agents of the sovereign, and have no proprietary right in the privilege of exercising the power of eminent domain.

3. The only other right or privilege conferred by the general law of 1858, upon water companies, is the right of laying down pipes in the streets of the city, and supplying the inhabitants with water at rates fixed by law; but this right is not only common to all water companies, but is also conferred by Art. xi., § 19, and Art. xiv., of the New Constitution, on all individuals, so that this right which, if granted absolutely and exclusively to a single individual or a single corporation, and his or its assigns, might be regarded as property,

has been by the fundamental law of the State made a matter of common right and general enjoyment. It is true that everybody does not exercise this right or privilege, just as everybody does not exercise the right to vote, but everybody has the right to exercise it, and it is even more unlimited and general than the right to vote, for the latter right is conferred only upon native-born inhabitants over twenty-one years of age and upon naturalized citizens, whilst the former right can be exercised by anybody, whether adult or minor, citizen or alien. This right or privilege has none of the incidents of ownership; no one can sell it, for everybody has it, and no person can gain by the accession of the right of another.

We have thus classified all the rights and privileges of water companies under the general law, and the Constitution of the State, and we find that they are all subject to alteration and entire revocation by the State; they are privileges enjoyed, not property owned. Webster defines property to be: "4. The exclusive right of possessing, enjoying, and disposing of a thing; ownership; 6. An estate, whether in lands, goods, or money." Blackstone, book 1, page 138, speaks of property as an absolute right "which consists in the free use, enjoyment, and disposal of all his acquisitions without any control or diminution, save only by the laws of the land," and in another place, book 2, page 2, speaks of the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe." Bouvier, in his Law Dictionary, in defining the word property, says: "It is the right to enjoy and to dispose of certain things in the most absolute manner, * * * so that property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person, without any consideration, or even throwing them away."

Can it be said that any of the rights or privileges conferred on the petitioner by general laws, subject to alteration, amendment or repeal, come within the definition of the term "property"? This Court has already determined (*People v. Hibernia Bank*, 51 Cal. 243), that "credits," though admitted to be

property within the above definitions, are not property in the sense in which the word "property" is used in Section 13, Article xi, of the old Constitution; but these rights and privileges are not "property" in any sense; the Constitution can not by a mere declaration make that "property" which has none of its attributes; it can not by a mere declaration make a liquid a solid, or substance spirit, or give a line breadth and thickness as well as length, or measure space with a yard stick—there are some things beyond the power of constitutional enactment. The constitutional provision will be entirely satisfied by confining the application of the term "franchises" to those grants made by the State already referred to which are "capable of private ownership."

This Court has already substantially determined that the privileges conferred by the general laws of the State are not property. In a recent case (*S. V. W. W. v. Schottler et al.*), the petitioner, claiming the right, under the Act of 1858, to an equal voice in the fixing of water rates, sued out a writ of mandate to compel the Board of Supervisors to fill a vacancy in the Board of Commissioners provided by that Act. The defense was that the new Constitution had changed the mode of fixing water rates and had vested the power in the Board of Supervisors, most of them consumers of water themselves, and all of them the political representatives of the domestic consumers and the agents of the city and county—the largest consumers of water. It was claimed on behalf of petitioner that the Act of 1858 was a contract, and that it had vested rights and property in the privileges thereby conferred; that among such was the right to have its rates fixed by a Board of Commissioners, two to be appointed by the Board of Supervisors and two by the company; that the new Constitution, if applicable to petitioner, was in contravention of the Federal Constitution in that it violated the obligation of a contract and deprived petitioner of its property (vested rights) without due process of law. The Supreme Court, in effect, determined that the Act of 1858 was not a contract and that the rights and privileges conferred by that Act were not "property." It follows, then, logically, that if these rights and privileges are not property within the meaning of the Federal Constitution, they can not be property within the meaning of the

State Constitution. It can not be contended that the term "property," as found in the State Constitution, is used in a broader sense than in the Federal, for the term is used in the latter, according to all the adjudged cases, in the broadest sense of which it is capable.

Under the old Constitution, it was possible to grant a franchise, in the property sense of that term, to any natural person. Such grants were made, are now in existence, and may be taxed as property. But no such franchise could, under the old Constitution, be granted to a corporation; for the Supreme Court, in construing the provisions of the Constitution with reference to corporations, in *San Francisco v. S. V. W. W.*, *supra*, in effect determined, not only that a corporation must be created under the general laws, but also that no special privilege or franchise can be granted to it after its creation, and that it can not acquire, even by assignment, any privilege, the nature of which is such that it can not be exercised without a grant from the Legislature.

Under the new Constitution it is impossible to grant a franchise, in the property sense of that term, to either natural or artificial persons, for it declares (Art. i., § 21): "No special privilege or immunities shall be granted which may not be altered, revoked, or repealed by the Legislature. Nor shall any class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." And again, (Art. iv., § 25): "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: Granting to any corporation, association, or individual any exclusive right, privilege, or immunity—in all cases where a general law may be made applicable."

It is evident, therefore, that the day of "franchises" as "property" is over. The whole tendency of the civilized government is to do away with special or exclusive privileges, and wherever a right is extended by the Government to make it common to all. Equality of right, equality of privilege, and equality of burden, are now the crowning franchises of all persons, natural and artificial, in this State. The great difficulty in construing a word like "franchise," which has figured extensively in the evolution of government, is that the attributes of a by-gone age are likely to be given to it not-

withstanding the modifications that may have taken place in its character and scope. As already stated the power of society over the individual is absolute. It is called the power of government, or the police power. Every privilege which the individual, either specially, or as a member of a class or in common with all other individuals, enjoys, may be regarded in one sense as a grant from the Government. The despot who rules with the consent or by the sufferance of society has absolute power over the vocation of life. He can grant to a certain individual the right to pursue a special trade exclusively, or he can throw open such trade or occupation to all. When such a grant is made to an individual, his heirs and assigns, it may be regarded as his property; and when such a grant is made to all individuals it is no less a franchise; it is a freedom, a liberty, but not "property." If we look back to the times of Elizabeth, James the First, and Charles the First, we will find many examples of special grants which partook of the nature of property. Hallam, in his Constitutional History of England, vol. i, chap. v, speaking of the reign of Elizabeth, says: "The crown either possessed or assumed the prerogative of regulating almost all matters of commerce at its discretion."

"Patents to deal exclusively in particular articles, generally of foreign growth, but reaching in some instances to such important necessities of life as salt, leather, and coal, had been lavishly granted to the courtiers with little direct advantage to the revenue. They sold them to companies of merchants, who of course enhanced the price to the utmost ability of the purchaser."

"In 1601 Parliament made a bolder and more successful attack on the administration than this reign had witnessed. The grievance of monopolies had gone on continually increasing; scarce any article was exempt from these oppressive patents. When the list of them was read over in the House a member exclaimed: 'Is not bread among the number?' The House seemed amazed: 'Nay,' said he, 'if no remedy is found for these, bread will be there before the next Parliament.'"

It was in those times that the East India Company was organized under letters patent from the crown, and vested with the exclusive right to trade in India. Monopolies were granted

by letters patent, conferring the exclusive right to deal in necessities of life, such as coal, iron, soap, salt, leather, tobacco, beer, hops, linen, etc. (Bright's English Hist., vol. ii. page 629.) Rights of ferry, rights of wharfage, rights of fishing, rights of chase and of toll-roads, etc., were also granted. All these grants, as a rule, were made by letters patent, running to an individual, his heirs or assigns, and exclusive in their nature. They were protected by the courts as property, and it was held by the courts that no grant could be made by the sovereign which would interfere with or impair the exercise of the previous grant. They were therefore termed incorporeal hereditaments, and Kent, in speaking of such franchises, says (Kent's Com., vol. 3, page 458): "Another class of incorporeal hereditaments are franchises, being certain privileges conferred by grant from government, and vested in individuals. In England they are very numerous and are understood to be royal privileges in the hands of a subject. They contain an implied covenant on the part of the Government not to invade the rights vested. * * * The Government can not resume them at pleasure or do any act to impair the grant without a breach of contract. * * * An estate in such a franchise and an estate in law rest upon the same principle, being equally grants of a right or privilege for an adequate consideration. If the creation of a franchise be not declared to be exclusive, yet it is necessarily implied in the grant, as in the case of the grant of the ferry, bridge, or turnpike, or railroad, that the Government will not, either directly or indirectly, interfere with it so as to destroy or materially impair its value. Every such interference, whether it be by the creation of a rival franchise or otherwise, would be in violation or in fraud of the grant."

Such was the nature of franchises in England and also in this country at the time Chancellor Kent wrote. In the celebrated case of *Dartmouth College v. Woodward*, 4 Wheaton, 519, it was decided that the charter granted by the British Crown to Dartmouth College was a contract, and that an Act of the Legislature of New Hampshire altering the charter was an act impairing the obligation of a contract, and was unconstitutional and void. Justice Washington said (page 657):

"To this grant or this franchise the parties are the king and the person for whose benefit it is created or trustees for them. The assent of both is necessary. The subjects of the grant are not only privileges and immunities, but property. * * * Certain obligations are created binding both on the grantor and the grantee. On the part of the former, it amounts to an extinguishment of the king's prerogative to bestow the same identical franchise on another corporate body, because it would prejudice his prior grant. It implies, therefore, a contract not to reassert the right to grant the franchise to another, or to impair it."

Justice Story says (p. 700): "In respect to corporate franchises they are, properly speaking, legal estates vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest."

Mr. Webster, in his memorable argument in that case, says: "Hume gives the reason: It is that such franchises were regarded in a most emphatic sense as private property. If it could be made to appear that the trustees and the president and professors held their offices and franchises during the pleasure of the Legislature, and that the property holden belonged to the State, then indeed the Legislature have done no more than they had a right to do. But this is not so. The charter is a charter of privileges and immunities, and these are holden by the trustees expressly against the State for ever."

The decision of this case attracted great attention. Its effect was feared; it placed the creature beyond the power of the creator, and as a result of it the various States adopted constitutional amendments providing for the formation of corporations under general laws, which should be subject to alteration, amendment, or repeal. The Courts themselves in a measure shrank back from the doctrine of that case, and in a subsequent case, argued in the Supreme Court of the United States, entitled *Charles River Bridge v. Warren Bridge et al.* (11 Peters, 420), they modified the doctrine which had previously existed as to the exclusiveness of franchises, and declared "that a franchise conferred by the government was not exclusive unless so expressed in the grant." This re-

mained the settled doctrine of the American Courts since that decision. It will be observed, therefore, that the tendency of the people, acting through constitutional conventions and representative Legislatures, and of the Courts, has been to modify the doctrine of the *Dartmouth College Case*, and to make powers conferred by the government upon persons, natural or artificial, mere privileges enjoyed, not property owned. This tendency has reached its highest development in our State, where the Legislature is not permitted to grant any special privilege to any person, natural or artificial, and where all privileges conferred by the sovereign power are made of common right and general enjoyment.

But while the tendency of the constitutional and legislative enactment has been to take away from all the rights and privileges conferred upon corporations the attributes and incidents of property, and to subject them entirely to the control of the sovereign will to be enjoyed only at the pleasure of the sovereign, yet the Courts, in considering these general privileges under the term "franchises" as subject to the taxing power, have sometimes lost sight of the change which has taken place in the character of such franchises, and they refer to the *Dartmouth College Case* as authority upon the proposition that corporate franchises are property, and as such subject to taxation. Thus, in *Society for Savings v. Coite* (6 Wall. 594), Justice Clifford says: "Corporate franchises are legal estates vested in the corporation itself as soon as it is in esse. They are not mere naked powers granted to the corporation, but powers coupled with an interest, which vest in the corporation upon the possession of its franchises." And he refers as his authority for this proposition to the *Dartmouth College Case* without inquiry as to whether or not the corporation under consideration had a charter resembling that of Dartmouth College, partaking of the nature of a contract, and as such property. And yet, while Justice Clifford in this case and in the two following cases in 6 Wallace, speaks of franchises as valuable, and as partaking of the nature of property, he expressly decides that the taxes in question, if regarded as taxes on property, would be unconstitutional and void, and upholds these taxes as taxes upon franchises and not upon property. He says (page 607):

"Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the State government."

And in *Provident Institution v. Massachusetts*, 6 Wall. 626, he says: "Regarded merely as a question of power, it is undoubtedly true * * * that the Legislature might as well exact a fee or tribute from brokers, factors, or commission merchants for the privilege of transacting their business." And again, page 630: "Considered as a tax on property, no part of the tax could be supported under the Constitution of the State. And there never was a moment when such a tax, if viewed as a property tax, could be upheld since the State was organized under a written Constitution." And again, page 631: "Franchise taxes are levied directly by an Act of the Legislature, and the corporations are required to pay the amount into the State Treasury. They differ from property taxes as levied for State and municipal purposes in the basis presented for computing the amount, in the manner of assessment, and in the mode of collection. And they are in lieu of all other taxation, State or municipal. Comparative valuation in assessing property taxes is the basis of computation in ascertaining the amount to be contributed by an individual, but the amount of a franchise tax depends upon the business transacted by the corporation, and the extent to which they have exercised the privileges granted in their charter."

It will be observed, therefore, that the taxes referred to in these cases were in the nature of excise or license taxes and were imposed upon the privilege of a corporation to do business, just as they might be, and often are, imposed upon the privilege of an individual to engage in business, or in the practice of a profession.

Examination also has developed the fact which would warrant Mr. Justice Clifford in referring to the *Dartmouth College Case*, for a construction of the nature of the franchises in question, that the Hamilton Company and the Provident Institution, referred to in 6 Wall., were both incorporated under charters containing no reserved power in the State.

(Laws of Mass., 1824, c. 44, p. 227; also Special Laws of Mass., 1816, vol. 5, p. 172.) No general statute was passed in Massachusetts reserving the power to amend or repeal the charter of corporations until 1830. (Rev. Stat. Mass., 1836, c. 44, § 23, p. 366.)

We undertake to say that in no case has it been determined that the privileges conferred upon corporations by general laws subject to alteration, amendment, or repeal, have been determined to be property, where the attention of the Court has been called to the distinction between the charter or franchise of such corporation, and the charter or franchise under consideration in the *Dartmouth College Case*; but in many such cases without noting the distinction, franchises have been referred to as property upon the authority of the *Dartmouth College Case*.

A review of the cases in which a franchise tax has been sustained, will demonstrate that the tax was not upon the franchise as property, but upon the person of the corporation, measured by its net earnings or income, or surplus profits, or by the extent to which it exercised its franchise, the rate of the tax being fixed by the statute as well as the mode of measuring it, and the tax being in all cases regarded not as a tax on property, but as an excise or license tax, upon the vocation or privilege of doing business, and similar to the taxes which are levied upon different trades, occupations, and professions, such as those of auctioneers, peddlers, merchants, and lawyers. (See 18 Wall. 206; 6 Id. 594, 633, 656; 13 Id. 206; *Portland Bank v. Apthorp*, 12 Mass. 252; *Providence Bank v. Billings*, 4 Pet. 514; *Gordon v. Appeal Tax Court*, 3 How. 150; *Wilmington R. R. Co. v. Reed*, 13 Wall. 264; *Burroughs on Tax*, § 85, p. 169; Constitution of Ill., art. ix., § 1.)

The only case which has been called to our attention in which a tax has been imposed upon the franchise of a corporation as property, separate and apart from the property in connection with which it is exercised, is the case of *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 7, in which the Court declared the tax invalid, in the following language: "It is proper here to remark, that it is said to have been determined by high authority, that the franchise of an incor-

porated bank, is the subject-matter of contract, and property of a clear and distinct character. If the corporate franchise of a bank be, in fact, property or effects of any description whatever, it is made a subject matter of taxation by the imperative language of the Constitution above recited, and should be placed on the list of assessments for that purpose. But what is the fact? Does a corporate franchise, in sober truth and reality, possess the essential qualities of property? It is said that the corporate franchise of a bank, conferring a peculiar legal capacity, and the high function of making and circulating paper money, is valuable—indeed, a thing of great value. But value is not the distinguishing attribute of property. The right of suffrage is esteemed valuable; a public office, with its emoluments, is valuable; a license to keep a tavern, as formerly granted in this State, or a license to carry on any special business which is prohibited without a special grant of authority from the Government, may be valuable; and a right to either of these things may be asserted and maintained in a Court of justice, yet neither of them possesses the essential qualities which constitute property. Our right to the free use and enjoyment of things which are in common, such as air, light, water, etc., is valuable; and our right to the free use of the public highways, and to many of the privileges and advantages derived from the Government, may be valuable, and may be maintained by legal process. Yet none of these things come within the denomination of property. Those things which constitute the subject-matter of private property are such as the owner may exercise exclusive dominion over, in the use, enjoyment, and disposal of them, without any control or diminution, save only by the laws of the land. (1 Wend. Blackstone, 138.) It is a fundamental principle that property considered as an exclusive right to things contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person, without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them.” (*Rutherford’s Institutes*, 20 Puffendorff, c. 9, b. 7.)

“It is said that capability of alienation, or disposal, either by sale, devise, or abandonment, is an essential incident to

property." (2 Kent's Com. 317.) "A corporate franchise, therefore, being a mere privilege, or grant of authority by the Government, is not property of any description, and consequently not subject to taxation under the above provision of the Constitution."

In this connection it may be added that no objection whatever could be urged against a rule of assessment which would take the franchise as an element of the value of the property in connection with which it is used. The value of all property must be considered in association with the uses to which it is put and its adaptability to them. Intrinsically there may be no difference between the value of agricultural land and a lot of equal size in the business center of a large city; but the latter, as a matter of fact, has a greater commercial value, because of the valuable uses to which it is or may be put. So, also, the mains, pipes, and reservoirs of the Spring Valley Water Works have a value above that of mere iron or land, in connection with the uses to which they are put, the privileges granted by the Government, which are exercised, the skill and energy shown in the conduct of the business. The "potentiality" of the corporation may enter as an element into the determination of the value of its property; but certainly the mere privilege of transacting business in a certain way has no money value apart from the property with which it is associated and in connection with which it is exercised. No rule, therefore, can be adopted which regards the "franchise" as a distinct entity, as a unit. That rule only can be made applicable which values the franchise in connection with and as a part of the property with which its exercise is united.

But assuming that the general rights and privileges enjoyed by water companies under the Constitution and general laws are franchises within the meaning of the Constitution, and as such are taxable property, the next question which arises is as to whether the law has prescribed a mode for ascertaining their value; for the Constitution not only provides that "all property shall be taxed in proportion to its value," but that such value is "to be ascertained as provided by law." The only rule laid down in the Political Code for the assessment of property is that contained in section 3637, to wit:

"All taxable property must be assessed at its full cash value," which latter term is defined (§ 8617, subd. 5) as follows: "The terms value and cash value mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor." In other words, the rights and privileges conferred upon the petitioner by the general laws must be assessed at the amount at which they would be taken in payment of a just debt due from a solvent debtor. This rule is no rule at all as applied to this particular class of property if they be such, for they would not be taken in payment of a just debt by the petitioner; the petitioner could not assign or transfer them; the creditor could not take them, for, as already shown, he could not gain anything by their acquisition beyond that which he already has.

In this case the Assessor valued the franchise of the petitioner at five thousand dollars; the Board of Equalization raised the assessment to five million dollars; the proceedings show that the rule adopted by the Board in making this assessment was one which has no countenance whatever from the statute. The rule applied was one which it was declared had the approval of the Supreme Court, in the case of *San José Gas Co. v. January*, viz., by ascertaining, first, the market value of the property of the corporation; and secondly, the assessed value of the property thereof; and deducting the latter from the former, the difference was declared to be the value of the franchise. But was this a correct or just rule, assuming that the Board of Equalization had the power to make a rule for themselves? Obviously not, the difference between the value of the tangible property and the aggregate value of the stock of the corporation is composed of various elements, among which may be enumerated the skill, ability, and enterprise with which the business is conducted, the fortunate conditions and circumstances surrounding it, the custom which has been gained by the steady pursuit of the business for a number of years and by a course of judicious and honorable dealing with the public. It would be as wrong to say that this difference represents the value of the franchise, as it would be to say that it represents the value of the skill, or ability, or enterprise employed in the business, or of the fortunate circumstances under which the business is con-

ducted. True, it might be said that the business of the company could not be conducted at all without the franchise; but so also it might be said that it could not be conducted without iron pipes, or labor, or skill, or energy, or fortunate circumstances. Each element of the business is as valuable as any other, and it is the union of all the elements which makes the business profitable and which gives to the shares of stock their market value. So that this rule of assessment not only included the value of the franchise, that is the mere privilege under an artificial name, of exercising the power of a natural person, but also included the valuation of luck, chance, hope, skill, ability, energy, enterprise, and good-will.

The rule applied does not operate equally and uniformly upon all franchises, for in the case of a franchise enjoyed by an individual, there would be no stock from the aggregate market value of which could be deducted the value of the tangible property in order to ascertain the value of the franchise, nor is it an equal or uniform rule in any sense, for it applies only to corporations, whereas the business of private individuals and firms should be subjected to the same mode of assessment. A mercantile firm may have a stock of goods on hand worth one hundred thousand dollars, and yet its business, the good will, so called, with the advantages which years of skillful and honorable attention to business united with fortunate circumstances may have given, may be worth five times as much as the stock. And yet the Assessor assesses only the tangible property and lets the good-will go free. The law provides that "private corporations may be formed for any purpose for which individuals may lawfully associate themselves" (C. C., § 286). Such a mercantile firm could, if it chose, form itself into a mercantile corporation. With a stock of goods on hand never exceeding one hundred thousand dollars it might earn, with the skill and ability of its members through the large custom acquired, a liberal rate of interest on five hundred thousand dollars, and the stock would sell in the market for that sum. In such cases the Assessor, pursuing the rule contended for here, would determine the value of the franchise to be four hundred thousand dollars; whereas, as a matter of fact, the right to be a corporation would be utterly valueless to a firm, and the difference between the

market value of the stock and the value of the tangible property would simply be the good-will of the business; this would exist, whether the concern was incorporated or not; and yet the difference is assessed only to corporations and not to individuals.

A more glaring instance of the absurdity of the rule applied, is that of a newspaper whose value is almost entirely made up of skill, ability, enterprise, and good-will. Take the case of the two leading newspapers of this city, the Chronicle and Call, owned by private proprietors. Each is valued at about three hundred thousand dollars, and probably yields its proprietors a liberal interest upon that amount. Probably the only property connected with either of these papers which the Assessor would assess are the printing presses and fixtures, worth say, thirty thousand dollars; but if either paper should be incorporated into a joint stock company, with a capital stock of three hundred thousand dollars, its stock would probably sell for that amount, as the value of the stock in the market is largely determined by the rate of interest paid as dividends upon it. The Assessor then, in that case, would assess the franchise, that is, the privilege of conducting the same business in the name of an artificial being, at the difference between the value of the printing press and fixtures, and the market value of the stock, namely: two hundred and seventy thousand dollars. So the mere change in the conduct of the business of such a newspaper, from the hands of a natural person to those of an artificial person, would result in an assessment upon the latter ten times greater than upon the former, and yet this artificial person is a purely business corporation; it does not have the power of eminent domain, or exercise the royal prerogative of collecting tolls; the only franchise it possesses is the right to be a corporation.

The Civil Code (§ 993) declares: "The good-will of a business is property transferable like any other." It certainly has more of the attributes of property than the general privileges enjoyed by a corporation under general laws, for whilst it is inseparably connected with the business to which it is attached, and perhaps with the name under which and the locality at which it is conducted, yet it can be sold or inherited in association with them. If then all property is to be taxed,

and the general privileges of corporations are property and must be taxed, the "good-will" of every individual and firm doing business in San Francisco must also be taxed. But has the statute laid down any rule whatever for measuring the value of the good will of a business? It simply says that all property shall be taxed at its full cash value, i. e., the amount at which it would be taken by a creditor in payment of a solvent debt. But no person would buy, and no creditor would take the good-will of an establishment disassociated from the place of business and from the stock. If, then, legislative action is required in order to prescribe the mode of assessing the value of the good-will, it is also required for assessing the value of the general privileges of corporations. In both cases it is equally impossible to determine "their full cash value," for this term means the value that would be paid in cash for a transfer of the property. As already shown, the rights and privileges constituting the franchise can not be sold, and if sold would add nothing to the wealth of the buyer. As to the good-will, it can not be sold, and it has no value except in connection with the stock, the place of business, and the name of the individual or firm conducting it.

In the case of *Dewitt v. Hays*, 2 Cal. 463, the Court declared the mere right to collect wharfage and dockage for a certain term of years, was neither real estate nor personal property, but a franchise or incorporeal hereditament, an uncertain profit issuing out of the realty, and also that the statute did not prescribe the mode for assessing its value, and until it did so, no assessment of it could be made. It may be said that this case, whilst it demonstrates that the Legislature must proscribe some rule for assessing franchises, yet declares them to be property. An examination of the case, however, will disclose that the rights and privileges under consideration were exclusive in their nature, and ran to the grantees and their assigns. As such they came within the meaning of the term "franchise" in its property sense, as hereinbefore declared. Whilst, then, the assessment of these rights and privileges, if they be property, must be left to the judgment of the Assessor, yet the rule by which the assessment is to be made, can not be left to his discretion or caprice. It must be clearly defined by the statute. It can not be left to him to

determine whether he will adopt the rule that is prescribed by statute in Massachusetts, or Pennsylvania, or Delaware, or Illinois, in each of which States a different rule prevails. Nor can he adopt his own rule; for if this were the case, we should have as many different rules for determining the value of franchises as there are Assessors and Boards of Equalization in the State. The very rule applied in this case can not be applied to all corporations, for it presupposes that the capital stock of a corporation has a market value, whereas we all know that the shares of stock of many mining corporations owning property of great value, are not on the market at all, and it is impossible to ascertain their real value by any market quotations. In the case of the valuation of the good-will of a firm or individual doing business, there would be no shares of stock whose aggregate market value would make an element in the calculation.

Where a defendant appears for the purpose of taking advantage of an irregular summons, by a motion to dismiss, it does not amount to a waiver of his rights so as to cure the defect; nor does he waive his rights by answering and moving to dismiss, and motion overruled. (*Deidesheimer v. Brown*, 8 Cal. 339.) A notice given by an attorney on behalf of a defendant, to plaintiff's attorney, that defendant will move before a Court Commissioner, that an attachment issued in the case be dissolved, does not constitute an appearance in the action. (*Glidden v. Packard*, 28 id. 649.) A person has a right to appear for the special purpose of moving to dismiss a defective summons. If the Court denies the motion, a general appearance afterwards and an answer does not waive the right or cure the error. (*Lyman v. Milton*, 44 id. 631; *Lander v. Fleming*, 47 id. 615.)

John L. Love & W. C. Burnett, for Respondents.

McAlister & Bergin, for The Nevada Bank of San Francisco, and for the Pacific Coast Steamship Company, on petition for rehearing.

Wilson & Wilson, for The Bank of California, on petition for rehearing.

THORNTON, J.:

This is an appeal from a judgment of the Superior Court of the City and County of San Francisco, denying the application of the Spring Valley Water Works for a writ of review, and confirming the action of the Board of Equalization of the city and county above named. The writ was sued out to review the action of the Board of Equalization in raising the assessment of the franchise of the Water Works above named from five thousand dollars to five million dollars, and to have it vacated and set aside as being in excess of the jurisdiction of the Board.

It is contended, on behalf of the appellant, that no notice, as required by law, was given to the Water Works, inasmuch as it was not given in accordance with a rule prescribed in advance by the Board. This Court has recently decided that these rules are no part of the record and proceedings to be brought up on *certiorari*. (*Garretson v. Supervisors*, 11 Pac. C. L. J. 685.) This point will not, therefore, be further considered.

The next point relates to the service of notice. The transcript shows that notices to appear and show cause before the Board of Supervisors, at their chambers in the City Hall, on Friday, June 24, at ten o'clock A. M., why the assessment of the Spring Valley Water Works should not be raised to fourteen million dollars, addressed to the President and Secretary of the Spring Valley Water Works, were served on June twenty-third and twenty-fourth on these officers, by leaving them (the notices) "at the office of the Spring Valley Water Works, at its principal place of business in the City and County of San Francisco." It also appears from the record that a notice addressed "to the Spring Valley Water Works Company, Charles Webb Howard, President, and William Norris, Secretary," was served on the twenty-fourth of June, 1881. This notice bore date the day just named, was entitled "In the matter of the equalization of the assessment of the Spring Valley Water Works Company," and the tenor of it was to inform and notify the Water Works Company that the petition to have the assessment on its franchise raised, then on file with the Board of Equalization, would be taken

up and acted on by the Board at its chambers at the New City Hall, on Saturday, June 25, 1881, at ten o'clock A. M., and it was thereby cited to appear and then and there show cause why the petition referred to should not be granted. This notice issued by an order of the Board made on the twenty-fourth of June, 1881, and was served on the same day by leaving it at the office of the company, as stated with regard to the notice first mentioned.

On the twenty-fourth of June, 1881, the Board took up the application to increase the valuation of the franchise of the Spring Valley Water Works. Charles N. Fox, Esq., attorney, then appeared and protested on behalf of the Spring Valley Water Works against a consideration of the application made in reference to said Water Works at that time, for want of jurisdiction on the part of the Board, inasmuch as the Board had adopted no rule prescribing the form and manner of notice, and therefore any further action by the Board would be in violation of law; and that sufficient time was not allowed the Spring Valley Water Works as contemplated by law to prepare and present its case. He (Fox) stated that a notice had been served upon the Secretary of the company on the afternoon of the preceding day, at four o'clock, just at the time of the closing of the office, to appear before the Board this morning. Afterwards, on the same day, Mr. Fox reiterated his objections to the Board's proceeding, and stated that the President of the company was out of town when the notice was served on the Secretary, and the notice to the president to appear was not received by him until this morning—meaning the morning of the twenty-fourth.

The Board determined the question of jurisdiction adversely to the contention of Mr. Fox. He (Fox) then requested that the hearing of the case be postponed until the next day (Saturday) or the Monday following, so as to give the company an opportunity for preparation and consultation. A like request for postponement on behalf of the San Francisco Gas Light Company was also made (the cases of these two companies were heard together), and on motion further action in the cases of the Spring Valley Water Works and the San Francisco Gas Light Company was postponed until the fore-

noon of the next day, Saturday, twenty-fifth of June, at ten o'clock. On the next day (twenty-fifth of June) at the request of R. P. Clement, Esq., who appeared on behalf of the San Francisco Gas Light Company (the case of the company last named being heard with that of the Spring Valley Water Works), and requested a further postponement of the cases of both companies until two o'clock on that day, for the purpose of allowing the respective counsel to have a consultation with the officers of the companies as to these cases. The cases of the above mentioned companies were afterwards on same day taken up for hearing, when the attorneys were called on to make an admission as to the value of the stock of the companies mentioned. Thereupon Mr. Fox stated that on yesterday he agreed, if ever the case reached that point, that he would admit that the market value of the stock (referring to the Spring Valley Water Works stock) on the seventh day of March, 1881, was par, reserving the right to object to its relevancy, but that on reflection he declined to appear for the water company further than to make the point made at the preceding meeting to the jurisdiction of the Board for want of notice to the company, and to repeat that no notice had been yet given the company. After this the Board proceeded to act upon the case of the Spring Valley Water Works, and raised the assessment as above stated.

It thus appears that after the Board had passed on the question of jurisdiction, Mr. Fox, who represented the Water Works, asked for a postponement of the case of the Water Works, which was granted, and that subsequently another postponement was granted. After this he declined further to appear, announcing his determination to rest on the question of jurisdiction.

It also appears that a notice addressed to the company was served on it on the twenty-fourth of June, to appear on the next day and show cause why the assessment of its franchise should not be raised, and that on request, two postponements were granted the company.

It is urged that the company was entitled to ten days' notice that the Board would act, by virtue of the provisions of Section 3681 of the Political Code. But that section has

no application to such a case as this, as a careful perusal of it will show.

Mr. Fox appeared for the company on the notices served, and by such appearance we hold that all objections of mere form to the notice are waived. As to the reasonableness of the time given by the notice to the corporation to show cause, that is in a great measure left to the discretion of the Board of Supervisors. We can not, under the circumstances, hold it unreasonable. The Board has but a limited period under the law, to act on the assessment book, and the range of inquiry is within narrow limits. In determining the point as to the time allowed, we think it proper to take into consideration the fact that postponements were granted to the corporation whenever asked, up to the time that Mr. Fox withdrew from the case and declined to act further for the company. This withdrawal and declination took place under circumstances which indicate that every reasonable request for time would have been granted by the Board. Even after the withdrawal of Mr. Fox, distinguished gentlemen (F. G. Newlands and R. P. Clement, Esquires), learned in the law, were by the Board heard at length as taxpayers in regard to the matter. It was claimed by them "that there was no franchise enjoyed by the Water and Gas Companies." It is a fair inference from this, that these gentlemen were heard in support of the pretensions of these companies. We refer to this last action by the Board as a clear indication that every reasonable request for the time would have been allowed.

In our opinion (as intimated in *Patten v. Green*, 13 Cal. 330), such tribunals as the Boards of Supervisors ought not to be held to any great strictness of procedure in the matters above discussed herein; and if, under a rule or an order of such Boards, a party has notice of the intended action of a Board of Supervisors sitting as a Board of Equalization in regard to the assessment of his property, in time to have a full and fair hearing during the sessions of the Board, we shall hold such notice to be sufficient, unless it appears affirmatively that a full and fair hearing was denied him by the action of the Board. Of course, the rule as to time here laid down, is not intended to apply to a case where the law requires a notice of a definite number of days to be given, and

no such notice has been given. We think the contentions of the appellant as to notice are untenable.

But it is said that there is a lack of jurisdiction of the subject-matter, that the Spring Valley Water Works has no property liable to assessment of the character of that upon which the increased valuation was placed by the Board of Equalization.

It appears from the petition, that the Spring Valley Water Works was a corporation prior to the seventh day of March, 1881, organized and existing under the laws of this State, having its principal place of business and doing business in the city and county of San Francisco. All corporations organized under the laws of this State, are, by the general law, vested with certain powers by express grant. This has been so since the passage of the first Act, in 1850, in relation to corporations. (See Sections 1 and 2 of the Act of 1850, in Hittell's Gen. L., 114, 115, as to corporations created prior to the Codes; as to those since, see Civil Code, §§ 354, 355.) They are invested with further powers by the particular Act under which they are incorporated, or by the title of the Code under which they are formed.

It appears from the statement of one of the counsel for petitioner, that the Spring Valley Water Works is a corporation formed and doing business under an Act passed April 14, 1853, for the formation of corporations for business and commercial purposes, and an Act passed April 22, 1853, entitled "An Act for the incorporation of water companies."

Under the laws of the State this corporation has power to have succession by its corporate name for a period of time (which must not exceed fifty years), to sue or be sued in any Court, to make and use a common seal and alter the same at pleasure, to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require, to appoint such subordinate officers and agents as the business may require, to make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and the transfer of its stock, as well as all power necessary to the exercise of the expressly granted powers. (See sections of Act of 1850 above cited, and § 4 of Act of 1853 above referred to; Hittell's Gen. Laws, pp.

147, 148.) It has also the power under the Act of 1858 (see Stats. 1858, p. 218), to purchase or to appropriate and take possession of, and to use and hold, all such lands and waters as may be required for the purposes of the company, upon making compensation therefor. This last power enables the corporation to purchase the land and waters required for its business against the will of the owner, by availing itself of the provisions of the laws for the condemnation of land; in other words, to acquire such lands by the exercise of the power of eminent domain. It has the right also under the Act of 1858, subject to the reasonable direction of the Board of Supervisors, to use so much of the streets, ways, and alleys, of the City of San Francisco, as may be necessary for laying pipes for conducting water into the city, or any part of it, and also the right to furnish water to the inhabitants of the City and County of San Francisco, and, as this Court has recently determined, to the city also. The water so furnished is to be paid for at rates to be fixed each year in a mode established by law. A further power or right inhering in this company by the laws of the State, was the power or right to divide its capital stock into a number of shares, which are personal estate, each share representing a minute fractional part of such stock, and each share capable of ownership, of being sold and bought and transferred by a simple process of passing by will, or to one's heirs after his death through the medium of an administration, and each share securing to the owner a right to participate in the profits and property of the company.

The Spring Valley Water Works, on and prior to the seventh day of March, 1881, existed and had the right given by law to exist, with the powers and rights above set forth. It should be added here that the before mentioned powers or privileges were supplemented by a further grant, which inured to the advantage of the petitioner, which will be found in the third section of the Act of 1858, by which all the privileges, immunities, and franchises that might be thereafter granted to any individual or corporation relating to the introduction of fresh water in the City and County of San Francisco, or into any city or town in this State, for the use of the inhabitants thereof, were also granted to all companies

incorporated before or after the passage of that Act. This last grant is a very important and valuable privilege, and, in fact, has been very valuable to the Spring Valley Water Works.

Blackstone says, in relation to franchises: "Franchise and liberty are used as synonymous terms; and their definition is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's grant; or in some cases may be held by prescription, which as has been frequently said, presupposes a grant. The kinds of them are various, and almost infinite;" and adds, "that they may be vested in either natural persons or bodies politic; in one man or in many." And again on this subject he says: "To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts; each individual member of such corporation is also said to have a franchise or freedom." (2 Bl. Com. 37.)

Kent defines franchises as "privileges conferred by grant from government, and vested in individuals." (3 Kent's Com. 458.) He also says: "Corporations or bodies politic are the most usual franchises known in our law." (Id. 459.)

In *Pierce v. Emery*, 32 N. H. 507, Perley, C. J., speaking for the Court remarks: "A corporation is itself a franchise belonging to the members of the corporation; and a corporation being itself a franchise, may hold other franchises as rights and franchises of the corporation." And further: "A corporation, being itself a franchise, consists and is made up of its rights and franchises."

In *City of Bridgeport v. N. Y. & N. H. R. R. Co.*, 36 Conn. 266, Butler, J., speaking for the Court, uses this language in regard to a railroad corporation: "The term 'franchise' has several significations, and there is some confusion in its use. The better opinion deduced from the authorities, seems to be that it consists of the entire privileges embraced in and constituting the grant." (See Title "Franchise" in Abbott's Law Dict., and cases there cited.)

It is true that the privileges so granted by the Government

do not pertain to the citizens of the State by common right. But what is the "*common right*" here referred to? Is it not a right which pertains to citizens by the *common law*, the investiture of which is not to be looked for in any special law, whether established by a Constitution or an Act of the Legislature? Coke says: "*De commun droit* — of common right — this is by the common law, because the common law is the best and most common birthright that the subject hath for the safeguard and defense not only of his goods, lands, and revenues, but of his wife and children. * * * This common law of England is sometimes called right, sometimes common right, and sometimes *communis justitia*." (Coke's Inst. 142a.) The definition of franchises as special privileges conferred by Government upon individuals, and which do not belong to the citizens of the country generally of common right, had its origin in *Bank of Augusta v. Earle*, 13 Pet. 575. A very learned and accurate writer, Mr. Emory Washburn, in his work on Real Property (2 vol. 267), adopts this definition and cites as authority the case above referred to from 13 Peters. The same definition is quoted by Angell & Ames in their work on Corporations, from the case referred to. (See Ang. & Ames on Corp., § 4.)

In the case in 13 Peters it was contended that under the laws and Constitution of Alabama the right of banking was a franchise. The Court refused to so hold, on the ground that the right of banking, *at common law*, belonged to every citizen. (See also *Curtis v. Leavitt*, 15 N. Y. 170, opinion of Shankland, J.) The discussion on the point in the opinion shows clearly that "*common right*" is used with the signification of common law.

We are of opinion that the common right refers to the right of citizens generally at common law. Such rights of citizens, though frequently spoken of as franchises, are not the franchises here meant; and it may be conceded that where such rights are granted to corporations, they are not franchises. But independent of the right to exist as a corporation, and to exercise powers in its corporate capacity, there are privileges granted to the Water Works, which do not, by common law, belong to citizens generally; such as the right to lay down pipes in the streets, ways, and alleys

of a city, and to collect rates for water furnished, which was held to be a franchise in *San Francisco v. Spring Valley Water Works*, 48 Cal. 493, and in *San José Gas Co. v. January*, 57 id. 616. Conceding for the argument that the Constitution, by Section 19 of Article xi., grants this right to every person, it does not follow that it is not a franchise. They are vested by a grant of the sovereign power, and not by the common law; and the generality of the grant does not deprive them of the character of franchises.

The right to collect rates for use of water supplied to the City and County of San Francisco, or the inhabitants thereof, which the appellant has possessed at least ever since the Act of 1858 went into effect, is expressly declared to be a franchise by the Constitution of the State in the second section of Article xiv. thereof. As has been said above, the very existence of a corporation as such is a franchise, and it exercises its franchise in every act which it performs as a corporation. In *The Bank of Augusta v. Earle*, above cited, the Supreme Court of the United States, speaking through Taney, C. J., in relation to the making of contracts by corporations, which, by common right, individuals could make said: "In making such contracts, a corporation, no doubt, exercises its corporate franchise. But it must do this whenever it acts as a corporation, for its existence is a franchise."

A corporation, whose existence is a franchise, may possess powers and privileges, which, in themselves, are not franchises (such as the right to bank, discussed in *Bank of Augusta v. Earle*, above cited, or the right to buy and sell property, real and personal), but it usually owns, along with such privileges, some that are franchises; but whether the powers be entirely of the kind which are franchises or not, its existence and right to employ its corporate powers is a franchise. This we think abundantly established by the cases above cited.

We have no doubt that it was the intention of those who framed and ratified the Constitution to place such franchises in the category of property to be taxed. The word "*franchises*," as used in the first Section of Article xiii., is used generally without any qualifying words, and is intended to embrace all franchises of the character above referred to,

whether vested in individuals or bodies politic. A franchise conferred on an individual to lay down pipes in the streets of a city and to collect rates for water furnished a city or its inhabitants is to be taxed in the same way as when vested in corporations. The law in this respect is the same in regard to all persons, whether natural or artificial.

It is contended that the clause "and all other matters and things real, personal, and mixed, capable of private ownership," in Section 1 of Article xiii. qualifies the word "franchises," which precedes it. We do not think so. The structure of the sentence forbids any such construction. What is said before the employment of these words is complete of itself, and needs nothing to show what was signified. The words used show clearly that they were intended to add something to what preceded them, to refer to kinds of property not previously mentioned, not to qualify anything. They were doubtless inserted out of abundant caution to show that all kinds of property, whether specifically enumerated or not, were intended to be included in the property to be taxed, though not embraced in the specific classes previously mentioned. They constituted a declaration that in enumerating the property to be taxed it was not intended to confine the enumeration to "moneys, credits, bonds, stocks, dues, franchises," but to include all other kinds of property, and that by no construction of the word property, as used in the section, were any kinds of property to be left out.

But it is immaterial whether these words qualified "franchises" or not, for the reason that the franchises so referred to are capable of private ownership. To hold that a private corporation does not own its franchise right, power, and privileges would be both novel and untenable. Admitting that under the law of the State there may be legislation which might impair their value, it does not follow that it is not owned as property, with all the rights which attach thereto. All these rights exist until the legislative authority has acted so as to impair them or take them away; and until such legislation is enacted the rights of property remain unimpaired. There has been no legislation yet of the character as regards the appellant that has been called to our attention, or that we have been able to discover.

This franchise of a corporation is sometimes classed as real estate — of that kind styled incorporeal hereditaments. (*Enfield Toll Bridge Co. v. Hartford and New Haven R. R. Co.*, 17 Conn. 40; S. C., Id. 462; *Price v. Price's Heirs*, 6 Dana, 107; 1 Blackstone's Com. 20–22, 37, 38.) In the case cited from 17 Conn. 40, this was said of a bridge corporation. The shares of stock of the Water Works are by statute made personal estate. (See Act of 1853.) But whether real or personal estate, they are property. Such franchises, as long as they exist, are protected *as property* by the guarantee universal in the States of the Union, which forbids their being taken except for public purposes and on compensation being made. (1 Cooley's Con. Lim., 4th ed., 655, and cases cited in note 4.) During their existence they are as fully protected by law as any other species of property. On this subject see *Wilmington R. Co. v. Reid*, 13 Wall. 268; 3 Kent's Com. 458; *Hamilton Co. v. Massachusetts*, 6 Wall. 633; *People v. Selfridge*, 52 Cal. 331; *T. & T. R. Co. v. Campbell*, 44 id. 89; *O. R. R. Co. v. O. B. & F. V. R. R. Co.*, 45 id. 365. (See cases just above cited from 17 Conn., and *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 36.)

The franchise of a corporation is and can be well defined to be the right of the corporation to exist and exercise the powers and privileges vested in it by its charter. (Burr. on Tax., § 83.) The franchise is the faculty of the corporation. As said by Redfield in his work on Railways: "The faculty of a corporation is its organic life; its corporate existence by which it is enabled to carry on business; that which it derives from its charter of incorporation, its corporate franchise." (2 Redf. on Railways, 3d ed., 452.) In this State, the charter is the statute or statutes granting and defining the powers of the corporation, under which it is constituted and exists, together with the instruments required to be executed by the provisions of such statute or statutes. These are sometimes called the constating instruments. (Field on Corp., § 34, n. 3.) Such franchises are legal estates, not mere naked powers, and are powers coupled with an interest, which vest in the corporation by virtue of its charter or constating instruments. (*Society for Savings v. Coite*, 6 Wall. 606; *Provident Institution v. Massachusetts*, id. 622; *Hamilton Co. v. Massachusetts*, id.

638; *Porter v. R. R. I. and St. L. R. R. Co.*, 76 Ill. 561.) That the State has full power to tax them, see same cases, and *State R. R. Tax Cases*, 92 U. S. 603. In the case from 76 Illinois, above cited, it is said: "It is clear upon authority that the franchise of a corporation is property, and as such it may be a proper object of taxation." (P. 573.) In *Veazie Bank v. Fenno*, 8 Wall. 547, Chase, C. J., used this language: "Franchises are property, often very valuable and productive property, and seem to be as properly objects of taxation as any other property." Daniel J., delivering the opinion of the Court in *West River Bridge Co. v. Dix et al.*, 6 How. 529, said: "We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred than other property. A franchise is property, and nothing more." (See also *Wilmington R. R. Co. v. Reid*, 13 Wall. 264, and *Monroe Savings Bank v. The City of Rochester*, 37 N. Y. 367.) In this last case Fullerton, J., delivering the opinion of the court, said, in regard to a statute declaring the privileges and franchises granted by the Legislature to savings banks or institutions for savings, personal property, and liable to taxation as such: "In declaring the privileges and franchises of a bank to be personal property, the Legislature has adopted no novel principle of taxation. The powers and privileges which constitute the franchise of a corporation are in a just sense property, and quite distinct and separate from the property, which, by the use of such franchise, the corporation may acquire. They are so regarded by the law, and so regarded by common acceptance."

That such franchises can be taxed according to the valuation arrived at through an assessment is recognized in *The Case of the Freight Tax*, 15 Wall. 282, and in the case of *The State Tax on Railway Gross Receipts*, Id. 296. In the case of the *State Railroad Tax Cases*, above cited from 92 U. S. Reports, a tax on the assessed value of franchise and capital stock by the State of Illinois was sustained, approving the decision to that effect in *Porter v. R. R. I. & St. L. R. R. Co.*, above cited from 76 Illinois. (See also *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 133, and Judge Redfield's comment on this case in 2 Redf. on Railways, 453.) As to the extent of the power of the State to tax, see *Providence Bank v. Billings*, 4 Pet.

562, and *Hamilton Co. v. Massachusetts*, 6 Wall. 639. In the case in 4 Peters, Marshall, C. J., said: "All powers * * * over which the sovereign power of a state extends are subjects of taxation. The sovereignty of a State extends to everything which exists by its authority, or is introduced by its permission." (4 Pet. 563.) The same doctrine was declared in *Osborne v. Bank of the U. S.*, 11 Wheat. 738. From the foregoing cases, it would seem that there can be no doubt of the power of a State to tax the franchise at its assessed value. There may be more difficulty in arriving at its value than that of a parcel of land or personal chattels, but still its value may be estimated. When it is condemned for public use, the compensation to be paid can be fixed. As is justly said in *Porter v. R. R. I. & St. L. R. R. Co.*, 76 Ill. 578: "We have never known it to be asserted that the value of a franchise is so indefinite and uncertain that it can not be made the measure of a recovery when it is wrongfully invaded; or that when it is taken and condemned for public use, it can not be ascertained what compensation shall be made to its owner. It is recognized in those respects as being capable of a definite valuation. * * * If its value may be ascertained for those purposes, it may as readily be ascertained for the purposes of taxation." As to value of franchises, and that they possess a value beyond that belonging to the tangible property of the corporation, see cases just above cited. (*Commonwealth v. Hamilton Mfg. Co.*, 12 Allen, 298, and *Commonwealth v. Cary Improvement Co.*, 98 Mass. 23.)

In this State, the Constitution having declared that franchises are property, and that all property in the State not exempt from taxation shall be assessed in proportion to its value, to be ascertained as provided by law (Const., Art. xiii., § 1), it would seem to follow that the tax must be according to the valuation made by the officer appointed for that purpose. If the State can impose a tax on the franchise of a corporation in the nature of an excise or duty, it does not exclude the taxation by a valuation made by an Assessor.

That such a franchise as that held by the appellant was taxable in this State, we think has been held by this Court in two cases: *Burke v. Badlam*, 57 Cal. 594; and *San José Gas Company v. January*, id. 614. In *Burke v. Badlam*, an

application was made to this Court for a writ of mandate to compel the Assessor of the City and County of San Francisco to assess to certain holders of certificates of stock in various corporations the respective shares held by them in such corporations, respectively, etc. The corporations mentioned in the petition for the writ were the Nevada Bank of San Francisco, the San Francisco Gas Light Company, the Golden City Chemical Works, the Selby Smelting and Lead Company, and the Virginia and Gold Hill Water Company. This proceeding was with reference to the assessment of 1881-82.

In deciding the case, the Court properly assumed, as it had a right to do, nothing appearing to the contrary, that the Assessor would assess in due time, to the various corporations, all of their property of every character, as required by the law.

It was claimed by the petitioner, according to the report of the case, that the Assessor must assess to the respective corporations all of their property of every kind, including their franchise, and to the individual stockholders thereof, the respective shares of the capital stock held by them. "If this would, in effect," said the Court, per Ross, J., "be assessing the same property twice for the same tax, it can not be done." (57 Cal. 600.) The Court then proceeds to declare that under the Constitution double taxation was neither required nor permitted, but was forbidden, and then passes to the consideration of the question whether an assessment as contended for (stated above) would be, in effect, assessing the same property twice for the same tax.

In discussing this question, the Court, after referring fully to the first section of Article xiii. of the Constitution, said: "Now, what is the stock of a corporation but its property, consisting of its franchise and such other property as the corporation may own? Of what else does its stock consist? If this is taken away, what remains? Obviously, nothing. When, therefore, all of the property of the corporation is assessed — its franchise, and all its other property of every character — then all of the stock of the corporation is assessed, and the mandate of the Constitution is complied with." Further on in the opinion, this is said: "To assess all of the cor-

porate property of the corporation, and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each. As well might it be contended that the property of a partnership should be assessed to the firm, and, in addition, that the interest of each partner in the firm property should be assessed to him individually. If I have an interest in partnership property, my interest therein is property. It is the right I have to share in the profits and property of the firm, in proportion to the interest I own. But my property rights are confined to the property held by the firm, just as the property rights of the stockholder in the corporation are confined to the property held by the corporation. In the case of the partnership, take away all the property of the firm, and I have no longer any property as a partner. In the case of the corporation, take away all its property, which, it must be remembered, includes its franchise, and the stockholder has no longer any property. (57 Cal. 601-2.)

The conclusion is reached, that when the law is complied with by assessing all the property of the corporation, which property includes *the franchise* of the corporation, to assess the shares would be double taxation; because it would be, in effect, to assess the same property twice for the same tax, which the Constitution forbids. It is held in the judgment pronounced, that the franchise of a corporation of the character of those named in the petition, is the property of the corporation, and that, as property, it is taxable.

In *San José Gas Company v. January*, 57 Cal. 614, this Court held, that the tax of a franchise was legal. The franchise in that case pertained to a corporation for manufacturing and selling gas to the city and inhabitants of San José. The particular franchise to which the attention of the Court seems to have been directed in that case, was, that of using the streets, and laying pipes therein, for supplying a city with gas. The Court said this was a franchise, and by Section 1 of Article xiii. of the Constitution, franchises are declared to be property for purposes of taxation. It was ar-

gued for appellant that such a franchise, as the one mentioned, had no value. It was said by the Court, *per* MYRICK, J., in reply to this contention: "The method of assessment, and by whom, was to be and was provided by law. Therefore, it does not rest with the plaintiff, nor with the Courts, to determine that its franchise had no value. In a pecuniary sense, the value of franchises may be as various as the objects for which they exist, and the methods by which they are employed, and may change with every moment of time; but that franchises are property, and are to be taxed in some method in proportion to value, is a part of the paramount law of this State."

At the time that the action to which this case relates was taken by the Board of Equalization, and at the time at which the matters in controversy in *Burke v. Badlam* originated, the Legislature had acted in regard to the assessments of property, and enacted as follows:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock; nor shall any holder thereof be taxed therefor." (Pol. Code, § 3608.) (It may be remarked here that the constitutional validity of this section was affirmed in *Burke v. Badlam*. See 57 Cal. 602.)

"All property in this State not exempt" (stating the exemptions allowed by the Constitution, etc.) "is subject to taxation as in this Code provided." * * * (Pol. Code, § 3607.) In Section 3617 Political Code, which is a definition of term employed in relation to revenue and taxation, it is provided that "the term 'property' includes moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." It is further provided in the same section, that "the terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor;" and that "the term 'personal property' includes everything which is the subject of ownership

not included within the meaning of the term real estate." In the Political Code the word person includes a corporation, as well as a natural person. (§ 17.) Each person (which includes corporations) must furnish a statement of property, real and personal. Each person must insert in the statement of his property "all property belonging to, or claimed by, or in the possession, or under the control or management of any corporation of which such person is President, Secretary, Cashier, or Managing Agent." (Pol. Code, § 3639, Subs. 1, 2, 3.) As *property* includes *franchise*, the latter must be inserted in the statement.

The Assessor must prepare an assessment book, with appropriate headings, etc., in which must be listed all property within the county. In this assessment book must be specified in a separate column, under its appropriate head, all personal property, showing the number, kind, amount, and quality, and also the cash value of all personal property, exclusive of money. (Pol. Code, § 3650, Subs. 4 and 10.)

In subdivision 15 of the same section it is provided that "each franchise must be entered on the assessment roll, without combining the same with other property, or the valuation thereof."

The Assessor must complete the assessment book on or before the first Monday in July in each year (Pol. Code, § 3652), and as soon as completed he must deliver this book, with the map book (see § 3653) and *statements*, to the Clerk of the Board of Supervisors, who must immediately give notice thereof and of the time the Board will meet to equalize assessments, * * * and in the mean time the book must remain in his office for the inspection of all persons interested. (§ 3654.) The section in relation to the power of the Board to equalize, so far as material herein, has been already quoted. (§ 3673.)

The power to act on each and every assessment is conferred on the Board, and to increase or lower it so as to make it conform to the true value in money of the property mentioned therein.

The above citations from the Political Code show that the Board has full power to act on the assessment of the franchise and increase or lower it as provided in Section 3673.

It appears from the record in this case that the Board of Supervisors, in the exercise of its power of equalization, assessed the franchise of the Water Works by taking the aggregate of the market value of the shares of stock in the company on the seventh of March, 1881, and deducting therefrom the value of the real and personal property of the company, and held the difference to be the value of the franchise. The market value of the shares was shown to the Board by the testimony of *witnesses*. Such a mode of arriving at the value of the franchise appears to have been adopted by the Assessor in *San José Gas Co. v. January*, 57 Cal. 614, and this mode was held to be within the powers vested in the Assessor. It was also impliedly approved as a correct mode in *Burke v. Badlam*, above cited. (See *Commonwealth v. Hamilton Mfg. Co.*, 12 Allen, 306.)

If such power is vested in the Assessor, it was also vested in the Board of Supervisors in exercising their powers under the Constitution and statute of this State. (See Pol. Code, § 3679, as to what the Board may use in its function of equalization.)

In addition to what has been said above as to the action of the Legislature, it should be stated that on the same day on which it passed Section 3608 of the Political Code above quoted, it repealed Section 3640 of the same Code, which was as follows: "Each person, firm, or corporation, owning or having in his or its possession any of the shares of the capital stock of any corporation, association, or joint stock company, shall be assessed therefor. If the corporation, association, or joint stock company has its principal place of business in this State, the assessable value of each share of its stock shall be ascertained by taking from the market value of its entire capital stock the value of all property assessed to it, and dividing the remainder by the entire number of shares into which its capital stock is divided. The owner or holder of capital stock in corporations, associations, and joint stock companies whose principal place of business is not within the State, must be individually assessed for such stock. Shareholders, in the statement required by Section 3629 of this Code, shall specify the number of shares of stock held by them, and the name of the corporation. The owner of

shares of stock, to be entitled to the deduction provided for in this section, must produce to the Assessor a certificate of the assessment of the property of the corporation, association, or joint stock company."

By this section, which was repealed as above, it will be seen that the whole property of the corporation including franchise and other assessed property, would have been taxed. This was by the operation of the section to have been brought about by taxing the shares to each owner of shares in the manner indicated by its provisions. But by declaring, as was done in Section 3608, that shares of stock were not to be taxed because they possessed no intrinsic value over and above the value of the property of the corporation which they stand for and represent, and as taxing of the shares and property both, would be double taxation, and therefore the shares should not be assessed, but the property should, no doubt it was their intention to tax everything in the shape of property owned by the corporation; that everything entering into and giving value to the shares should be taxed. It can not be doubted that the Legislature in acting on the subject of revenue and taxation during the Session of 1881, did not intend to leave the system in relation to so important a matter in such a shape, that so large an amount of property as indicated by the difference between the market value of the shares of corporations and the value of the tangible property of such corporations, should escape taxation. To come to any other conclusion, would be to impute to that body a most culpable dereliction of duty.

There is a further point which we think it proper to notice. It is contended that good-will enters into and forms an element in the value of the shares of stock. No case has been produced to us, nor have we been able to find any holding or even intimating that this is so. We find no such element of value in the least hinted at, by any one who has written on the subject, nor has any such been called to our attention. We can not recognize any such element as giving value to shares in a trading corporation. It would be strange to predicate good-will as pertaining to or extending to an abstraction, to an "artificial being, invisible, intangible, and existing only in contemplation of law."

Our conclusion is that the Board of Supervisors in its capacity of a Board of Equalization, had jurisdiction of the person and subject-matter in the matters involved in this cause, and the judgment of the Court below is affirmed.

ROSS, MYRICK, MCKINSTAY, MCKEE, and SHARPSTEIN, JJ., concurred.

MORRISON, C. J., took no part in this decision.

[No. 8,223.— In Bank.]
November 16, 1882.

SAN FRANCISCO GAS LIGHT COMPANY v. ANTONE
SCHOTTLER ET AL.

TAXATION OF FRANCHISE OF CORPORATION — ASSESSMENT — POWER OF COUNTY BOARD OF EQUALIZATION — RULES OF BOARD OF EQUALIZATION — NOTICE TO TAXPAYER — CONSTITUTION — APPEARANCE IS WAIVER OF NOTICE — REVENUE — WRIT OF REVIEW — FRANCHISE — CORPORATION — SAN FRANCISCO.— Upon the authority of *Spring Valley Water Works v. Schottler et al.*, ante, 69, judgment affirmed.

APPEAL by the plaintiff from the judgment of the Superior Court of the City and County of San Francisco. ALLEN, J.

Application for a writ of review. The facts in this case are in all material respects similar to the case of *Spring Valley Water Works v. Schottler et al.*, ante, 69. The proceedings before the Board of Equalization, in both cases, were heard together. After the decision a petition for a rehearing was presented and denied.

Clement, Osment & Clement, and *W. T. Wallace*, for Appellant.

John L. Love and *W. C. Burnett*, for Respondent.

The COURT:

Upon the authority of *Spring Valley Water Works v. Schottler et al.*, No. 8,052 (opinion this day filed), ante, 69, and for the reasons given in the opinion, the judgment of the Court below is affirmed.

MORRISON, C. J., did not participate.

[No. 10,761.— In Bank.]

November 17, 1882.

THE PEOPLE v. T. J. HOIN.

HOMICIDE — INSANITY — DEFINITION.— On the trial the Court instructed the jury: "Insanity, as used in this sense, means such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong in relation to the act with which he is charged." *Held*, The instruction is correct.

ID.— ID.— IRRESISTIBLE IMPULSE.— The Court refused to instruct the jury, on motion of defendant, as follows: "The mere intellectual knowledge of right and wrong is not enough to defeat a defense of insanity, unless with such knowledge the defendant also has the volitional power to choose the one instead of the other. No thoroughness of knowledge by the defendant that the act of killing the deceased then and there was wrong and forbidden would defeat his defense of insanity, if it were also legally proved that while he possessed such knowledge he did not possess the power to do or not to do the killing under the guidance of such knowledge."

Held: An irresistible impulse to commit an act which one knows is wrong or unlawful, if it ever exists, does not constitute the insanity which is a legal defense. The instruction was therefore properly refused. Whatever may be the abstract truth, the law never recognizes an impulse as uncontrollable which yet leaves the reasoning powers, including the capacity to appreciate the nature and quality of the particular act, unaffected by mental disease.

APPEAL from a judgment of conviction and from an order denying a new trial in the Supreme Court of the City and County of San Francisco. **FERRAL, J.**

C. B. Darwin, for Appellant.

A. L. Hart, Attorney General, for Respondent.

McKINSTRY, J.:

The Court below charged the jury: "As a defense to this prosecution the defendant has interposed the plea of insanity. * * * 'Insanity,' as used in this sense, means such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong in relation to the act with which he is charged."

The charge as given is substantially the law as laid down by Tindal, C. J., in the answers of the English Judges to the questions propounded to them by the House of Lords, after

the acquittal of McNaughton: "The jury ought to be told * * * that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely if ever leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to *the very act* with which he is charged."

Counsel for defendant asked the Court below to charge: "The mere intellectual knowledge of right and wrong is not enough to defeat a defense of insanity, unless with such knowledge the defendant also has the volitional power to choose the one instead of the other. No thoroughness of knowledge by the defendant that the act of killing the deceased then and there was wrong and forbidden, would defeat his defense of insanity, if it were also legally proved that, while he possessed such knowledge, he did not possess the power to do or not to do the killing under the guidance of such knowledge."

It is evident from the case as presented, that the instructions requested refer to an entire absence of power of choice which, it is assumed, may exist with a capacity to distinguish between right and wrong as applied to the particular act. There is no evidence tending to prove the existence of such physical disease as, of itself, and separate from its effect upon the mind, would deprive one of the control of his action, as in the case of the "convulsive fit" spoken of by Sir James Fitz Stephens. (Digest of Criminal Law, note 1, p. 361.) Such irresistible impulse to commit an act which he knows is wrong or unlawful (if it ever exists), does not constitute the insanity which is a legal defense.

How can such impulse be known to exist? Rolfe, B., in summing up in *Reg. v. Stokes*, 3 C. and K. 185, said: "It is

true learned speculators, in their writings, have laid it down that men, with a consciousness that they were doing wrong, were irresistibly impelled to commit some unlawful act. But who enabled them to dive into the human heart and see the real motive that prompted the commission of such deeds?" And the learned Baron charged the jury, "Every man is held responsible for his acts by the law of this country, if he can discern right from wrong." And in *Reg. v. Haynes*, 1 F. and F. p. 666, Branwell, B., said: "It has been urged for the prisoner that you should acquit him on the ground that, it being impossible to assign any reason for the perpetration of the offense, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. But I must remark as to that, the circumstance of an act being *apparently* motiveless, is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but irresistible) thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence — the restraint of religion, the restraint of conscience, the restraint of law. But if the influence itself be held to be a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration." We must, therefore, return to the simple question you have to determine—did the prisoner know the nature of the act he was doing; and did he know he was doing what was wrong? The Reporter's head-note to this case contains the statement: "The circumstance of the prisoner having acted under an irresistible influence to the commission of homicide no defense, if, at the time he committed the act, he knew he was doing what was wrong."

In *Reg. v. Barton*, 3 Cox C. C. 275, Baron Parke told the jury "that there was but one question for their consideration, viz., whether, at the time the prisoner inflicted the wounds which caused the death of his wife, he was in a state of mind

to be made responsible to the law for her murder. That would depend upon the question whether he, at the time, knew the nature and character of the deed he was committing, and, if so, whether he knew he was doing wrong in so acting. This mode of dealing with the defense of insanity had not, he was aware, the concurrence of medical men; but he must, nevertheless, express his decided concurrence with Mr. Baron Rolfe's views of such cases, that learned judge having expressed his opinion to be that the excuse of an irresistible impulse co-existing with the full possession of reasoning powers might be urged in justification of every crime known to the law, for every man might be said, and truly, not to commit any crime — except under the influence of some irresistible impulse. Something more than this was necessary to justify an acquittal on the ground of insanity, and it would therefore be for the jury to say whether, taking into consideration all that the surgeon had said, which was entitled to great weight, the impulse under which the prisoner had committed this deed was one which altogether deprived him of the knowledge that he was doing wrong."

It will be seen that the English Courts have refused to recognize the co-existence of an impulse *absolutely* irresistible with capacity to distinguish between right and wrong with reference to the act. It can not be said to be irresistible because not resisted. Whatever may be the abstract truth, the law has never recognized an impulse as uncontrollable which yet leaves the reasoning powers — including the capacity to appreciate the nature and quality of the particular act — unaffected by mental disease. No different rule has been adopted by American Courts.

Judgment and order affirmed.

MORRISON, C. J., and ROSS, SHARPSTEIN, MYRICK, and MOORE, JJ., concurred.

[No. 8,511.— Department Two.]
November 17, 1882.

MARY ELLEN LAWRENCE v. JOSEPH COYNE.

REPLEVIN — DESCRIPTION OF PROPERTY — PLEADING.— In an action of replevin, the complaint, and also the affidavit and the order indorsed, described the property simply as "400 sheep."

Held: The process was regular on its face, and justified the Sheriff in seizing the property.

APPEAL from a judgment for the defendant in the Superior Court of the County of San Diego, McNEALLY, J., and from an order denying a new trial in the same Court. SEPULVEDA, J.

W. Jeff Gatewood and A. B. Hotchkiss, for Appellant.

Leach & Parker, for Respondent.

The COURT:

Plaintiff sued defendant as the Sheriff of San Diego county, for the possession of certain sheep or the value thereof, and defendant justified under a seizure made by him in an action brought against the plaintiff and others by one Joseph Lambeye. There is but one point made on the appeal, and that is that the complaint filed in the case of *Lambeye v. Lawrence et al.* did not contain a sufficient description of the property. If the point were well taken it would not follow therefrom that the plaintiff has any cause of action against the defendant. The Court had jurisdiction. The process was regular on its face, and justified the defendant in seizing the property.

Judgment and order affirmed.

[No. 7,460.— In Bank.]

November 17, 1882.

E. D. HAM v. THE SANTA ROSA BANK ET AL.

DECLARATION OF HOMESTEAD.—A declaration of homestead was filed, in which the value of the homestead premises was estimated at eight thousand dollars.

Held: The declaration was not invalid because the estimate of value was in excess of the value of the homestead interest exempted by law from forced sale.

Id.—SELECTION OF HOMESTEAD.—In the selection of a homestead there is no statutory limitations as to quantity or value. The law simply requires that the premises selected for that purpose shall be described, and that the value of the premises shall be estimated.

Id.—NO CONFLICT BETWEEN SECTIONS 1260 AND 1263, CIVIL CODE.—There is no conflict between §§ 1260 and 1263 of the Civil Code; the word "value" in the one refers to the actual value, or the value in the opinion of persons other than the declarant, whilst the words "estimate of value" in the other refer to an estimate of value in the opinion of the declarant.

Id.—CONSTRUCTION OF CODE.—If there is any seeming conflict between §§ 1260 and 1263 of the Civil Code, the two sections must be construed according to the canon prescribed by § 4482 of the Political Code for the construction of all the Codes.

EXCESS IN VALUE DOES NOT INVALIDATE SELECTION OF HOMESTEAD.—Exemption from forced sale is not an attribute, but only an incident of the homestead; the homestead may exceed the value limit of the exemption; but the excess in value does not invalidate the selection if it is otherwise valid under the provisions of §§ 1262 and 1263, Civil Code.

Id.—HOMESTEAD, WHAT IS.—In its inception then or thereafter, the substance of a homestead is a parcel of land on which the family reside. It is constituted by the attributes of residence and selection according to law. When these things exist so as to express its essence, the homestead becomes an estate in the premises selected, exempted by law from forced sale.

APPEAL by the defendant, the Santa Rosa Bank, from the judgment of the Superior Court of the County of Sonoma.
TEMPLE, J.

Action to foreclose a mortgage, made by one of the defendants, C. F. Jouilliard. Defendants Jouilliard and wife filed a cross-complaint claiming a homestead in the premises, and alleged they had filed a declaration in which they estimated the homestead premises to be of the value of eight thousand dollars. Defendant bank, a creditor of defendant Jouilliard, having a judgment lien which attached subsequent to the

filing of said declaration of homestead, demurred to the cross-complaint of Joulliard and wife on the grounds that it did not state facts sufficient, etc. The Court overruled the demurrer, and rendered judgment for defendants Joulliard and against defendant bank, which ruling is assigned as error.

Rutledge & McConnell, and Henley & Hardin, for Appellant.

The naked question is presented in this appeal, whether a declaration of homestead is of any avail, which states the value of the property selected to be eight thousand dollars? Appellant claims that such declaration is void and makes the following points in support of such proposition.

Section 1260 of the Civil Code is as follows: "Homesteads may be selected and claimed * * * of not exceeding five thousand dollars." In this case the declaration states the actual cost value of the property to be eight thousand dollars.

We claim that the declaration itself shows the property to be of such a character in value that it can not be selected as a homestead, and if any person having property greater in value than the five thousand dollar limit, the Code imposes upon such person the duty, before any portion of it can be impressed with a homestead character, of segregating and measuring it off, and describing it in the declaration. This was the view taken by the Supreme Court of Michigan. (*Beecher v. Baldy*, 7 Mich. 501; *Helpenstein v. Cave*, 3 Iowa, 287; *Thomp. on Homest.* 112.)

The provisions of the Code in reference to the manner of selecting a homestead have been held by this Court to be mandatory. (*Ashley v. Olmstead*, 54 Cal. 616.)

The section of the Code above quoted says homesteads may be selected and claimed, evidently contemplating the imposition upon the claimant of some act in the way of selection over and above the mere act of filing the declaration. Section 1263 requires the declaration to contain a description of the premises. This section must be construed with Section 1260. Now what premises must be described in the declaration? Why, the homestead premises, of course, which must not exceed five thousand dollars, but the premises described here are declared to be worth eight thousand dollars, and no

five thousand dollars premises are described at all. Now, the object of requiring with such particularity the declaration to state the actual cash value, who is living on the land, a description of the premises, etc., undoubtedly is to enable all parties interested to see from the declaration what property is claimed. That requirement of the statute is not met by this declaration. An eight thousand dollar tract is described, and we are left entirely in the dark as to what portion of it is claimed as a homestead.

It can not be that the Legislature intended the effect which must be the result if the position contended for by respondent is the law. The premises described in the declaration constitutes the homestead, no matter what its extent or value, and if filed by the wife or husband, even against the consent of the other, on community property, of the value of millions, on the death of either the whole vests in the survivor. The heirs of one is absolutely cut off "without a shilling" without the consent perhaps of the owner and transferred to a stranger to his blood. The Legislature could never have intended such a result. The Legislature must have intended to compel the claimant to select and limit him to property not exceeding five thousand dollars in value. (See § 1265; *Estate of Wixom*, 35 Cal. 323; *Matter of William H. Orr*, 29 id. 103.) The Court will note that the Code is amended so as now to make the premises described in the homestead to vest absolutely in the survivor. (C. C. P., §§ 1265, 1474.)

In the opinion of Justice Rhodes, in *Estate of Delaney*, 37 Cal. 180, the homestead "at its inception is limited to five thousand dollars." And the machinery of the Code for the excess over that amount is supposed to apply to an enhanced or increased value subsequent to that time.

But it will be also noticed that the Code of Civil Procedure has been changed in another respect since that time. There is now "one homestead as against creditors, and a different one when the survivor asserts his or her claim as against the heirs of the deceased." During the life of the spouses the creditors under the provisions of the Civil Code can subject to the payment of debts this enhanced or increased value. But after death, and in appraising the value, the Code of Civil Procedure changes the rule and directs the inquiry to

the value at the time of filing the declaration. (§ 1476, C. C. P.)

Whether subsequent Legislatures intended to change the law in accordance with the opinion of Judge Sanderson, in *Gregg v. Bostwick*, 33 Cal. 226 and 227, or not, it is very evident it has radically changed the wording of the statute. Section 327, C. C., whilst adopting a part of the language of Section 1 of the Act of 1860, qualifies it by inserting the words "selected as in this title provided," and the word "homestead" is no longer used in the "popular sense," it is only a "homestead" now when selected as "in this title provided." The learned judge is undoubtedly referring to the Act of 1851, and quotes the first section thereof at page 227 of the opinion. (Compare the Act of 1851, page 296.) And is construing that law as applicable to the case then before the Court. (See statement of facts as found by the District Court, 33 Cal. 220, 221.) This is the only case referred to that gives countenance to the views of respondent. But can not be authority on the law as it stands now.

George A. Johnson, for Respondents.

I claim that there is no law in this State requiring a description of the homestead in the homestead declaration. It is "a description of the premises." (C. C., § 1263.) I claim there is no law in this State requiring an estimate of the actual cash value of the homestead; it is of "their" (the premises') "actual cash value." (§ 1263.)

There is no law that the declaration shall contain a statement that the person making it is residing on the homestead; but the statement required is that he is residing on the premises, "and claims them as a homestead." That there is a distinction between "the premises" and "the homestead," and that such was the legislative intent, seems to be apparent from Section 1263. All the other sections of the Civil Code are in accord with this view.

I call the Court's attention to Section 1241, C. C.: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained" on certain debts which were liens on the premises, not on the homestead. What is meant by selecting and claiming a homestead, Section 1260 says: "Home-

steads may be selected and claimed: "1. Of not exceeding five thousand dollars in value, by any head of a family." Then it may be selected and claimed by any head of a family. But there must be a dwelling-house in which the claimant resides. Section 1237: "The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this title provided."

Any head of a family, then, may have a homestead in a dwelling-house and the land on which it is situate, if he selects it as provided. What section is it that provides as to the manner of this selection and claim? Most unquestionably, Section 1263. Does this declaration contain a statement that Jouilliard is the head of a family? It does. Does it contain a statement that Jouilliard is residing on the premises and claims them as a homestead? It does. Does it contain a description of the premises? It does. Does it contain an estimate of the actual cash value of the premises? It does.

It is not apparent that anything more can be done. This is the declaration that the law says shall be recorded in the Recorder's office of the county. (§ 1264.) This is the declaration, from and after the filing of which for record "the premises therein described constitute a homestead." (§ 1265.) All that Section 1260 determines is, who may have a homestead, giving the debtor the right to select one of several tracts, and to what value; a head of a family, five thousand dollars in value; any other person, one thousand dollars. It doesn't purport to contain the essentials of a declaration which is to be recorded, and from the filing of which for record the premises therein described are to constitute a homestead, as provided for, in express terms, by Sections 1263, 1264, and 1265, C. C.

The misapprehension consists in this, in supposing that our law requires any description of the homestead whatever, or any statement of the value of the homestead; whereas it is only a description of the premises which it requires, and a statement of their value. To state the value of the homestead would be a matter of supererogation, because the law fixes it at not exceeding five thousand dollars. (§ 1260.) There is no provision for recording any homestead claim under

Section 1260, but there is for recording the homestead claim provided for by Section 1263, and from the filing of which for record the premises described do absolutely constitute a homestead, without any further conditions or limitations.

Section 1246, Civil Code, is certainly broad enough to cover every case where "the value of the homestead exceeds the amount of the homestead exemption." If it had been the intention of the Legislature that this section should include only those cases where the value of the premises at the inception of the homestead did not exceed five thousand dollars, would they not have so enacted in clear and unambiguous language? Are we not to infer, therefore, from their using general words, without any conditions or limitations, that they intended to embrace all homesteads, without reference to their value at their inception, or to any class of homestead claimants? (*McDonald v. Badger*, 23 Cal. 397.)

"But a person can not thus inclose more than one lot in the homestead declaration, where the value of such lot, with the dwelling thereon, equals or exceeds five thousand dollars. And if it is attempted, the homestead claim will be held void as to all separate lots included therein, over and above the one thus occupied as a residence."

In *Gregg v. Bostwick*, 33 Cal. 220, the Court says: "The Act" (the Homestead Act) "is founded upon the idea that it is good for the general welfare that every family should have a home," etc. "It is for the protection and maintenance of the wife and children against the neglect and improvidence of the husband and father." (*Cook v. McChristian*, 4 id. 26.)

In *Estate of Delaney*, 37 Cal. 181, the Court says: "The value of the lands is not stated in the declaration" (that is of homestead), "and had such been the case, the declaration would not have been evidence of their value; but if the value then exceeded five thousand dollars, the statutory homestead could not embrace the whole number of blocks and parts of blocks mentioned." (*Estate of George McCauley*, 50 id. 545.) "No homestead had been selected during the life-time of the testator. The mortgages on the property exceeded ten thousand dollars. The court made an order for the sale of the land subject to the liens of the mortgages, and for setting apart a homestead to the widow out of the proceeds." The

appraisers in this case appraised the premises at fourteen thousand three hundred and ninety-six dollars and sixty-three cents. The above order was affirmed by the Supreme Court.

The Constitution of the State says: "The Legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." (Art. xvii., § 1, Const. 1879, and Art. xi., § 15, Const. 1849.) In *Gregg v. Bostwick*, *supra*, the Court says: "If the homestead, when ascertained, exceeds the quantity named, where limitation is by quantity, it must be reduced by cutting off the excess; or, if it exceeds the value named, where limitation is by value, it must be divided, if that can be done; if not, it must be sold and the proceeds divided." Again: "Hence, neither quantity nor value can be taken into account as tests as to what the homestead is in fact in a given case, for they, in no just sense, enter into the definition of a homestead until after the homestead has been ascertained by other tests, and then they operate only as limitations."

How, then, can the statement of value in a declaration of homestead at eight thousand dollars operate as a test before there has been any judicial ascertainment as to what constitutes the statutory homestead, or the value of the premises?

In a number of the States there are constitutional provisions on the subject of homesteads, as in Alabama, Arkansas, Georgia, Michigan, North Carolina, South Carolina, Tennessee, Texas, where the value is not to exceed a specified amount; and in Texas a certain amount, under the Constitution of 1869, at the inception of the homestead.

The case of *Beecher v. Baldy*, 7 Mich. 500, was decided under a constitutional provision, and as the Legislature had provided no means whereby a homestead in property not susceptible of division and worth more than the constitutional limit could be made available, as, for instance, by sale, and giving a certain portion of the proceeds to the homestead claimant, the Court held there was no homestead. But in California, the Legislature has provided the means, and the machinery for this purpose is ample, as enacted in Sections 1246 to 1258, C. C.

Smyth on Homesteads and Exemptions says this case of

Beecher v. Baldy "presents an interpretation of the statute in relation to homesteads at variance with most of the cases which have come under our observation." (Note under Section 67.) He further says: "A person who is in debt and living on land which he claims as a homestead, but which is worth more than the statutory limit, is liable to have the overplus sold on execution. If the land can be divided in conformity with the statute, a certain portion, worth the amount in value allowed the debtor under the particular statute, may be set off, which he can hold exempt. But if, in the course of time, the portion so allotted to him has so increased in value as to be worth more than the statutory limit, the homestead may be divided a second time, and the overplus again sold for the satisfaction of creditors; and this course may be pursued as often as the homestead increases in value and remains divisible; but if indivisible, the whole may be sold by the creditor upon the payment to the homestead claimant of the amount exempt by law." (§ 91.)

A declarant of a homestead is between Scylla and Charybdis. If in his declaration he states that the value of the premises in which he claims a homestead is eight thousand dollars, he may tell the truth; but he thereby loses his homestead. If, on the other hand, he states the value to be five thousand dollars, he falsifies the facts, and runs the risk of losing his homestead on account of having underestimated the value of the premises in his declaration, for the purpose of hindering, delaying, and defrauding his creditors.

Or, we will take another hypothesis: if he states the value to be five thousand dollars, he falsifies the facts; but he gains thereby a castle for himself and family, a shelter for his wife and children against his own pecuniary improvidence.

The difficulties increase. Suppose he estimates the premises at eight thousand dollars, when in fact they are worth only five thousand dollars, he loses his homestead, and yet the law protects five thousand dollars "in value." He has made a wrong estimate. Suppose he estimates them at eight thousand dollars, when in fact they are worth eight thousand dollars, he loses his homestead. He has made a wrong estimate in law.

The question then suggests itself, what is the use of any

estimate at all, if all homesteads are made to lie in a Procrustean bed, and the value of the premises can not exceed five thousand dollars?

If Section 1263 of the Civil Code had provided for an estimate of the actual cash value of the premises, not exceeding five thousand dollars, it would probably have operated by way of limitation, and a declaration of homestead which stated the value at eight thousand dollars might be invalid. But there are no such words of limitation or prohibition.

I claim further, that as Section 1263 has been decided to be mandatory, and that an estimate of the actual cash value of the premises must be in some certain amount, that as Section 1264 has been decided to be mandatory also, and the declaration must be recorded, that Section 1265 is also mandatory, being in close chronological sequence, being also "*in pari materia*," and because it is there stated, in clear and unequivocal language, that from and after the time the declaration prescribed in the preceding sections is filed for record, "the premises therein described constitute a homestead." The legislative will thus made manifest should be obeyed.

The constitutional provision is equally clear. "The Legislature shall protect by law, from forced sale, a certain portion of the homestead and other property of all heads of families." Not the homestead, but a certain portion of the homestead. Why are these words, "a certain portion," used? Because the homestead in fact may not correspond with the statutory homestead. Hence the language of Sanderson in *Gregg v. Bostwick*, 33 Cal. 228: "If what is actually used as a homestead is of greater value than five thousand dollars, the excess is not homestead under the statute, though so in fact." This distinction should invariably be drawn between a homestead in fact and the statutory homestead, and with this discrimination the provisions of the Code are without complication, and the constitutional provision is easily understood.

But it may be claimed that, although this provision of the Constitution is made mandatory by the express words of the Constitution itself, that is to say, the Constitution of 1879, there is no legislative machinery to work out this beneficial result to all heads of families. That does not matter, if such was the case. (*Van Hook v. Whitlock*, 2 Edw. Ch. 804.)

Where a remedial statute does not point out the manner in which it shall be enforced, an action lies in favor of a party aggrieved by implication. What is more remedial than the homestead law? It protects the family against misfortune and improvidence. At common law, the creditor could not take the debtor's lands under his execution. It was by statute only that he gained this right. I cite, also, *Goldman v. Clark*, 1 Nev. 607, where Beatty, Judge, says: "If the Constitution and law has given her certain rights, the failure of the Legislature to prescribe the particular manner in which she shall proceed to enforce them, can not deprive her of those rights."

I may also cite, on this proposition, the case of *Helpenstein and Gore v. Cave*, 3 Iowa, 287, cited by appellant's counsel, for they have been most unhappy in their citations, where the Court says: "Where an end is distinctly pointed out by statute, but the mode is not presented, the Court will find a method." The other case cited by them, *Beecher v. Baldy*, *supra*, is not in accordance with the weight of authority, and its correctness has been challenged.

The Court:

As head of a family, the defendant, Jouilliard, filed a declaration of homestead in which he estimated the value of the homestead premises at eight thousand dollars; and the contention here is, that this estimate of value, being in excess of the value of the homestead premises exempted by law from forced sale, renders his declaration ineffectual to vest in the family a homestead right.

A homestead consists of the dwelling-house in which the claimant resides and the land on which the same is situated, selected as provided by law. (§ 1237, C. C.; *Gregg v. Bostwick*, 33 Cal. 220; *Estate of Delaney*, 37 Cal. 176.) It is selected according to law whenever the claimant executes and acknowledges, as a grant of real estate is required by law to be acknowledged, and files for record a declaration containing a statement showing, (1) that the person making it is the head of a family, (2) that he is residing on the premises and claims them as a homestead, (3) a description of the premises, and (4) an estimate of their cash value. From and after the

filing for record of such a "declaration" the premises described in it became the homestead of the claimant, and the record of the declaration operates as notice of the selection to all the world. (Tit. 5, Chap. 2, C. C.)

In the *selection* of a homestead there is no statutory limitation as to quantity or value. The law simply requires that the premises selected for that purpose shall be described, and that the value of the premises shall be estimated. It is just to infer that this requirement was of a true estimate, not a false one. It was not required to be under oath; therefore by making a false statement of the value, a homestead claimant does not incur the pains and penalty of perjury. So far as legal penalties are concerned, he is left free to insert a false estimate in his declaration; but, if he prefers to state what is true on the subject, the truth of his statement should not be used against him to destroy a right, if it be founded upon a compliance with the requirements of law.

Now the estimate of the claimant in the declaration under consideration, together with the description of the premises, and the statement that he was the head of a family, and was residing on the premises which he claimed as his homestead, constituted the essential elements of the declaration required by the homestead law to indicate his selection. The declaration itself was made strictly according to the formalities prescribed. In every particular the provisions of Sections 1262, 1263, Chapter 2, of the Homestead Law, were complied with. Having been strictly complied with, how can it be held that a declaration made according to the forms of law, is void under the law. Certainly there are no words in the sections referred to which make the legal acts of a homestead claimant issue in such a result. If there were, the provisions of those sections would be involved in absurdity — a thing which the Legislature could not have intended.

It is claimed, however, that such a result arises out of Section 1260, Chapter I. of the law by which it is declared that "Homesteads may be selected and claimed: 1, of not exceeding five thousand dollars in value by any head of a family." If this is to be regarded as such implication, it would prove too much. It would prove that the right could not attach under the statute, if the place declared on was of more than

five thousand dollars in value, whatever might be stated as the estimate of value of the parcel described in the declaration. Certainly the statute meant nothing of this kind. Again, such implication can not exist, for the reason that the word "value" is used in Section 1260, and the language in Section 1263 is "estimate of value." The right of exemption is made to depend on the actual value, not on the declarant's estimate of value; on an actual existing reality, not on the fallible or mistaken opinion of the declarant of what that real value may be. In Section 1260, the law speaks of something certain; in Section 1263, of something existing in the mind of a person, of which certainty can not assuredly be predicated; for nothing is more uncertain or more variable than an estimate of value.

The Section (1260) ought not to be held to change the meaning of Section 1263, if the provisions of the two sections can be harmonized. These provisions can be brought into harmony so as to exclude any prohibitory effect in the latter section over the former by the fact that they refer to different things, one to value in the opinion of other persons, and the other to an estimate of value in the opinion of the declarant. If one portion of a statute is held to affect and change another, there must be a conflict in the controlling clause over that which it controls. And if there is no conflict here, no alteration can be allowed in one by the other. If there is a conflict and one changes the other section, why not as well hold that Section 1263 changes the meaning of Section 1260? If it is so held, the prohibition by implication ceases to exist. Besides, the question is pertinent here, who made Section 1260 the master of 1263? Who invested the former with dominion over the latter? They emanate from a common source of power, and that common source has not invested the former section with any such control. But this common parent has furnished the means of controlling this strife, for where there is a conflict between the two sections the difficulty must be solved by the canon prescribed in the Political Code, *for the construction of all Codes*.

By Section 4482 of that Code it is provided: "If the provisions of any chapter conflict with or contravene the provisions of another chapter of the same title, the provisions of

each chapter must prevail as to all matters and questions arising out of the subject-matter of such chapter." The broad language here used, "all matters and questions arising out of," etc., can not fail to strike the attention on a mere perusal of the section. And by Section 4484 of the same Code a like rule of construction is given for determining conflicting provisions found in different sections of the same chapter or article of the Codes; that is to say, the provisions of the section last in numerical order must prevail, unless such construction be inconsistent with the general meaning of such chapter or article.

Proceeding from these canons of construction, we arrive at the conclusion that there is no inconsistency or incongruity between the sections of the homestead law which we have been considering. For Section 1260 has its place in Chapter I., Title v. of Part iv., Division Second, of the Civil Code, and Sections 1262 and 1263 have places in Chapter II. of the same title. Both chapters have relation to the same general subject-matter, namely, the homestead. But the first chapter contains general provisions which relate to the persons entitled to select homesteads, the property from which homesteads may be carved, the exemption of portions of homesteads from forced sale, the mode and manner in which they may be alienated, incumbered, or abandoned, and the remedies by which they may be subjected to the claims of execution creditors. On the other hand, the second chapter relates to the mode of the selection of the homestead, the form of the declaration by which its selection shall be made, its recordation, and the tenure by which the homestead, when selected, shall be held. The two sections of this chapter, therefore, relate wholly to the selection of the homestead. But Section 1260 of the first chapter relates to the selection and something more—it declares that the head of a family shall be entitled to select and *claim* a homestead not exceeding in value five thousand dollars. By this language a different meaning is expressed, and a different subject referred to, from the meaning expressed and the subject referred to in the two sections of the second chapter. And assuming that a conflict exists between the sections or the chapters in which they are contained, each chapter must, according to

the rules of construction in hand, be read by itself. So read and applied to the declaration of homestead before us, the declaration, appearing to have been made and filed in strict conformity with the provisions of Chapter II, assured to the declarant a homestead right to the premises described in his declaration. But his right in the premises was limited and defined by Section 1260 of Chapter I. Of these premises he could only claim and hold as against his creditors to the extent of five thousand dollars in value. Beyond that value, the premises were subject to the claims of execution creditors; the provision of Section 1260 was therefore subservient to the higher object of the entire title, namely the protection by law of the homestead; and there is no inconsistency between the two chapters.

It can not be denied that the entire legislation comprehended by the two chapters referred to was had for the purpose of carrying into effect the provisions of the Constitution expressed in Section 15, Article xi. of the Constitution of 1849, and Section I, Article xvii. of the Constitution of 1879, whereby the Legislature was commanded to "protect by law from forced sale a *certain portion* of the homestead and other property of all heads of families." Exemption of a portion of the homestead premises from forced sale was therefore the special subject-matter and object of Section 1260, Chapter I of the homestead law. The entire property in such premises belonged to the owner; the title to it was vested in him; no legislation could divest him of it, and the premises were subject to the claims of his creditors, except so much of them as were exempted by law. But this exemption is not an attribute of the homestead—it is only an incident. In fact, the homestead premises may exceed the value limit of the exemption; but the excess in value does not invalidate the selection, if it is otherwise valid under the provisions of Sections 1262, 1263, *supra*. The excess, though used in fact as homestead, is always subject to the claims of the creditors of the owner, and the law has provided ample remedies for the enforcement of such claims. (§§ 1245–1259, Chapter I, *supra*.)

In its inception, then, or thereafter, the substance of a homestead is a parcel of land on which the family reside. It

is constituted by the attributes of residence and selection according to law. When these things exist so as to express its essence, the homestead becomes an estate in the premises selected exempted by law from forced sale. The premises may be of greater or less value than the interest in them exempted by law. If less it may increase; but increase in value over the exemption only works diminution in quantity of the homestead. The excess in value, though it may be homestead, in fact, is not the interest in the premises which is exempted from execution. It is, as part of the homestead, subject to the *jus disponendi* of the owner and the claims of his creditors. And where the excess is shown by the estimation of value at the time of the selection, or by the increase of value after selection, there is no evasion of statutory requirements. In either case the rights of creditors are secured, and the rights of no one are interfered with.

Judgment affirmed.

MYRICK and MCKINSTY, JJ., dissented.

[No. 10,752.— In Bank.]

November 21, 1882.

THE PEOPLE v. MANUEL SALORSE.

EMBEZZLEMENT — LARCENY — DEFINITION — BAILMENT. — The defendant was charged and convicted of embezzlement of a horse, hired to him by another. Upon appeal it was claimed that the conviction was erroneous, because the offense committed, if any, was larceny, not embezzlement.

Held: When the act of taking co-exists with a felonious intent to deprive the owner of his property, the offense is complete. Hence, if at the time of receiving the horse from its owner the defendant had the fraudulent intent to take it and convert it to his own use and to deprive the owner of it, and did in fact obtain the possession for that purpose, he would have been guilty of larceny, because a fraudulent receipt of the property of another amounts, in law, to a taking without his consent; but in this case there was no charge against the defendant, and no proof that the original taking was felonious; and the offense, therefore, constituted embezzlement, and not larceny.

Id. — Id. — MISDEMEANOR — FELONY — VALUE OF PROPERTY. — Under Section 514, Penal Code, the embezzlement of a horse or other of the animals specified in Section 487, Subdivision 3, of that Code, is felony, without regard to the value of the property.

ID.— ID.— VENUE — IRRELEVANT INSTRUCTION.— The defendant asked the Court to instruct the jury, that if the defendant, at the time of receiving the horse from its owner in the County of San Benito, intended to feloniously steal, convert, or appropriate it, they should acquit; and also the following instruction: "If you believe, from the evidence, that the horse was given into the hands of the defendant by the complaining witness in the County of San Benito, and that it was afterwards taken by defendant into the counties of Merced, Fresno, or any other county than the County of San Benito, and by him in such county lost or converted to his own use, you can not convict;" and the Court refused to grant the first instruction, and qualified the second instruction by adding: "Unless you also find that defendant, at the time of receiving the horse, intended to feloniously appropriate it to his own use."

Held: The first of these instructions was properly refused, because there was no evidence tending to show an appropriation by the defendant at the time of receiving the horse.

The second instruction as originally presented was not correct, because the fact that the horse might have been taken by defendant and feloniously converted to his own use in any one of the counties specified in the instruction, within five hundred yards of the county of San Benito, was ignored.

In modifying it, the Court, by its words of qualification, must have referred either to the appropriation of the horse within the five hundred yards belt between the County of San Benito and any of the outside counties, or to the original taking in the County of San Benito. If to the former, the instruction as qualified was not erroneous. If to the latter, it was, like the preceding instruction which the Court refused to give, inapplicable to the evidence in the case; and for that reason, even if erroneous, not calculated to mislead the jury.

ID. — ID. — ID. — DEPOSITION BEFORE COMMITTING MAGISTRATE — OBJECTION.— The District Attorney having offered to prove statements of the defendant when testifying as a witness in his own behalf, at his preliminary examination before the examining magistrate, the defendant objected on the ground that the deposition had been reduced to writing and that it was the best evidence; and thereupon the deposition was produced and read in evidence without objection.

Held: An objection to the admission of evidence can not be made in this Court for the first time. It is a general principle running through all the cases, that a party must object at the time the act is done or ruling made by the Court. If he does not, he will not be heard afterwards to complain.

ID. — IMPEACHMENT OF WITNESS — IMMATERIAL ERROR.— A question was asked the defendant, for the purpose of impeachment, as to a declaration previously made by him; but neither time, nor place, nor person present was indicated by the question.

Held: The objection to the question was properly sustained, and, even if the ruling was erroneous, it was error without injury, because the witness did subsequently answer a like question without objection.

APPEAL from a judgment of conviction, and from an order

denying a new trial, in the Superior Court of San Benito County.

D. W. Burchard and H. W. Scott, for Appellant.

A. L. Hart, Attorney General, for Respondent.

McKEE, J.:

This case arises out of an information against the defendant for embezzlement. Conviction followed the trial of the defendant, and on this appeal from the judgment and order denying his motion for a new trial, it is contended on his behalf, that the conviction is erroneous, because the offense committed, if any, was larceny, not embezzlement.

The evidence went to prove that the defendant in March, 1879, in the county of San Benito, hired a horse from its owner for a term of two months, and he agreed that he would use it exclusively in San Benito County, and redeliver it to the owner at the end of the term, and then pay for its hire. Under this contract the horse was delivered to the defendant, who used it for about a month in San Benito County, but afterwards—some time in April, 1879—he took the horse out of the county, without the consent of the owner, into the counties of Merced, Stanislaus, and San Joaquin, where he tried to dispose of it by sale or raffle, and he never returned the horse to its owner nor settled for its hire, but converted the same to his own use.

1. The proofs did not make out a case of larceny. Larceny is the felonious stealing, taking, carrying, or driving away the personal property of another. (P. C., § 484.) When the act of taking co-exists with a felonious intent to deprive the owner of his property, the offense is complete; hence, if at the time of receiving the horse from its owner the defendant had conceived the fraudulent intent to take it and convert it to his own use and to deprive the owner of it, and did, in fact, obtain the possession for that purpose, he would have been guilty of larceny, because the fraudulent receipt of the property of another, amounts in law to a taking without his consent. But here there was no charge against the defendant and no proof that the original taking was felonious. The

horse was intrusted to the defendant by the owner for a lawful purpose. There was nothing in the evidence which tended to prove that the defendant received it otherwise than for that purpose; therefore the delivery was such as to divest the owner of the possession of his horse and to vest it in the defendant, for the time expressed in their contract, to be restored at the end of that time to the owner in San Benito County. In taking the horse for that purpose, the defendant became bailee of it for the owner, and continued to hold it as such until he absconded from the county, taking the horse with him. That act, being in violation of his duty as bailee and connected with the fraudulent intent to appropriate the horse, and to deprive the owner of it, as the jury found by their verdict, constituted embezzlement and not larceny.

2. But it is also urged that if embezzlement, the conviction is erroneous, because the property stolen did not exceed fifty dollars in value; and as embezzlement is punishable as larceny, the offense was a misdemeanor, and the action was barred by the Statute of Limitations. If the offense was a misdemeanor it was barred, because the information was filed more than a year after its commission. (Pen. C., § 801.) But it was not a misdemeanor, unless the value of the property stolen constituted an element in the offense. As to the fact of value there is no conflict in the evidence. The horse did not exceed in value fifty dollars, and, in ordinary cases, this would amount to petit larceny, and would be a misdemeanor. In such cases it is true, as a general rule, that the value of property stolen must be alleged and proved; but there are exceptions to the rule in favor of a particular species of property designated by the Legislature. Thus, grand larceny is defined to be "larceny committed of a horse, mare, gelding, cow, steer, bull, calf, mule, jack, jenny, goat, sheep, or hog." (Pen. C., § 487, subd. 3.) Any one of those enumerated animals is made by the law the subject of larceny or embezzlement without reference to its value. The law makes no distinction between grand and petit larceny as in the theft of other species of property. It fixes a definite punishment for the stealing of a horse, whether its value be five hundred dollars or only five dollars. The value of the horse was therefore not an ingredient of the offense of stealing the horse,

and it was not necessary to aver or prove its value; therefore, the instruction which the defendant requested to be given to the jury, to the effect that if the value of the horse did not exceed fifty dollars, and if the embezzlement of the horse took place more than a year prior to the filing of the complaint before the committing magistrate, they must acquit, was properly refused. (*People v. Leehey*, 4 Pac. C. L. J. 75.)

3. It is next assigned as error that the Court refused to give an instruction to the jury at the request of the defendant, to the effect that if the defendant, at the time of receiving the horse from its owner in the County of San Benito, intended to feloniously steal, convert, or appropriate it, they should acquit: and gave the following instruction, namely: "If you believe, from the evidence, that the horse was given into the hands of the defendant by the complaining witness, in the County of San Benito, and that it was afterwards taken by defendant into the counties of Merced, Fresno, or any other county than the county of San Benito, and by him in such county lost or converted to his own use, you can not convict, unless you also find that defendant, at the time of receiving the horse, intended to feloniously appropriate it to his own use."

The first of these instructions was properly refused, because, as has been already stated, there was no evidence tending to show an appropriation by the defendant at the time of receiving the horse. The second of the instructions, as appears by the record, is marked, "given with the words of qualification contained in the last part of the instruction."

As it was originally presented, the instruction was not correct, because the point of law comprehended in it was not stated fairly and concisely. The fact that the horse might have been taken by defendant, and feloniously converted to his own use in any of the counties specified in the instruction, within five hundred yards of the County of San Benito, was ignored. A fraudulent appropriation of the horse in any of those counties, within the five-hundred-yard belt of the county in which the horse had been rightfully received, would have made the defendant guilty, and he was not entitled to acquittal. So that, instead of modifying the instruction, the Court should have refused it. But in modifying it, the Court, by

its words of qualification, must have referred either to the appropriation of the horse within the five-hundred-yard belt between the County of San Benito and any of the outside counties specified in the original instruction as presented (because the Court had previously fully instructed the jury upon that point), or to the original taking in the County of San Benito. If to the former, the instruction, as qualified, was not erroneous; if to the latter, it was, like the preceding instruction, which the Court refused to give, inapplicable to the evidence in the case, and, for that reason, was not calculated to mislead the jury; and if erroneous, the error was not prejudicial, for it appears, by the record, that the law of the case as it was submitted to the jury on the evidence, was fairly presented by the Court. By the unchallenged instructions contained in the record, the jury were correctly charged as to what constituted embezzlement, and also, as to the necessity of finding that the offense, if committed at all, was within the jurisdiction of San Benito County. Two of those instructions given by the Court of its own motion, two given at the request of the defendant, and one at the request of the prosecution, especially directed the jury that if they found that the offense was not committed in the County of San Benito, or within five hundred yards of the boundary line thereof, they must acquit. As an entirety these instructions correctly laid down the law of the case, and the verdict returned by the jury was according to the evidence. That being the case, this Court will not set aside the verdict and grant a new trial, even if it should find in the record an erroneous instruction, which was not calculated to mislead the jury, and where the jury were bound to find as they did. (*Moffitt v. Cressler*, 8 Iowa, 122; *State v. Donovan*, 10 Nev. 36; *Carrington v. P. M. S. S. Co.*, 1 Cal. 476.)

4. For the purpose of proving the appropriation of the horse by the defendant and his movements in the several counties through which he went with it, the District Attorney offered to prove some statements which the defendant had made when testifying as a witness in his own behalf at his preliminary trial before the committing magistrate. To oral evidence of such statements counsel for defendant objected that they had been reduced to writing in the form of a depo-

sition, and that the deposition was the best evidence. The deposition was then produced and read as evidence, without objection. Yet the admission of the deposition is now assigned as error. An objection to the admission of evidence can not be made for the first time in an appellate Court. It is a general principle running through all cases that a party must object at the time an act is done, or a ruling made by the Court. If he does not, he will not be heard afterwards to complain. (*King v. Haney*, 46 Cal. 560; *People v. Long*, 43 id. 444; *Livermore v. Stine*, 43 id. 274.)

5. The question asked by defendant of the complaining witness was evidently for the purpose of impeachment. But neither time nor place, nor person present, was indicated by the question (C. C. P., § 2054); the objection made to the question was therefore properly sustained. But if the ruling was erroneous it was error without injury, because witness did subsequently answer a like question, without objection.

Judgment and orders appealed from affirmed.

MORRISON, C. J., and MYRICK, ROSS, SHARPSTEIN, and MOKINSTRY, JJ., concurred.

[No. 7,471. — Department One.]

November 21, 1882.

JOHN F. LANG v. MARGARETTE SPECHT ET AL.

SERVICE OF TRANSCRIPT PRINTED UNDER DIRECTION OF CLERK — RULES OF SUPREME COURT. — Under Rule 10 of this Court it has been the uniform practice, where the written transcript has been transmitted to the Clerk within the forty days fixed by Rule 2, or any extension of such period, to require only the service upon respondent mentioned in Rule 10; that is, service of copy of the transcript after the same has been printed under the direction of the Clerk. The rules do not require, in such case, service of the transcript before it is printed.

STATUTE OF LIMITATIONS WHEN DEFENDANT ABSENT FROM STATE, ON NOTE EXECUTED OUT OF THIS STATE. — The defendant B. pleaded the Statute of Limitations.

Held: As the note was executed in the State of Nevada, and there is no pretense that the defendant openly visited California more than two years before the commencement of the action, the Court below properly found against the defendant as to the bar of the statute.

CAL. REPR. LXII — 10.

FINDING — PLEADING — FINDINGS MUST COVER ISSUES. — The action is on a promissory note against the defendant S., who alone was served, as joint maker with one K., brought by the plaintiff as indorsee of the indorsees of the payees in the note. The complaint contains no statement of facts which would suggest that, as between themselves, K. was only surety for S., and that as such surety he had taken up the note, and assigned his right of action against S. The answer of S. avers payment of the note by K. The Court below found "that the payment made by K. & Co., was for the benefit of the defendant," "and that the payment was made by the firm of K. & Co., in liquidation of the debt, and that having paid the same as surety, his assignee is entitled to recover against his co-obligor, S., and that the assignment to the plaintiff was made in good faith, and for a valuable consideration, and that he is entitled to judgment for one thousand two hundred and fifty-three dollars."

Held: 1. If these findings could be read in connection with the evidence in the case, they would be strongly suggestive of payment.

2. But since they can not be so read, and they can not possibly be construed as determining that K. did not pay the note, the Court, therefore, failed to find on the issue of payment.

3. But if they could be construed as finding that K., as surety, paid the note for the benefit of S., and that he transferred to the plaintiff his right to recover of S., the findings would be entirely unsupported by, and outside of, the pleadings in the case.

APPEAL by defendant Specht from the judgment of the Superior Court of the City and County of San Francisco, and from an order denying a motion for a new trial. HUNT, J.

Action on promissory note. The action was commenced August 5, 1879, by the plaintiff, as indorsee of one John L. Koster, who was the indorsee of Lonkey & Smith, the payees of the note, against the defendant, Margarette Specht, upon a note executed by her and one A. M. Kruttschnitt, jointly, November 26, 1875, payable ninety days after date, for six hundred and ten dollars and forty-seven cents, with interest at the rate of two per cent. per month from date until paid. Although named in the complaint as one of the defendants, no judgment was asked in the prayer of the complaint against the defendant Kruttschnitt. Judgment was given April 21, 1880, by the Court against the defendants, after trial, as to defendant S., for the sum of one thousand two hundred and fifty-three dollars, and costs. The defendant S., after moving for a new trial, took this appeal on the thirteenth day of September, 1880. On the last day for filing the transcript on appeal with the Clerk of the Supreme Court, the appellant

filed a written transcript, as provided in Rule 10 of this Court, with the Clerk, to have the same printed, served, and filed as therein required. The service of the transcript as printed, was made upon the attorney for the respondent on the twenty-third day of December following. The respondent moved in this Court, upon affidavits and notice, to dismiss the appeal for failure to serve, and file the transcript in time. The other facts are stated in the opinion of the Court. After the decision in department, a petition for rehearing in bank was presented and denied.

F. J. Castlehun and T. C. Van Ness, for Appellant.

As to the first defense, the evidence shows that the note was made in the State of Nevada, on the twenty-sixth day of November, 1875, and that it became due on February 24, 1876. The action was brought August 5, 1879, more than two years after the making of the note. The Civil Code (§ 339, subd. 1) provides that an action upon an instrument in writing executed out of this State is barred in two years. Respondent claims that Mrs. Specht was absent from the State for at least two years (a fact not denied), and that therefore Section 351 of the Civil Code applies.

Appellant, however, contends that the last-named section does not apply, because the note in suit was made out of this State, between non-residents thereof. If it be held as applying to non-residents, the result will be that they will enjoy greater privileges than residents themselves enjoy. To illustrate: The payee of a note made in Nevada (supposing Nevada's law of limitations to be identical with our own) can hold a note made in Nevada for three years, eleven months, and twenty-five days, and can then bring the note to California, where, according to respondent's theory, the note will not be barred until the maker has been in California for two years. The presumption is that the Legislature never contemplated conferring greater privileges on non-residents than on residents. In support of this proposition we refer to the following decisions: *Beardsley v. Southmayd*, 3 Green (N. J.) Law, 171; *Taberrer v. Brentnall*, 3 Harr. (N. J.) 262; *Wood v. Leslie*, 6 Vroom (N. J.), 472; *Hyman v. Bayne*, 83 Ill. 256; *Hale v. Lawrence*, 1 Zab. (N. J.) 714.

The Court found that Kruttschnitt signed the note as indorser or surety for appellant. This finding is outside of the issues, as the pleadings show. It has been repeatedly held that a finding outside of the issues does not warrant a judgment. (*Devoe v. Devoe*, 51 Cal. 543; *Morenhout v. Barron*, 42 id. 603; *Green v. Chandler*, 54 id. 626.) The pleadings admit that Kruttschnitt and Mrs. Specht signed and were makers of the note. A finding which negatives the existence of a fact admitted by the pleadings is a finding against the evidence, and the judgment rendered thereon is erroneous. (*Burnett v. Stearns*, 33 Cal. 468; *Hill v. Den*, 54 id. 20; *Tracy v. Craig*, 55 id. 91; *Silvey v. Neary*, reported in vol. 8, p. 677, P. C. L. J.)

In *Murdock et al. v. Clarke*, 59 Cal. 683, this Court used the following language: "It was said in the case of *Green v. Covillaud*, 10 Cal. 332, that a plaintiff's case can not be better as proved, than it is as stated. It is a cardinal rule in equity, as in all pleading, that the *allegata* and *probata* must agree, and that averments material to the case, omitted from the pleading, can not be supplied by the evidence, or, as said in *Woodcock v. Bennett*, 1 Cowen, 711; S. C., 13 Am. Dec. 568, 'in a Court of Chancery, every material allegation should be put in issue by the pleadings.' Thus in *Bank of U. S. v. Schultz*, 3 Ohio, 62, it was held that 'a party can not travel out of the matter alleged in his bill to make a ground of relief; and accordingly the court, even upon an agreed state of facts, refused to find upon facts not put in issue by the bill.' And in a more recent case *Morenhout v. Barron*, 42 Cal. 605, the Court says: 'The complaint does not aver the agreement reserving the right to rescind, which is found by the Court. A finding is useless and idle, unless the facts found are within the issues; and a judgment based upon such facts can not be sustained.' "

If the Court finds contrary to the facts admitted by the answer, the findings must be disregarded. (*McDonald v. M. V. Homestead Association*, 51 Cal. 210; *Gregory v. Nelson*, 41 id. 278; *Bradbury v. Cronise*, 46 id. 287; *Marks v. Sayward*, 50 id. 57; *Devoe v. Devoe*, 51 id. 543.) If a finding is inconsistent with the judgment, it is fatal, without an exception.

(*Lucas v. San Francisco*, 28 Cal. 591; *Burnett v. Stearns*, 33 id. 468; *Solomon v. Reese*, 34 id. 28.)

In the case at bar, there is a finding that Kruttschnitt signed as surety, and yet the judgment is against both the obligors. A finding "that all the material facts set forth in this complaint are true," will not support a judgment. (*Ladd v. Tully*, 51 Cal. 277.) If findings do not respond to the issues, the judgment will be reversed. (*Roeding v. Perasso*, 7 P. C. L. J. 153.) Where findings are contradictory upon a material point the judgment can not be sustained. (*Manly v. Howlett*, 55 Cal. 94.)

John C. Burch, for Respondent.

1. It is admitted that appellant made said note, so that the burden of proof of all matters of defense devolves upon the defendant. (*Lindsay v. Europ. Pet. Co.*, 3 Lans. (N. Y.) 176; 10 Abb. Pr. (N. S.) 107; 41 How. Pr. 56; *Hereth v. Smith*, 33 Ind. 514.) Appellant, being on her way to Europe, made the note at Virginia City, Nevada, and left for Germany the next day, and remained away until just before suit was brought, August, 1879. It also appears that her place of residence is and was San Francisco. There is nothing in the first point.

2. In *Bosquett v. Crane*, 51 Cal. 505, this Court held that the findings may be amended on remittitur. In *Le Clert v. Oullahan et al.*, 52 id. 253, where the findings were silent on a material issue, the case was remanded for further findings. But here the new matter set out in the answer is wholly immaterial and constitutes no defense. In *McCourtney v. Fortune*, 57 id. 616, Justice McKee, speaking for the Court, held, * * * "If there be no finding on a material issue, the judgment can not be sustained." (*Phipps v. Harlan*, 53 id. 87.) "But a judgment will not be reversed on that ground, where the want of a finding on a particular issue is not prejudicial to the appellant." (C. C. P., § 475.) No substantial right being affected (*Johnson v. Perry*, 53 Cal. 354), the judgment should be affirmed.

We submit that the appeal in this case appears to have been taken for delay. It is without merit, and damage should be imposed. (C. C. P., § 957.)

The COURT:

Under rule ten of this Court it has been the uniform practice, where the written transcript has been transmitted to the Clerk within the forty days fixed by rule two, or any extension of such period, to require only the service upon respondent mentioned in rule ten, that is, service of copy of the transcript after the same has been printed under the direction of the Clerk. The rules do not require, in such case, service of the transcript before it is printed.

The note sued on was executed in the State of Nevada, and there is no pretense that defendant Specht openly visited California more than two years before the commencement of the action. The Court below properly found against defendant upon the plea of the Statute of Limitations.

The complaint alleges the execution of the promissory note by defendants Specht and *Kruttchnitt* as joint makers. It contains no statement of facts which would suggest that, as between themselves, *Kruttchnitt* was surety only for Specht, and that as such surety had taken up the note and assigned his right of action against his principal. The complaint alleges that the *payees* indorsed to plaintiff's indorsers. The answer of Specht avers *payment* of the note by *Kruttchnitt*. The Court found that *Kruttchnitt* signed the note as surety for Specht.

There is no finding upon the issue of payment, nor any finding relating to the matter of payment, except the following: "I further find *that the payment* made by *Kruttchnitt & Co.*, was for the benefit of the defendant" (the only defendant served was Specht), "and that the payment was made by the firm of *Kruttchnitt & Co.*, *in liquidation of the debt*, and that having paid the same as surety, *his* assignee is entitled to recover against his co-obligor, Margarette Specht, and that the assignment to John F. Lang, the plaintiff, was made in good faith and for a valuable consideration, and that he is entitled to judgment for one thousand two hundred and fifty-three dollars."

From the amount of the judgment it would appear that it was intended to allow for the amount paid to the payees or holders of the note by some party or parties with legal inter-

est thereon. But, as we have seen, the action is brought on the note. If we read the finding in connection with the evidence to which it seems to refer, payment is found. But this can not properly be done. Separated from the reference to "the payment made by Kruttschnitt & Co."—a payment not previously mentioned in the findings—and the proposition of law insterted into the finding, that Kruttschnitt & Co., "having paid the same *in liquidation of the debt*, his assignee is entitled to recover," there is certainly no direct finding that the note was not paid by Kruttschnitt, who was joint maker as to the payees. In brief, the findings, so far as they go, are strongly suggestive of a payment of the note by Kruttschnitt; they can not possibly be construed as determining that Kruttschnitt did not pay the note. The Court, therefore, failed to find upon the issue of payment.

The findings—if they could be construed to be that Kruttschnitt, as surety, paid the note for the benefit of defendant Specht, and that he thereupon transferred his right to recover of defendant Specht to plaintiff—would be utterly unsupported by the averments of the complaint and entirely outside of the pleadings.

Judgment and order reversed and cause remanded for a new trial.

[No. 7,454. — Department One.]
November 22, 1882.

O. ROSENKRANZ v. PHILIP WAGNER ET AL.

UNDER MECHANIC'S LIEN LAW, SUB-CONTRACTOR'S LIEN IS SUBORDINATE TO CONTRACT OF THE ORIGINAL CONTRACTOR—COMPLAINT INSUFFICIENT.—Action of foreclosure of mechanic's lien by plaintiff as sub-contractor under one W., the original contractor, against the defendants, Wagner and wife, owners of the premises. The complaint failed to state that anything was due from the defendants Wagner and wife to the original contractor when plaintiff's lien was filed or that defendants were notified or had any knowledge of the claim of plaintiff prior to the payment in full of the amount due to the original contractor under his contract. *Held*: The complaint contains no statements of a cause of action.

Id.—FINDING OUTSIDE OF ISSUE.—The Court below found as a fact that the defendants, Wagner and wife, were notified orally and in writing that the plaintiff had performed work, etc., for which he claimed sixty dollars

and eighteen cents before defendants made the second payment of five hundred dollars to the contractor. *Held*: This finding is entirely without the issues made by the pleadings.

APPEAL by the plaintiff from the judgment of the Superior Court of the City and County of San Francisco. LATIMER, J.

Action of foreclosure of mechanic's lien. In the complaint it was alleged, "that the defendant Philip Wagner is, and at all the times herein mentioned was, the owner of the land and premises situate," etc. (Here follows the description of the premises.)

"That prior to the twentieth day of November, 1877, said defendant, Wagner, had employed defendant, Walsh, as an original contractor, to improve, alter, and repair a certain building or dwelling-house on said lands, for him, defendant, Wagner. That defendant, Walsh, went on under said employment, and took charge of and improved, altered, and repaired said building on said land for said defendant. That under the direction, and with the knowledge of said defendant Wagner, defendant Walsh employed plaintiff on said building as a tinsmith, and to furnish the materials for all the tinwork thereon, namely, tin and galvanized iron, and promised to pay said plaintiff in gold coin upon the termination of his said labor, and for his said materials furnished, what the same might be reasonably worth. That, in consideration of said promise, said plaintiff went on and performed the labor and furnished the materials, consisting of tin and galvanized iron, required in the performance of all said tin work, between the twentieth day of November and the eleventh day of December, 1877, and all said materials were actually used in the said improvement, alteration, and repair of said structure. That the amount of said labor and materials furnished were reasonably worth the sum of sixty dollars and eighteen cents; that no part of said sum has ever been paid to said plaintiff, and that there remains due said plaintiff the sum of sixty dollars and eighteen cents gold coin therefor. That on, to wit, the fifteenth day of January, 1878, said building was completed, and within thirty days thereafter, to wit, on the seventeenth day of January, 1878, said plaintiff filed for record with the County Recorder of said

city and county, a claim in writing, containing a true statement of his demand for said work and materials, after deducting all just credits and offsets, and showing that said sum of sixty dollars and eighteen cents in gold coin was justly due to him, said plaintiff, for his said labor and materials furnished, and also setting forth in said claim the name of the owner of said premises, to wit, Philip Wagner, and also the name of the person by whom he, said plaintiff, was so employed, to wit, George Walsh; with a statement of the terms, time given, and conditions of his said contract, and also a description of the property to be charged with his lien, sufficient for identification, which claim was verified by the oath of said plaintiff and was thereupon recorded in said Recorder's office.

"Plaintiff further avers that the whole of said land is necessary for the convenient use and occupation of said building. That he, plaintiff, paid two dollars and seventy-five cents for the said recording and verification of said claim; that one hundred dollars is a reasonable attorney's fee for plaintiff's attorney in this action, and that ninety days have not elapsed since the filing and recording of said claim. That said defendants, Mary Wagner, I. Wells, Bass, Doe, Roe, White, and Black, have each some claim against or lien upon said premises. Wherefore plaintiff prays judgment," etc.

The defendants, Philip and Mary Wagner, after denying specifically the allegations of the complaint in their answer, alleged substantially as follows: That the property belonged to Mary Wagner, the wife of Philip; that the original contractor was one Ivory Wells and not G. Walsh; that plaintiff contracted with Wells to do the tin work, etc., on the house for a fixed compensation; that he failed to comply with his contract and abandoned it; that Wells' agreement with the defendants was to furnish labor and materials and make the improvements upon the premises for one thousand five hundred dollars, payable in three equal installments, as the work progressed and upon the production of the certificate of an architect showing due performance; that after the second payment to Wells he also abandoned the contract, and they, the defendants, as authorized by the agreement, after three days' notice to Wells, hired other parties and completed the improvements at a cost to them of four hundred and thirty-

two dollars and twenty-three cents, leaving a balance of the original contract price in their hands of sixty-seven dollars and seventy-seven cents, which amount they had offered to pay to the plaintiff and the other claimants of liens, but as they refused to take it the defendants offered to pay the sum into Court.

The eleventh finding is as follows: That after the work had progressed so far as to entitle said Wells to said certificate of the architect entitling him to demand the said second payment of five hundred dollars, to wit, on the twenty-seventh day of December, 1877, said plaintiff notified orally and in writing said defendants, Wagner and Wagner, that he had performed the work, etc., for which he claimed said sixty dollars and eighteen cents, and had not been paid by said Wells, and requested payment therefor; that thereupon both of said Wagners told him he should be paid, and advised him to file a mechanic's lien therefor.

J. C. Bates, for Appellant.

T. F. Bachelder, for Respondent.

THE COURT:

The Court below found as a fact, defendants were notified orally and in writing, that plaintiff had performed work, etc., for which he claimed sixty dollars and eighteen cents, *before* defendants made the payment of five hundred dollars to the contractor.

The finding is entirely without the issues made by the pleadings. The complaint fails to allege that anything was due from defendants to the original contractor when plaintiff's lien was filed, or that defendants were notified or had any knowledge of the claim of plaintiff, prior to the payment in full of the amount due to the original contractor under his contract. The complaint contains no statement of a cause of action. (*Renton v. Conley*, 49 Cal. 187; *Wells v. Cahn*, 51 id. 423; *Dingley v. Greene*, 54 id. 333.)

Judgment affirmed.

[No. 7,324. — Department One.]

November 22, 1882.

PATRICK HANLY v. JAMES KELLY ET AL.

ELECTION — ESTOPPEL — TRUST — EQUITY. — The amended complaint showed in substance, that in 1873 plaintiff recovered a judgment against the defendant, James Kelly, which judgment established a trust in favor of the plaintiff as to certain money deposited in 1865 by plaintiff with defendant, James Kelly, repayable on demand; that demand was made in 1872, and defendant refused to pay, etc.; that the money was invested as part payment in the purchase by Kelly of a lot of land in his own name, and upon which a declaration of homestead was subsequently made by him. And the prayer of the amended complaint was, that it be adjudged that K. held such portion of the lot in trust for plaintiff as the trust money bears to the whole purchase price of the lot, etc. The allegation with reference to the investment of the trust moneys by Kelly in the lot of land, is: That whilst said trust money has been so as aforesaid in the hands of the said James Kelly, he, the said James Kelly, has invested the same and its proceeds, etc.

Held: For aught that appears, the investment was made with full knowledge on the part of the plaintiff before the action was brought to recover the amount deposited, with interest, which resulted in the judgment in the action at law, and since facts are alleged showing that the plaintiff had complete information respecting the amount and condition of the trust fund, he must be held to have elected his remedy at law, and estopped from pursuing in equity the fund into the homestead.

APPEAL by the plaintiff from a judgment in the Superior Court of the City and County of San Francisco. HUNT, J.

Action to declare and enforce a trust as against the defendants James Kelly and Mary Kelly, his wife. The third amended complaint of the plaintiff sets forth: That on the nineteenth day of March, 1873, at said City and County of San Francisco, in an action in the Nineteenth District Court, the plaintiff recovered a judgment against the defendant, James Kelly, which judgment conclusively established that on or about September, 1865, at said City and County of San Francisco, the plaintiff, through his wife, deposited with said defendant, James Kelly, through the wife of the latter, six hundred dollars, in lawful money of the United States, being money of said plaintiff, which money the said defendant James Kelly personally received, to be held and safely kept by him in trust for said plaintiff until the same should be

thereafter demanded of him by said plaintiff, and upon such demand to be returned and paid over to said plaintiff; that such demand was made by said plaintiff upon said defendant James Kelly, on the twenty-first day of May, 1872; that said defendant James Kelly had never returned or paid over to said plaintiff said sum of money or any part thereof, and that there was then due from said defendant James Kelly to said plaintiff, on account of said trust money and interest thereon, the sum of six hundred and thirty-four dollars and eighty-two cents, together with the sum of seventy-nine dollars and seventy-five cents for said plaintiff's costs and disbursements in that action. That no part of said trust money, nor of any interest thereon, nor of the above-mentioned costs and disbursements has ever been paid by the said James Kelly to plaintiff. That, whilst said trust money has been so as aforesaid in the hands of the said James Kelly, he, the said James Kelly, has invested the same and its proceeds (with two hundred and seventy-five dollars money of the said James Kelly), in the purchase of a certain lot of land (here follows a description of the land); and that said James Kelly has taken the deed of conveyance of said lot in the sole name of himself, the said James Kelly, which deed has been duly recorded in the Recorder's office, and is now of record therein; and that since the execution and recording of said deed, he, the said James Kelly, has executed and acknowledged before a Notary Public, so as to entitle the same to be recorded, and has since caused to be recorded in the same Recorder's office, an instrument of writing, purporting to be a "declaration of homestead." That by the placing of said "declaration of homestead," by the said James Kelly, on file in said Recorder's office, the said defendant Mary Kelly, who was then and is now the wife of James Kelly, has become and claims to be interested in said lot of land is a necessary party to this action, but has no interest whatever in said lot, otherwise than under and by virtue of said "declaration of homestead." That the said James Kelly holds and is in the possession and enjoyment of the said lot of land and improvements thereon. That there is now due from said James Kelly to this plaintiff the whole amount of said trust money, with interest thereon, at the rate of seven per cent. per annum, from the date of said de-

mand, to wit, from said twenty-first day of May, 1872, to the present time, together with said sum of seventy-nine dollars and seventy-five cents, the above-mentioned costs and disbursements. Wherefore, said plaintiff prays that the said James Kelly be, by this honorable Court, adjudged, decreed, and declared to have been from the time of his purchase of said lot of land, and to be now a trustee of such proportion of the title thereof, for the use and benefit of this plaintiff, as said trust money and the interest accrued thereon, bears to the whole purchase money of said lot; and that it be adjudged, decreed, and declared that this plaintiff has an interest in said lot and a lien thereon, to the extent and for the repayment to this plaintiff of the amount of said trust money and all interest now due or which shall hereafter become due thereon, together with said plaintiff's costs and disbursements aforesaid, and of this action; that said "declaration of homestead" be adjudged and declared of no force or effect as against this plaintiff and his interest in and lien upon said lot of land, for and on account of said trust money, interest thereon, and costs aforesaid; and that by the order, direction, and decree of this honorable Court, said lot of land, with the improvements thereon, be sold by the Sheriff of said city and county, and the amount of said trust money, together with all interest which shall then be due thereon, at the rate aforesaid; and said plaintiff's costs and disbursements aforesaid, be thereupon paid by said Sheriff to this plaintiff out of the proceeds of such sale, and that said plaintiff have such further and other remedy and relief in the premises as shall be consistent with law and equity.

To this amended complaint the defendants separately demurred; the defendant James Kelly assigning the following grounds: That said complaint does not state facts sufficient to constitute a cause of action, in this, that it does not appear that this Court acquired jurisdiction to render said judgment, as set forth in subdivision 3 of said complaint, or otherwise, against this defendant; and that as to said trust, the same was merged in said judgment. That said complaint is indefinite and uncertain, because it is uncertain which is the cause of action relied upon, the loan of said money on trust and the refusal to pay the same on demand, or the judgment recovered

thereon; also, it is uncertain when said moneys were invested in said homestead lot, whether before or after said judgment; also, it is uncertain when he obtained the deed therefor to himself, or when the same was acknowledged or recorded, whether before or since the commencement of this suit; or when said declaration of homestead was made, before or since said judgment, or before or since the commencement of this suit; also, it is uncertain when Mary Kelly became interested therein, before or since the commencement of this suit, or rendition of said judgment.

The defendant Mary Kelly assigned the following grounds of demurrer: That said complaint does not state a cause of action as against this defendant. That said complaint is indefinite and uncertain, in the respects set forth in the second subdivision of James Kelly's demurrer, herewith served and filed. That said cause of action against this defendant is barred by the provisions of subdivision 4 of Section 338 of the Code of Civil Procedure of this State; also by the provisions of Section 343 of same Code; also by the provisions of Section 336 of same Code; also by the provisions of subdivision 1 of Section 339 of same Code.

The demurrers were sustained, and plaintiff failing to amend, judgment was given in favor of the defendants.

G. Heinlen and N. Soderberg, for Appellant.

We think it apparent that the statute of limitations did not run in favor of the trustee until demand. Citation of authorities is needless. This case is on principle like that of *Shinn v. McPherson*, 58 Cal. 596.

The present action is based upon the facts, which we aver were conclusively proved and established by the judgment mentioned in the complaint, and upon the additional facts contained in the present complaint. If, upon the trial, plaintiff proves all of those facts, he will, we think, clearly be entitled to the relief which he asks. (2 Story's Eq., §§ 1215, 1216 a, 1216 c, 1217, 1219, 1258, 1260, 1265.)

Plaintiff has the right to use the judgment mentioned in the complaint, as not only proving but as estopping the defendants from denying the facts upon which it was based. The same was done and approved by the Supreme Court, in

the case of *San Francisco v. Spring Valley Water Works*, 29 Cal. 481, 482. (*People v. Supervisors of S. F.*, 27 id. 674, 676, 679.)

E. A. Lawrence, for Respondent.

The Statute of Limitations runs on a certificate of deposit in two years, and also on a note payable on demand. *Brummagim v. Tallant*, 29 Cal. 503; *Morrison v. Mullin*, 34 Pa. St. 12; *Estate of Galvin*, 51 Cal. 215; *Codman v. Rogers*, 10 Pick. 112.) If the judgment is the cause of action stated (*Anderson v. Mayers*, 50 Cal. 525), it is not alleged that summons was served, or that Kelly appeared, and shows no jurisdiction was acquired to render the judgment. Plaintiff has lost his right to bring this suit by laches. He has acquiesced in the purchase by Kelly. (2 Perry on Trusts, 850, 865, 869, 870.)

The Court:

The demurrer to the third amended complaint was properly sustained. The allegation with reference to the investment of the trust moneys, by defendant James Kelly, in the lot of land described, is: "That whilst said trust money has been so as aforesaid in the hands of the said James Kelly, he, the said James Kelly, has invested the same," etc. For aught that appears, the investment was made with full knowledge on the part of plaintiff before the action was brought to recover the amount deposited, with interest, which resulted in the judgment at law, and facts are alleged showing that plaintiff had complete information with respect to the amount and condition of the trust fund.

Under such circumstances, plaintiff must be held to have elected his remedy at law, and to be estopped from pursuing in equity the fund into the homestead. (See 2 Story's Eq. Juris. 1097; *Dash v. Van Kleeck*, 7 Johns. 497; S. C., 5 Am. Dec. 291; *Wells, Fargo & Co. v. Robinson*, 13 Cal. 141.)

Judgment affirmed.

[No. 8,673. — In Bank.]
November 23, 1882.

BELCHER CONSOLIDATED GOLD MINING COMPANY v. AUGUSTINE DEFERRARI ET AL.

EJECTMENT — DAMAGES — FINDINGS — ESTOPPEL BY JUDGMENT. — The complaint being in ejectment, with an averment of damages, the Court below failed to find expressly upon the issue created by the denial of that averment; but no judgment was rendered for damages.

Held: The defendant can not complain of omission which did them no injury. The judgment will bar any further action to recover the same damages.

LOCATION OF MINING CLAIMS — ESTOPPEL BY DEED — JUDICIAL NOTICE. — The lower Court found that, on a certain day, the plaintiff became the purchaser by "deed from the defendants and others," of the mining claims described in the complaint, and entered into possession thereof.

Held: In the absence of proof of subsequently acquired title from a paramount source, the defendants are estopped from denying that they and their co-grantors were the owners of and entitled to the possession of the mining claims at the execution of the deed.

ID. — ID. — ID. — As the appellate Court takes notice of the character of the property, and its original ownership in the United States, defendants are estopped from denying that they and their co-grantees (or those from whom they derived) had located the mines in accordance with the laws of the United States, the only way in which the title could be acquired.

WORK ON MINING CLAIMS — FORFEITURE. — The lower Court found that in the year 1880 plaintiff expended in labor on the two claims one hundred dollars, and in January, 1881, resumed work upon the claims and expended in labor twenty-four dollars before the entry and location of defendants in August, 1881.

Held: Under Section 2324, Revised Statutes of the United States, allowing resumption of work, "after failure and before location," plaintiff's rights were not forfeited when defendants entered.

ID. — ID. — It is unnecessary to decide that an attempt to assert a continuous right may be based upon a pretense of work, so plainly a sham that it will be disregarded, as here the work done was actual and valuable.

ID. — ID. — Forfeitures and denunciations are not to be favored by basing them upon language which does not plainly and unmistakably provide for them.

APPEAL from a judgment for the plaintiff, in the Superior Court of Tuolumne County.

Street & Street, for Appellants.

The Court failed to find on all the material issues of the case, in omitting to find on the issue of damages. The judg-

ment, as it now stands, could not be pleaded in bar to a further suit by plaintiff against defendants to recover the damages alleged to have been sustained by reason of the acts of defendants. (*Glascock v. Ashman*, 52 Cal. 420; *Morenhaut v. Wilson*, id. 263; *Watson v. Cornell*, id. 91; *Phipps v. Harlan*, 53 id. 87; *Baggs v. Smith*, id. 88; *Shaw v. Wandersforde*, id. 300; *Taylor v. Reynolds*, id. 686; *Paulson v. Numan*, 54 id. 123; *Byrnes v. Claffey*, id. 155; *Du Prat v. James*, 10 P. C. L. J. 102.)

The first requisite for holding the possession of mining lands belonging to the Government of the United States is a location, which shall comply with the requirements of Section 2324 of the United States Revised Statutes. The court below has not found that the plaintiff, or its grantor, made any location, valid or otherwise, of the mining claims in controversy. As far as the finding shows, the deed from the defendants and others, is the only title to the right of possession which plaintiff has to these mining claims. Defendants are not estopped from denying the title of plaintiff to the portion of those mines conveyed to it by its other grantors. The defendants aver in their answer, "that the said mining claims, prior to August 1, 1881, were a part of the public domain and belonged to the United States Government, and were open to location by citizens of the United States." There is no finding whatever upon this affirmative matter set up in the answer, which, constituting a valid defense, should have been found on. (*Swift v. Canavan*, 52 Cal. 417.) Upon these facts as found, appellants are entitled to judgment. (*Hilliard on New Trials*, 104, § 12.)

Plaintiff did not make such a resumption of labor in the month of January, 1881, upon these mining claims, as would relieve them from the forfeiture of the year 1880. If the expenditure of twenty-four dollars in labor for the month of January, and no further labor done, during the first six months of the year, after the forfeiture of 1880, is a sufficient resumption, and saves a complete forfeiture of these mining claims, then they may be held from year to year, with the expenditure of only twenty-four dollars upon them, or even less. Appellants hold, that a resumption of labor, in good

faith, upon a mining claim, should be by an expenditure, for labor and improvements, sufficient to make up the balance of the deficiency for the former year, and also begin the assessment work for the incoming year.

Edwin A. Rodgers, for Respondent.

A finding on the issue for damages is not material nor necessary to sustain a judgment for the recovery of the claims. The defendants can not complain because there is no finding on the question of damages. They are not hurt.

The plaintiff had a right to waive that branch of its case. Admitting that the claims were subject to relocation on the first of January, 1881, by reason of the non-performance of the amount of work on said claims in 1880, required by law to hold said claims, still plaintiff, by resuming work on said claims in January, 1881, and before defendants attempted relocation thereof, made said claims not subject to relocation by defendants. (*Gonu v. Russell*, 3 Montana, 358; 1 Miller, U. S. S. Court, 104; U. S. Rev. Stat., § 2324.)

McKINSTRY, J.:

The complaint is in the ordinary form of ejectment, with an averment of damages caused by the excavation and removal of gold-bearing quartz by defendants during their adverse holding.

1. The Court below failed to find expressly upon the issue created by the denial of the averment as to damages. It is urged by appellants that this failure necessitates a reversal of the judgment. But no judgment was rendered for damages, and defendants (the appellants) can not complain of an omission which did them no injury. The judgment herein will constitute a bar to any further action to recover the same damages.

2. It is said there is no finding that plaintiff or his grantors located the mine as required by Section 2324 of the United States Revised Statutes. The Court found that plaintiff, on the ninth day of April, 1878, became the purchaser "by deed from the defendants and others" of the mining claims described in the complaint, entered into possession thereof, etc. In the absence of proof of subsequently ac-

quired title from a paramount source, the defendants are estopped from denying that they and their co-grantors were the owners of and entitled to the possession of the mining claims when the deed to the plaintiff was executed. As we take notice of the character of the property and its original ownership in the United States, the defendants were estopped from denying that they and their co-grantors (or those from whom they derived) had located the mines in accordance with the laws of the United States — the only way in which the title could be acquired.

3. The Court found that in the year 1880 plaintiff expended in labor on the two claims one hundred dollars; that in January, 1881, plaintiff resumed work upon the claims, and expended in labor twenty-four dollars. Defendants entered and located in August, 1881. As the plaintiff had resumed work upon the claims "after failure and before location," his rights were not forfeited when defendants entered. (R. S. U. S., § 2324.)

It is urged that the resumption of work was not such as is required by the Act of Congress; that if so, one may fail to perform the work required by the Act during any year, and yet keep alive his right indefinitely by doing *any* work during the January following. In other words, that, by such construction, while the Act requires one hundred dollars' worth of work each year, a party may keep his claim good by doing one dollar's worth each year, provided he shall succeed in doing it before a relocation can be accomplished. It is not necessary to decide that an attempt to assert a continuous right may be based upon a pretense of work, so plainly a sham as that it will be disregarded. But here the work done was actual and valuable. The letter of the statute upholds the view, as to resumption of work, taken by the Court below, and forfeitures and denunciations are not to be favored by basing them upon language which does not plainly and unmistakably provide for them.

Judgment affirmed.

McKEN and ROSS, JJ., concurred.

[No. 7,331. — In Bank.]
November 23, 1882.

HORACE WILSON v. SOUTHERN PACIFIC RAIL- ROAD COMPANY.

VERDICT — EVIDENCE — NEGLIGENCE. — The verdict of a jury against the defendant in an action for negligence, is conclusive on appeal to the Supreme Court on the question of negligence, and also upon all the allegations in the complaint material to recovery in the action, if there was any evidence to warrant the verdict.

NEGLIGENCE — EVIDENCE — PRIMA FACIE CASE — WAREHOUSEMAN — BURDEN OF PROOF. — A *prima facie* case of negligence is made out against a warehouseman who refuses to deliver property stored with him, upon proof of demand and refusal. Such evidence alone is sufficient to show a conversion by him. But if it appear that the property, when demanded, was consumed by fire, the burden of proof is then on the bailor to show that the fire was the result of the negligence of the warehouseman.

EVIDENCE — POSITIVE — CIRCUMSTANTIAL. — Negligence may be shown not only by direct and positive evidence, but by any circumstances which tend to prove it, or from which it may be reasonably inferred.

EVIDENCE — NONSUIT — NEGLIGENCE. — On a trial before a jury in an action for negligence, a nonsuit should not be ordered by the court unless there is no evidence at all, or a mere scintilla of evidence wholly insufficient for the consideration of the jury, or unless the facts are agreed upon or admitted, and in the judgment of the Court are insufficient to constitute a cause of action.

EVIDENCE — NONSUIT. — In this case the evidence discussed, and *held*: That the motion for a nonsuit was properly denied by the Court below.

EVIDENCE — ADMISSIBILITY. — In an action against a warehouseman for negligence, to recover damages for loss by fire of goods stored with him, evidence which tends to show the condition of the building at the time of the fire, and all the facts and circumstances connected with the fire, are admissible.

ERROR WITHOUT INJURY. — Though the Court below may have erred in denying a motion to strike out part of a pleading as irrelevant, immaterial, and redundant, still, if the facts alleged be proved in the case without objection, or if they be inseparably connected with the evidence, *Held*: Error without injury.

INSTRUCTION — VERDICT. — When the instructions, taken as a whole, fairly submit the case to the jury, the verdict will not be disturbed for mere inaccuracies or errors from which no possible injury could have resulted.

CUMULATIVE EVIDENCE — NEW TRIAL. — The motion for a new trial was properly denied because the newly discovered evidence was cumulative.

EXCESSIVE DAMAGES. — In this case it is not shown that the damages found are excessive, or that they were given under the influence of passion or prejudice.

APPEAL from a judgment against the defendant in the

Superior Court of the County of San Benito, and from an order denying a motion for new trial. BREEN, J.

Action against the defendant as warehouseman for negligence. On the thirty-first day of October, 1875, the plaintiff owned and stored with the defendant, in its warehouse at Hollister, in the County of San Benito, sixty-four bales of wool, weighing in the aggregate twenty-two thousand two hundred and seventy-five pounds. On January 5, 1876, the warehouse was consumed by fire and all the wool was burned, except three bales saved uninjured, and about three hundred and seventy pounds in a damaged condition.

There was evidence showing or tending to show that the wool at the time it was burnt was worth thirteen cents a pound, and that the three hundred and seventy pounds after the fire were worth three or four cents a pound. The action was tried before a jury, in April, 1880, and the verdict was for the plaintiff in the sum of three thousand five hundred and eighty-nine dollars and seventy-one cents. As a part of the cause of action the complaint alleged that the defendant was a railroad corporation, duly incorporated, and at the several dates mentioned in the complaint owned and operated a railroad in the County of San Benito, which road ran through the town of Hollister. A motion was made by the defendant in the Court below to strike out all of these allegations, on the ground that they were irrelevant, immaterial, and redundant. The motion was denied, and the defendant presented and filed its bill of exceptions.

On the trial the Court below, on its own motion, after giving the instructions asked by defendant, gave with other instructions the following: "In this case the principal question you will have to determine is this: Was the defendant or its servants guilty of culpable negligence in respect to the burning of the wool? This question you will have to determine from the proofs and circumstances of this case, measured, as they must be, by rules of law, as you have laid down to you.

"As an abstract principle it is somewhat difficult to locate exactly the point where due care ends and culpable negligence begins; but the line must be drawn somewhere.

"In some cases the law exacts the utmost diligence and care,

while in others the rigor of the rule is relaxed, as, for instance, if a warehouseman received for safe keeping or storage a valuable package, known to contain diamonds, he would not be permitted to excuse himself for their loss by showing that he had exercised the same degree of care or diligence in protecting them from loss, as he and ordinarily prudent and careful warehousemen were in the habit of bestowing on less valuable and heavier articles of merchandise, such as are generally committed to the care of warehousemen; so the locality and other surrounding circumstances are frequently important factors to be considered by a jury in actions of this kind. By way of illustration I will say that, at the present time, the law would exact from a warehouseman doing business in a populous city like San Francisco, a greater degree of care and circumspection than from one doing business in a rural town like Hollister; because, judging from the public acts and utterances of certain individuals, it would be reasonable to infer that there is a more disturbed and feverish social condition there than here, and, consequently, the danger to property from riotous acts would be more imminent in the city than in the country; and the person of ordinary care and prudence would be expected to govern himself accordingly, and increase his precautions against loss that might occur from the condition just referred to.

“Precaution should be taken just in proportion to the imminence of probability of harm. There always being of course a fixed and reasonable limit, beyond which none is expected to go with his efforts, and what or where that limit is in this case is a question that you alone have authority to answer. It is a question of fact to be determined from what has been conceded and proved in this case, and in determining this question you may consider any facts and surrounding circumstances of the character just mentioned, and similar ones bearing on the question of negligence, and give to them such weight as in your judgment they may be entitled to.

“The general rule that should apply in cases of this character is: that the same care should be taken as a man of ordinary prudence and caution would manifest in looking to his own interest. But to exonerate the defendant it will not be sufficient for it to show that the same degree of care with

respect to the property in question was exercised as was wont to be bestowed on its own property, unless it appears that that degree was up to the ordinary standard of care and caution. The standard to which you will refer is, how did the management of the defendant correspond with that of other persons of ordinary care and caution engaged in the same business in this and other communities similarly situated and circumstanced?

"The testimony in this case does not positively disclose the origin of the fire, but it is insisted by the plaintiff that, whatever it may have been, its origin and destructive progress are attributable to defendant's negligence in these respects: 1. In not keeping a watchman on the premises; 2. In leaving the lower part of the building exposed, so that vagrants or vicious persons could get under it; 3. In not having a proper water supply or connection with the water-works of Hollister; 4. In leaving a lighted lamp on the premises, from which, it is claimed, the fire originated. These are all questions of fact, that you are to determine from the evidence. But even if you find that the defendant did, or omitted to do, all the acts that plaintiff complains of, it does not necessarily follow that the defendant was culpably negligent in his conduct. The question would again recur, were those acts or omissions of that negligent character that in law are called culpable? If, then, you find the defendant did, or omitted to do, as he is charged by the plaintiff, and that the acts or omissions were negligent in the sense in which the term is used in this connection, and that in consequence of these acts and omissions the fire originated and progressed until the property in question was destroyed, the defendant is liable to plaintiff for the value of the property lost or damaged.

"You are the sole and exclusive judges of the credibility of the witnesses who have testified before you, and of the weight that is to be given to any testimony offered here."

All the other facts are stated in the opinion of the Court.

McKisick & Rankin, for Appellant.

Ordinary care is all that is required of a depositary for the preservation of the thing deposited. (C. C., § 1852; Wharton on Negligence, § 573.) If the thing deposited is lost by fire,

the burden of proof is on the plaintiff to show that the fire occurred through the negligence of the defendant. If the depositor demands the thing deposited, and it can not be found, the defendant must exculpate himself. (*Jackson v. Sacramento V. R. R. Co.*, 23 Cal. 269; see also 46 N. Y. 271; 6 Wend. 271; 7 Allen, 98; 1 Gray, 263.)

The negligence of the warehouseman must be the cause of the injury. (Wharton, §§ 576-597; *Roberts v. Gurney*, 120 Mass. 33; 15 Wall. 537; Shearman & R. on Neg., §§ 8-9.) Proximate cause is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue. (Shearman & R. on Neg., § 10; *Ill. C. R. R. Co. v. Benton*, 69 Ill. 174; *Smith v. Leavenworth*, 15 Kan. 81; *Scott v. National Bank*, 72 Penn. St. 471.) If there be no evidence of negligence, or a mere scintilla of evidence, the Court should grant a nonsuit. (*Cotton v. Wood*, 8 C. B. (N. S.) 568; *Brooks v. Somerville*, 106 Mass. 271; *Denny v. Williams*, 5 Allen, 1; *McCaig v. Erie R. R. Co.*, 8 Hun, 599; 104 Mass. 71; *Toomey v. L. etc. R. R. Co.*, 3 C. B. (N. S.) 146-150; *Cornman v. E. C. R. Co.*, 4 H. & N. 781; L. R., 3 App. Cas. 1155; 99 Mass. 612; *Briggs v. Oliver*, 4 Hurl. & Colt. 403; Shearman & R. on Neg., § 11; 49 Cal. 257.)

Here there is no evidence tending to show that the defendant or its servants were negligent, or that its or their negligence was the approximate cause of the injury complained of. We have seen that in a case of this kind, the law will not presume negligence. We have also seen that the law emphatically condemns "surmise and imagination," when the verdict can rest upon nothing else. If, then, presumption, surmise, imagination, be excluded, the plaintiff's case rests alone, upon the facts, that there was a fire, and consequent loss, and the case has not, for the plaintiff, advanced beyond the point where it was when the complaint and answer were read to the Court and jury. We have also seen that "the burden of proof in an action upon negligence, always rests upon the party charging it." * * * And that, "It is not enough for him to prove that he has suffered loss by some event which happened upon the defendant's premises, or even by the act or omission of the defendant. He must also prove

that the defendant in such act or omission violated a duty resting upon him. (S. & R. on Neg., § 12.)

As to the larry theory: That is without the shadow of a foundation to rest upon; it is purely imagination, and is met and overthrown by the "familiar principle, that negligence being a wrong, will not be presumed, but must be proved by the party charging it and seeking a recovery thereon." And if a presumption is to be indulged in, the presumption is that the servant was negligent while engaged about his own affairs, as it was not shown that he had any duty to perform for his employer, at or near the time the fire occurred. *Harlan v. St. Louis etc. R. R. Co.*, 65 Mo. 22; *First Nat. Bank v. Ocean Bank*, 60 N. Y. 278; *Doggett v. Richmond etc. R. R. Co.*, 78 N. C. 305; *Hoag v. Lake Shore R. R. Co.*, 85 Pa. St. 293; *Gilman v. Noyes*, 57 N. H. 627.)

An application of the foregoing plain, incontrovertible rules of law to the facts of this case, would have sustained the defendant's motion for a nonsuit. For the purpose of testing the correctness of the ruling of his honor, the superior judge, we will admit, for that purpose only, that all of the testimony offered by the plaintiff was competent. The testimony goes no further than to show a case of accidental fire, its real origin being wholly unknown.

The averment that defendant owned and operated a railroad was not necessary or proper, and, whether intentional or not, tended to irritate and excite the prejudices of the jury against the defendant. Immaterial matter in a complaint is irrelevant, and the defendant has the right to have it removed. (Code C. P., § 453; *Larco v. Casaneuava*, 30 Cal. 565; *Willson v. Cleaveland*, id. 200; *Green v. Palmer*, 15 id. 414; *Coryell v. Cain*, 16 id. 571.)

The charge of the Court, excepted to by the defendant and assigned as error, was manifestly erroneous and improper in this, that after having correctly instructed the jury upon the question of negligence, at the request of the defendant, the entire effect of those instructions was destroyed by introducing into the case hypothetical and contradictory statements, and in allowing the jury to determine the whole case without proper and legal limitations and qualifications applicable to the case on trial; and under the circumstances of this case was too

broad, and without proper qualification, and was error. (*People v. Arnold*, 15 Cal. 482.) Although the Court did not literally instruct the jury to "take into consideration all of the case and do equal justice between the parties," an instruction condemned by this Court, in a case of negligence, in *Kelly v. Cunningham*, 1 Cal. 367, the Court did say: "You may consider any facts and surrounding circumstances of the character just mentioned and similar ones bearing on the question of negligence, and give to them such weight as in your judgment they may be entitled to."

This, after he had instructed them that they were not to give any weight to certain particular facts unless they found that other facts existed. This was not only contradictory, but tended directly to confuse the jury, and was error. (*Bank of Stockton v. Bliven*, 53 Cal. 708; *In the Matter of Estate of Cunningham*, 52 id. 465; *McCreery v. Everding*, 44 id. 246; *People v. Anderson*, id. 65.) The instruction directly contravenes another principle of the law of negligence, for it authorized the jury, not only to consider all the facts, but to give to them such weight as in their judgment they might be entitled to, no matter how remote the cause of the fire may have been from any negligent act of the defendant. "The law is well settled that in actions for negligence, the damages to be recovered are only those of which the negligent act is the proximate cause," says this Court in *Chidester v. Con. P. Ditch Co.*, 53 Cal. 56, where the judgment was reversed for error in the instruction, and also because there were contradictory instructions.

Among other objectionable things, the Court said to the jury: "By way of illustration I will say, that at the present time, the law would exact from a warehouseman doing business in a populous city like San Francisco, a greater degree of care and circumspection than from one doing business in a rural town like Hollister, because, judging from the public acts and utterances of certain individuals, it would be reasonable to infer that there is a more disturbed and feverish social condition there than here, and consequently the danger to property from riotous acts would be more imminent than in the country."

We submit that this was under the circumstances highly improper.

Undoubtedly the general rule is, that a new trial will not be granted upon the ground of newly discovered cumulative evidence, but that the rule has its exceptions, like all other general rules, is quite as well settled. (*Tuttle v. Cooper*, 5 Pick. 414; 3 Gra. & Wat. on New Trials, 1063-1064, 1081, 1344.) "A new trial will not be refused solely because the newly discovered evidence is cumulative, if it will make a doubtful case clear." (3 Gra. & Wat. on New Trials, 1063 and 1064; applied in *Hoyt v. Saunders*, 4 Cal. 345.) The affidavits offered fall within the rule, they will make a doubtful case clear. It is evident that the jury gave the plaintiff his anticipated or speculative profits, and the verdict should be set aside on that ground. (*Muldrow v. Morris*, 2 Cal. 74; *Moody v. McDonald*, 4 id. 297.)

Laine & Lieb, for Respondent.

McKEN, J.:

The appeal in this case comes from a judgment and order denying the motion of appellant for a new trial in an action to recover damages for the destruction of certain property of the respondent, by a fire caused, as alleged, by the negligence of the appellant and its employees in conducting and managing its warehouse in which the property had been stored.

The case was tried by the Court with a jury, and a verdict was rendered against the appellant. If there was any evidence to warrant the verdict we can not review it on appeal. It is conclusive upon us, not only on the question of negligence, but upon all the allegations in the complaint material to recovery in the action. (*Algier v. Steamer Marie*, 14 Cal. 167; *Brown v. Brown*, 41 id. 88; *Trenor v. C. P. R. R. Co.*, 50 id. 222.) It is, however, contended that there was no evidence to sustain the verdict, and that the Court below erred in denying a motion for a nonsuit.

It was proved on the trial that the respondent had stored in the appellant's warehouse sixty-four bales of wool of a certain value per pound, which, on demand and tender of the storage due upon it, the appellant refused to deliver to the respond-

ent, assigning, as a reason, that the warehouse and all it contained, except about three bales of wool, which were returned to him, had been consumed by fire.

A *prima facie* case of negligence is made out against a warehouseman, who refuses to deliver property stored with him, upon proof of demand and refusal. Upon such proof alone the burden is on him to account for the property; otherwise he shall be deemed to have converted it to his own use. But if it appears that the property, when demanded, was consumed by fire, the burden of proof is then on the bailor to show that the fire was the result of the negligence of the warehouseman. (*Harris v. Packwood*, 3 Taunt. 264; *Beardslee v. Richardson*, 11 Wend. 26; *Browne v. Johnson*, 29 Tex. 43; *Lamb v. Camden and Amboy R. R. Co.*, 46 N. Y. 271; *Jackson v. Sac. Val. R. R. Co.*, 23 Cal. 269.)

The negligence of the appellant, as the proximate cause of the loss of the property by fire, thus became the essential fact to recovery; and the burden of proof was upon the plaintiff in the action. It was incumbent on him to prove that the defendant had, by some act of omission, violated some duty, by reason of which the fire originated; or that some negligence or want of care, such as a prudent man would take under similar circumstances of his own property, caused or permitted, or contributed to cause or permit, the fire by which the property was destroyed.

Direct and positive evidence of negligence as a fact is not required. Any circumstances which tend to prove it, or from which it may be reasonably inferred, are sufficient. And when such evidence has been given on the trial of an action, it is not for the Court to usurp the disposition of the fact by ordering a nonsuit. Such an order should not be made, unless there is no evidence at all, or a mere scintilla of evidence wholly insufficient for the consideration of the jury, or unless the facts are agreed upon, or admitted, and (in the judgment of the Court, are insufficient to constitute a cause of action. Upon facts admitted, or proved and found, it is the duty of the Court to say what the law applicable to them is. But where negligence, as the essential fact in the case, is disputed, and the evidence of it is conflicting, or consists of circumstances from which inferences may be drawn for or against

it, it is the province of the jury to determine, under instructions by the Court, whether the evidence establishes it as the proximate cause of the injury complained of.

Applying these principles to the record before us, we find there was no error in sending the case to the jury. For the evidence upon which the plaintiff rested went to show that the building, up to the time of the fire, had been used by the defendant as a warehouse and railroad depot, and was in charge of two employees of the defendant, one of whom was its local agent, and the other its warehouse-keeper. In the warehouse, cut off from the northern end of the building, there was adjoining the office and sitting-room of the railroad depot, a bed-room in which the keeper slept every night. The room was about fourteen feet square; its walls were constructed of upright redwood boards, about fourteen feet high, which were lined with cloth and paper. It was occupied with the bed and furniture of the keeper, and on the walls hung his clothes and files of newspapers. On a shelf against one of the partition walls in the warehouse were kept several lamps trimmed and ready for use. On the evening of the fire, the local agent had left the warehouse in charge of the keeper, whose duty it was to "shut up the doors of the warehouse and fasten it up for the night." Having performed that duty, the keeper himself went to supper, and after supper returned to the warehouse. When he returned he went into the office, lit one of the lamps, took it into his bedroom, and set it down on a little stand at the head of his bed, between the window and bed, and about three feet from the window. He remained while he changed his clothes, and dressed himself for the purpose of going out to visit some friends. Having finished his toilet, he locked up and left the warehouse.

What he did with the lighted lamp before leaving is thus stated by himself: "After I had partially changed my clothing, I returned to the office and remained there perhaps half an hour or three quarters of an hour; * * * I think I extinguished my lamp and went away. * * * No lamp was burning when I left the depot. When I came out of the office into the sitting-room I turned down the lamp, blew it out, and set it on a little shelf within the office, to the left of

the office door. * * * I looked at it, saw it was out, and left it." About an hour or so after he had gone the warehouse was afire.

The first person to observe the fire was the proprietor of a hotel, situate about three hundred feet from the warehouse. Seated in the front office of the hotel, looking through the glass window of the door of the office, his attention was arrested by a sudden flash of light, which momentarily lighted up the warehouse and then went out, leaving the warehouse enveloped in smoke. Remarking to some one near him that the warehouse was afire, he ran out and gave the alarm. Those whom the fire alarm drew first to the burning building, discovered, as they ran to it, the fire dropping from about the center of the warehouse, very near to the locality of the bedroom and office; and on reaching the spot, they kicked in the bedroom and office windows, and saw the office filled with smoke and the bedroom afire — the flames running up the partition walls and over the bed.

There is no doubt that the warehouse-keeper had the right to light the lamp, and use it in the bedroom and office before leaving the warehouse; and it was reasonable to infer that a careful use of the lamp would not have set fire to the warehouse. But it would also be a reasonable inference that a negligent use of the lamp might have occasioned the fire; and the question arose whether, under all the circumstances, in connection with the use of the lamp, the warehouse-keeper *was* careless in using the lamp while in the bedroom and office, or in the extinguishment of it before he left the warehouse. If he was careless in its use or extinguishment, and that carelessness caused the lamp to explode or otherwise ignite any inflammable matter near to it which fired the building, the fire would be attributable to the negligence of the defendant.

Now, it was an indisputable fact that the warehouse was fired from some cause; it was also indisputable, that the fire occurred while the warehouse, in which the keeper had been using a lighted lamp, was under the lock and key of the defendant, and soon after the warehouse had been closed by the keeper for the night; and (as the evidence tended to show) the fire originated at, or "very near" the bedroom and office

in the warehouse in which the lamp had been used. It is manifest that these facts and circumstances point, somewhat at least, in the direction of the lamp as the cause of the fire. And even if inferences to be drawn from them as to the origin of the fire were uncertain and controvertible, yet as differences of opinion upon the subject might reasonably exist in the minds of intelligent men, the facts and circumstances were for the consideration of the jury and not for the Court. It was for the jury to determine from them, in connection with the other circumstances in the case, whether the warehouse-keeper used due care in respect to the lamp, its use and extinguishment; and whether the fire originated in his carelessness or from accidental causes, such as spontaneous combustion of the wool in the warehouse. Defendant's counsel attributed the fire to that cause. But there seems to be nothing in the evidence in the record to sustain his theory. And, however that may be, there was in the evidence of the case sufficient to warrant the Court in submitting it to the consideration of the jury.

There was, therefore, no error in denying the motion for a nonsuit, nor did the Court err in overruling objections which were made at the trial to the admission of evidence which tended to show the condition of the building at the time of the fire, and all the facts and circumstances connected with the fire. These were properly allowed to go to the jury for their consideration upon the issue submitted to them.

The Court may have erred in denying the defendant's motion to strike out the averment in the complaint, that "the defendant was the owner of and operated a railroad in the county," etc., but it was error without injury; for the fact that the defendant was in possession of the building and used it as a warehouse and depot in connection with its railroad, was proved in the case without objection; and it was inseparably connected with the evidence as to the use of the warehouse. We can not, therefore, perceive how the averment of the fact in the complaint tended to "irritate and excite the prejudices of the jury against the defendant." There is nothing in the record suggestive even of the existence of such prejudices; and nothing to overcome the presumption that the verdict

was a fair expression of judicial opinion warranted by the evidence, submitted to the jury for their consideration.

Some parts of the charge of the Court may be subject to verbal criticisms, but we see nothing in it inharmonious or misleading. Taken as a whole it fairly submitted the case to the jury; and under such circumstances the verdict will not be disturbed for mere inaccuracies or errors, from which no possible injury could have resulted to the defendant.

The newly discovered evidence upon which the defendant asked for a new trial was cumulative.

We can not say that the damages given by the jury are excessive, or appear to have been given under the influence of passion or prejudice.

No error prejudicial to the defendant appearing in the record, the judgment and order appealed from are affirmed.

ROSS, SHARPSTEIN, and MYRICK, JJ., concurred.

McKINSTRY, J., concurred in the judgment.

[No. 8,163. — Department One.]

November 23, 1882.

EVA M. DUNN v. D. G. DUNN ET AL.

HABITUAL INTEMPERANCE — DIVORCE. — Under Section 107 of the Civil Code, habitual intemperance, as defined in Section 106 of the same Code, must continue for one year before it is a ground for divorce.

FINDING. — If on that issue there be no finding showing the continuance of habitual intemperance for one year, the judgment will be reversed.

APPEAL by the defendant, D. G. Dunn, from a judgment in the Superior Court of the County of Placer. MYERS, J.

Action against the defendant, D. G. Dunn, for a divorce on the ground of habitual intemperance. The answer of the defendant denied all of the allegations of the complaint relating to intemperance. The case in the Court below was tried before a jury, and upon the question of intemperance two special issues were submitted by the Court to the jury — that is to say: 1. Was the defendant, D. G. Dunn, so addicted

to the use of intoxicating drinks that he was disqualified a great portion of his time from properly attending to business? 2. Was the defendant, D. G. Dunn, guilty of the intemperate use of intoxicating liquors to such a degree as to inflict upon the plaintiff, Mrs. Eva Dunn, a course of great mental anguish? The jury answered both in the affirmative. Judgment was given for the plaintiff. The judgment recited that it was based on the findings of the jury.

J. M. Fulweiler and J. E. Prewett, for Appellant.

The findings of the jury are insufficient to justify a decree. The first finding does not find that defendant was guilty of habitual intemperance for a period of one year, and defendant might admit the truth of said finding, and yet plaintiff would not, as a conclusion of law therefrom, be entitled to a divorce. The duration of the intemperance is a material issue. The findings must cover all the material issues and support of the judgment. (See *Downing v. Graves*, 55 Cal. 544; 53 Cal. 88, 300; 16 id. 113; 17 id. 299; 17 id. 511; 19 id. 103.)

In this case the findings are clearly insufficient to support the decree, and they were excepted to by defendant. There can be no implied findings, for: 1. Findings were not waived; 2. There are some findings by the jury, and the Court can not supplement them or add to them, because a jury trial was not waived; and, 3. The decree purports expressly to be founded upon the findings of the jury. (See *Forbes v. Hyde*, 31 Cal. 355; *Montgomery v. Tutt*, 11 id. 317.)

Hale and Craig, for Respondent.

To appellant's objection here, that said first and second findings do not embrace the element of time, as provided in Section 107 of the Civil Code, we think this a conclusive answer, viz.: that the terms of each of said issues, *ex vi termini*, embrace all of the elements requisite to constitute intemperance — as a legal cause of divorce.

Taken together, Sections 92, 106, and 107 of the Civil Code define intemperance as a legal cause for divorce. Section 92 prescribes for what causes divorces may be granted, one of which is habitual intemperance. Sections 106 and 107, taken

together, define habitual intemperance, and it is declared to be that degree of intemperance from the use of intoxicating drinks, continued for one year, which disqualifies the person, a great portion of the time, from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party.

We submit that, in legal intent and effect, by said first and second issues, the Court presented to the jury for answer the one vital question, viz.: Had the defendant been guilty of habitual intemperance (as legally defined), with the result, either as to his business, or upon the mental condition of plaintiff, which would legally justify her in demanding a divorce, and to this question the jury answered that he had been so guilty.

Any other reading of the record is too narrow; is, in fact, to stick in the bark.

The Court:

The ground relied on by the plaintiff for divorce was the alleged habitual intemperance of the defendant. Section 106 of the Civil Code declares that "habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party;" and the following section declares that such intemperance must continue for one year, before it is a ground for divorce. There is in the case before us no finding that the habitual intemperance of which the defendant was found guilty had continued for the period of one year, for which reason we are bound to remand the cause. Judgment reversed and cause remanded for a new trial.

[No. 8,743. — Department One.]

November 23, 1882.

THOMAS MENZIES ET AL. v. THE BOARD OF EQUALIZATION OF THE COUNTY OF MONO.

CERTIORARI TO BOARD OF EQUALIZATION — PRACTICE. — Application for writ of certiorari denied on the ground that the petition did not show a sufficient reason why the application should not have been made to the Superior Court.

APPLICATION for writ of certiorari to the Board of Equalization of the County of Mono to review an order of the Board directing the Assessor to assess to the plaintiffs a mortgage standing in their names upon the records of the county which had not previously been assessed. The affidavit alleged that no notice was given by the Clerk of the proposed action by the Board, as required by Section 3681 of the Political Code, and further alleged as follows: "That petitioners made this application to this Court in the first instance for the reason that the application will only present a question of law, which must in the end be determined by this Court; and for the further reason that there is not time to apply to the Superior Court, and by appeal to this Court obtain a final judgment before the time fixed by law for the payment of taxes for said fiscal year."

Lloyd & Wood, for Plaintiffs.

No brief on file for Defendant.

The COURT:

The application for a writ of review is denied, the petition showing no sufficient reason why the application should not have been made to the Superior Court.

[No. 8,593. — Department One.]

November 23, 1882.

MARIA A. VANDEFORD v. C. F. FOSTER.**VERDICT — JURY — ISSUES — NEW TRIAL — EXCESSIVE DAMAGES.**

APPEAL from a judgment for the plaintiff, and from an

order denying a new trial, in the Superior Court of the County of Tehama. MAYHEW, J.

The facts in this case are similar to those stated in *Garlick v. Bower, ante*, 63.

Chipman & Garter, for Appellant.

Jerome Banks and Charles R. Barry, for Respondent.

The COURT:

On the authority of *Garlick v. Bower, ante*, 65, order denying appellant's motion for a new trial reversed and cause remanded.

[No. 6,229. — In Bank.]
November 28, 1882.

SANTA CRUZ RAILROAD CO. v. THE COUNTY OF
SANTA CLARA.

ACTION AGAINST COUNTY — LIABILITY OF SUPERVISORS. — The complaint alleged a failure of the Board of Supervisors to issue certain bonds to the plaintiff at the times the same should have been issued, and that the plaintiff had suffered damage thereby.

Held: The facts alleged would not justify a judgment against the county. For a neglect or a refusal to perform a duty imposed on him by law, a Supervisor is by Section 4088, Political Code, made personally liable.

APPEAL from a judgment for the defendant, on demurrer, in the Twentieth District Court, County of Santa Cruz. BELDEN, J.

The action was brought to recover damages alleged to have been suffered by reason of the delay of the Board of Supervisors of the County of Santa Cruz in issuing to the plaintiff certain bonds, to which the plaintiff was entitled under the contracts and laws referred to in the case of *Santa Cruz Railroad Company v. The Board of Supervisors of the County of Santa Cruz*, 8 P. C. L. 809.

Charles B. Younger, for Appellant.

The county contracted to deliver its bonds to appellant as

the work on the railroad progressed, and failed so to do until long after the stipulated times. Appellant was damaged thereby as though the contract had been executed between individuals.

J. H. Logan, for Respondent.

Admitting, for the purpose of argument, that the plaintiff has suffered damages by the negligence of the Supervisors, the county can not be held for the same. (*Sherbourne v. Yuba County*, 21 Cal. 113; *Huffman v. San Joaquin County*, 21 id. 426; *Crowell v. Sonoma County*, 25 id. 813.)

The COURT:

The demurrer to the complaint was properly sustained. We see no such statement of facts in the complaint as would justify a judgment against the county. For a neglect or a refusal to perform a duty imposed on him by law, a Supervisor is by Section 4086, Political Code, made personally liable.

Judgment affirmed.

[No. 8,726. — Department One.]

November 23, 1882.

VAUGHN v. WERLEY.

DISMISSAL OF APPEAL — DAMAGES. — On dismissal of appeal for failure to file transcript, damages can not be imposed.

MOTION to dismiss appeal.

Hale & Craig, for Appellant.

J. M. Fulweiler, for Respondent.

The COURT:

No transcript on appeal has been filed. The certificate of the Clerk below is on file, showing the matters required by Rule 4 of this Court. The appeal is dismissed.

We are asked to affix damages. The statute authorizes damages on affirmance of the judgment, if it appear that the appeal was taken for delay. In the absence of the transcript we have nothing from which to determine that the appeal was taken for delay. Application for damages denied.

[No. 6,582. — In Bank.]

November 28, 1882.

THE ST. HELENA WATER CO. v. A. B. FORBES.

EMINENT DOMAIN — PUBLIC USE — DEFINITION. — The supplying of the inhabitants of a town with pure fresh water, is one of the "public uses" in behalf of which the Legislature has declared the right of eminent domain may be exercised.

ID. — ID. — ID. — CORPORATION. — A corporation organized under the laws of this State, for the purpose of supplying the inhabitants of a town with fresh water, is authorized to exercise the right of eminent domain in behalf of such use.

ID. — ID. — ID. — STREAM OF WATER. — Under the laws of this State, the right of a private individual to enjoy the flow of water in its natural channel, upon or along his land, can be condemned for public use.

APPEAL by the defendant from a judgment in his favor, and from an order denying a new trial, in the Seventh District Court of the County of Napa. **WALLACE, J.**

McAllister & Bergin, for Appellant.

Stanly, Stoney & Hayes, and B. S. Brooks, for Respondent.

Ross, J.:

The plaintiff is a corporation organized under the laws of this State, for the purpose of supplying the inhabitants of the town of St. Helena with fresh water. The defendant is the owner of a tract of land through which run the waters of a certain creek called Hudson or York Creek.

The purpose of the present proceeding on the part of the plaintiff is to condemn the waters of the creek for the purpose of supplying the inhabitants of the town with water; and the principal question in the case is, whether or not, under the laws of this State, the right of a private individual to enjoy the flow of water in its natural channel, upon or along his land, can be taken from him for such purpose.

There can be no sort of doubt that the supplying of the inhabitants of a town with pure fresh water, is one of the "public uses," in behalf of which the Legislature has declared the right of eminent domain may be exercised. (Code of Civil Proc., § 1238.) Whether, with such declaration, the

Courts can in any case interfere, need not now be determined, since it is very clear that we would not be justified in holding that the supplying of the inhabitants of a town with pure fresh water is not a public use. It is equally clear that the plaintiff is authorized to exercise the right of eminent domain in behalf of such use. Section 1001 of the Civil Code provides: "Any person may, without further legislative action, acquire private property for any use specified in Section 1238 of the Code of Civil Procedure, either by consent of the owner or by proceedings had under the provisions of Title VII, Part III, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title is 'an agent of the State,' or 'a person in charge of' such use, within the meaning of those terms, as used in such title."

The only question about which we have had any serious doubt is whether the statute authorizes the condemnation of the particular kind of property here sought to be taken.

Section 1240 of the Code of Civil Procedure defines the property which is made subject to the exercise of the right of eminent domain, and Section 1239 classifies the estates and rights in lands subject to be taken for public use, as follows: "1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine. 2. An easement, when taken for any other use. 3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use."

It is sufficiently obvious, we think, that the property in question comes within the category of real property. "The rights of riparian proprietors," says Mr. Washburn, in his work on Easements and Servitudes, pp. 276-7 (215), "though coming under the head of what are called 'Natural Easements,' are not, in fact, the result of any supposed grant, evidenced by long acquiescence on the part of a superior proprietor, of the flow of the water from his land to the land below. The right of enjoying this flow, without disturbance or interruption by any other proprietor, is one *jure naturæ*, and is

an incident of property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself, in its natural state, unaffected by the tortious acts of a neighboring landowner."

"It is inseparably annexed to the soil, and passes with it, not as an easement, nor as an appurtenance, but as *parcel*," said Chief Justice Shaw, in *Johnson v. Jordan*, 2 Metc. 234; S. C., 37 Am. Dec. 85. (See, also, Angell on Watercourses, Sec. 141; *Brace v. Yale*, 10 Allen, 443; Civil Code, §§ 14, 658, 662.)

The water therefore, that runs over the defendant's land, is a part and parcel of his land. The Legislature has said that "an easement" in land may be taken for such public use as is here involved. Does this mean only an easement owned by the person against whom the right to condemn is asserted? We think not. As no man can have an easement in his own land, it would be only such easements as he might own in lands of others, that would be subject to be taken for public use, under such a construction of the statute as that. Yet the statute subjects all real property belonging to any person to the right of eminent domain, to be exercised in the cases and for the purposes therein stated. In other words, it authorizes the fee simple of all real property belonging to any person to be taken when needed for any of the public uses enumerated in subdivision 1 of Section 1239, and an easement in all real property belonging to any person, to be taken when needed for any other public use. The question remains: By taking the water that in its natural channel runs over the defendant's lands, does the plaintiff take an easement in the lands of defendant? If the defendant should sell to the plaintiff the right thus to divert the water, there can be no doubt that he would sell an easement in his land. (*Owen v. Field*, 102 Mass. 90; *Amidon v. Harris*, 113 id. 59; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Cary v. Daniels*, 5 Metc. 236; S. C., 41 Am. Dec. 532.) And if the plaintiff, by adverse use, should acquire the right, it is equally clear that the interest so acquired would be an easement in the land of the defendant. "In many cases," says Mr. Washburn in his work on Real Property, Vol. 2, c. 1, p. 321, "one landowner may acquire a right to apply the use of water upon his own lands so as essentially to impair

its use by other proprietors, above or below him, and even to interfere thereby with the enjoyments of the land of another; as for instance, by stopping the water of a stream in his own land, and flowing back the same upon the land of a proprietor above him, or diverting it so as to water it, or prevent its reaching the land of a proprietor below him in its natural quantity. A right thus to interfere with the natural right to make use of water belonging to another where it is connected with the occupation of land, would constitute an easement in favor of the latter, as the dominant estate. Such an easement may be acquired like other easements, by grant, or by an adverse enjoyment so long continued as to raise a legal presumption of a grant." (See also Wood on Nuisances, §§ 353, 354, 374; Angell on Watercourses, § 141.)

If there is any difference in the nature of the same right when acquired by condemnation proceedings, we are unable to perceive it.

In response to the suggestion that the proceedings taken in this case are in effect a violation of an injunction previously obtained by the defendant in respect to the same water, it is sufficient to say that the present plaintiff was not a party to the suit in which the injunction was awarded, and, besides, the right here asserted is to take the water upon making just compensation therefor.

Upon proof made, the Court below found all of the facts essential to authorize the taking.

We must affirm the judgment and order. *So ordered.*

MORRISON, C. J., and SHARPSTEIN, J., concurred.

MYRICK, J., concurring:

As the right to have the water flow in the stream to defendant's land is an incorporeal hereditament appertaining to his land, and is, therefore, real property, and as all real property of an individual, or such interest therein as may be necessary, may be taken by the right of eminent domain, in behalf of canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, etc., the taking of the water from the stream, above the land of defendant, is a taking of an interest in real property in behalf

of a public use. The land through, over, and upon which pipes, aqueducts, flumes, and ditches may be constructed or laid is not used by the public; the corporation uses the land for the conveying of water; the water, after having been conveyed, is taken by the public, and at that point, strictly speaking, is where the public use commences; but both the water and the land are taken, to the end that the public may be supplied with the one by the use of the other. In this case the plaintiff has already acquired the one, viz., places for its pipes, etc. (which are worthless and serve no purpose without water), and now it seeks to acquire the necessary water, such water, when acquired, to be used in behalf of, for the benefit of, to the interest of, for the behoof of, ditches, etc., for conducting water for the use of the inhabitants of a village. [See Worcester's Dictionary, "Behalf."]

THORNTON, J., concurred in the judgment.

McKEE and McKINSTRY, JJ., dissented.

[No. 8,485. — In Bank.]
November 23, 1882.

ESTATE OF W. W. HILL, DECEASED.

ESTATES OF DECEASED PERSONS — CONTEST OF CLAIM — SETTLEMENT OF FINAL ACCOUNT — APPLICATION TO SUPREME COURT TO PROVE BILL OF EXCEPTIONS. — An allowed claim may be contested at the settlement of the final account of the administrator, if such claim has not already been passed upon, and a party contesting such claim is entitled to an exception to any adverse ruling of the Court, and in case of the refusal of the Court to allow the exception, may apply to the Supreme Court under § 652, C. C. P., to prove the same.

APPLICATION to the Supreme Court to prove bill of exceptions.

H. S. Dickson, for Petitioners.

The COURT:

This is an application to prove certain alleged facts on which an exception was reserved, which exception it is

averred the Judge of the Court below has refused to allow in accordance with the facts. We have examined the petition and answer, and are of opinion that the petitioners should be allowed to make proof of such facts.

The matters referred to in the petition and answer relate to a contest as to a claim which had been allowed by the administrator, which allowance is contested by the heirs and distributees of the deceased, who are the petitioners.

The Judge of the Court below refers to the matters in issue as something incidental and collateral to the proceeding before the Court. In this we can not concur with him. The matters in contest relate to the allowance of a claim by the administrator of deceased, which, the petitioners allege, was improperly and unlawfully done; and these matters were brought before the Court, in connection with the settlement of the final account of the administrator. An allowed claim may be contested at such settlement (C. O. P., § 1636), when such claim has not been passed on on the settlement of a former account, or on rendering an exhibit, or on making a decree of sale. Such does not appear to have been the case with regard to the claim in this case.

We are of opinion that the prayer of the petitioners should be granted, and an order will be made that the petitioners be allowed to prove the facts alleged in their petition before Stuart S. Wright, on reasonable notice to be given.

[No. 8,504. — Department One.]

November 24, 1882.

A. L. HART v. JONAS SPECT ET AL.

BILL OF PARTICULARS — ACCOUNT — EVIDENCE — PRACTICE. — After the plaintiff had on the demand of the defendants served a bill of particulars, and under an order of the Court had furnished the defendants a further account in writing of the items of the plaintiff's claim, the defendants, without asking an order for a still further account, moved the Court for an order that the plaintiff be precluded from giving any evidence in support of his complaint, which motion was denied.

Held: An order precluding a party from giving evidence in support of his claim is proper only where such party has failed or refused to deliver to the adverse party on demand a copy of his account; and that the motion in this case was properly denied.

APPEAL by the defendant Jonas Spect, from the judgment of the Superior Court of the County of Colusa. BLANCHARD, J.

Action to recover the value of legal services. Trial before a jury. Verdict for plaintiff. The facts are stated in the opinion of the Court.

Dyas & Bridgford, for Appellant.

The only point presented by the record in this case is whether or not the Court erred in denying defendants' motion to preclude plaintiff from giving any testimony as to the account sued upon.

Section 454 of the Code of Civil Procedure reads as follows: "It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The Court, or Judge thereof, may order a further account, when the one delivered is too general or is defective in any particular."

In making the motion for the order to preclude plaintiff from giving testimony, defendants followed literally the rule of practice in such cases laid down by this Court in the case of *Conner v. Hutchinson*, 17 Cal. 280.

A. L. Hart, Respondent, *in propria persona*.

The bill of particulars served by the plaintiff upon the defendants in pursuance of the order of the trial Court, requiring an additional bill of particulars, was a sufficient compliance with such order. It set forth the items of the account sued on with as much particularity as the nature of the account would admit.

The object to be secured by requiring a bill of particulars to be furnished to a defendant in an action is, that he may be apprised of the particular nature of the demand made, and what will be attempted to be proved against him at the trial. This object was accomplished by the one furnished in the present case. (See *P. T. Co. v. Prader*, 32 Cal. 638.)

Section 454 of the Code of Civil Procedure, under which

the motion of defendants was made, does not authorize the trial Court to make an order precluding a plaintiff from giving any evidence of an account sued on, when he has, in good faith, furnished the defendant with a bill of particulars containing the items of the account, as far as it is in his power to do so. The section simply provides that if he fails to furnish the adverse party with a copy of the account, he shall be precluded from giving evidence thereof; and that when an account is furnished, if too general, the Court may require a more particular one.

The Court:

The complaint is to recover the value of legal services. Defendants demanded a bill of particulars, which was served. The Court made an order that plaintiff furnish a further account in writing of the items of the claim, setting forth the number of suits in which services were performed, the title of each suit, and the value of the services rendered in each suit, together with the date at which each item of service became due.

Plaintiff then served the further account following:

"JONAS SPECT AND LOU G. SPECT,

To A. L. HART, Dr.

"May 19, 1880 — To services as attorney-at-law, in litigation involving the title to lots in the town of Colusa.....\$10,000
Cr.

"December, 1881 — By cash paid 500

"Balance \$9,500

"This litigation embraced the trial of the following causes, to wit: *Spect v. Gregg*, District and Supreme Courts; *Spect v. Bundy*, District and Supreme Courts; *Hagar v. Spect*, District and Supreme Courts; *Montgomery v. Spect*, District and Supreme Courts; *Spect v. Arnold*, District and Supreme Courts.

"Said litigation also involved the management and trial of the following causes, up to the nineteenth day of May, 1880, to wit: *Spect v. Cheney*, No. 930; *Yates v. Shearer and Dean*; *Spect v. McGrath et al.*; *Spect v. Gill*; *Spect v. Town of Co-*

lusa; Spect v. Minchum; Spect v. Warner; Spect v. Liening; Spect v. Peyton; Spect v. Grover; Spect v. McLaughlin; Spect v. Cheney, No. 797; Spect v. Spittler; Spect v. De Jarnatt. Said services involved the general management of said litigation, and entitled me to a fee for the entire service, the amount of which was not fixed, but was contingent upon final success or recovery, hence there is and can be but one item of charge to the account. Respectfully,

"A. L. HART."

Defendants moved, that, inasmuch as plaintiff had failed to comply with the order of the Court, plaintiff be precluded from giving any evidence in support of his complaint. The Court denied the motion and defendants excepted.

It will be observed that no application was made to the Court below for an order for a further account. It is only where a party has failed or refused to deliver to the adverse party on demand, a copy of his account, that the latter is entitled to an order that the former be precluded from giving evidence.

Judgment affirmed.

[No. 8,584. — Department One.]

November 27, 1882.

HELEN D. GRIDLEY, ADMINISTRATRIX OF THE ESTATE OF GEORGE W. GRIDLEY, DECEASED, v. JOHN BOGGS ET AL.

FINDING — SUBSTANTIAL CONFLICT IN EVIDENCE. — Action commenced by George W. Gridley in his life-time, prosecuted by plaintiff, appellant, as the administratrix of his estate, to obtain a decree setting aside a deed made by him September 4, 1879, to certain of the defendants (John Boggs, E. D. Pond, and C. W. Clarke), and also an accompanying contract executed by them declaring trusts in favor of named creditors of said George W. Gridley and one D. M. Reavis. The fraud charged upon the defendants especially named is, that taking advantage of the weak, feeble, and diseased condition of the mind of George W. Gridley, and of his consequent incapacity to protect his own interests, they induced him, by false representations, to execute the deed, and enter into the contract sought to be annulled. The representations were made concerning matters in respect to which Gridley was fully informed, and must have acted responsibly, provided he was a person of sound mind, on which question the Court below found in favor of the defendants on evidence in which there was a substantial conflict.

CROSS-EXAMINATION OF WITNESS. — An expert witness, called on behalf of the plaintiff, had testified that he had made a post mortem examination of the body of George W. Gridley, and as to the condition of the brain, pelvic viscera, and particularly the kidneys and bladder, and the prostate gland and the urethra; that he had found nitrate of urea in crystals in washing the membranes of the brain, and crystals of urea in the arachnoid sac, etc.; that the kidneys were apparently in the normal state, except that they were engorged with blood; that the membranes of the brain, the pia mater, the arachnoid and dura mater were "thickened, discolored, adherent, and matted together;" that the prostate gland was enlarged, thickened, and indurated, and its walls pressed together. In his opinion, the deceased must have been of unsound mind for five or six years prior to his death, by reason of the facts that the condition of the prostate gland had obstructed the elimination of urea, causing it to enter in the circulation, and poisoning the cranial membranes, and that the patient died of uræmic convulsions, thus produced; that the thickened condition of the brain coverings established insanity, and that the thickening produced by the chronic uræmic poisoning must have been gradual, continuing several years. One B., called as an expert witness by the defendant, after stating that he had been a practicing physician and surgeon since 1864, that he was a graduate of certain medical schools, and that he had been superintendent for about two years of an insane asylum in Lancashire, England, proceeded to testify, in effect, that he had never known crystals of urea to be found in the brain or any of its surroundings; that nitrate of urea is perfectly soluble in water; that uric and urea are specifically different. He added, that taking the condition of the coverings of the brain and the brain itself, and of the kidneys, the bladder, the prostate gland, and the urethra, as described by M. (and Dr. C., who assisted at the post-mortem), he could not understand how any such condition of his brain or its membranes could be attributed to uræmic poisoning, without disease of the kidneys antedating it, and declared that disease or unsoundness of mind could not be predicated on the condition of the coverings of the brain as described by Menara, M. and C. On cross-examination of B., the plaintiff wished to put to him a hypothetical question, in all respects similar to such questions propounded to plaintiff's witnesses on direct examination.

Held: Since the testimony of B. on direct examination was confined to a contradiction of the theory of M. as to the mental unsoundness of Gridley produced by slow uræmic poisoning, the question was not proper cross-examination, as the answer of the witness thereto, if it sustained the plaintiff's views, would have constituted part of the plaintiff's case, which should have been made out before she rested. Nor was the question proper as testing the capacity of B.; for if the answer of B. had been the same as that given by the plaintiff's experts it would have strengthened the plaintiff's affirmative case, if different it would have tended no more to prove the incompetency of B. than it would have done to prove the incompetency of the plaintiff's experts.

EVIDENCE — JUDGMENT REFUSING PROBATE OF WILL — HOW FAR CONCLUSIVE. — The plaintiff in the Court below offered to introduce in evidence a document filed in the Superior Court on the fourteenth day of March,

1881, purporting to be the last will and testament of George W. Gridley, deceased, together with the objections to the probate of the same by Charles W. Gridley and Flora D. Harris, and the Court's findings of fact and conclusions of law thereon, and the decree of said Court thereon rejecting said will "and deciding that said George W. Gridley was unsound in mind, and incompetent by reason thereof to make a will at the date of the execution thereof, to wit, March 26, 1879." Upon the objection of the defendants the documents offered were excluded.

Held: The ruling was proper. The judgment of the Superior Court determined that a certain instrument, purporting to be the last will and testament of George W. Gridley, was not his last will and testament. The proceeding was not a special inquiry to determine his status as to sanity or insanity. The finding of insanity was of a probative fact upon which the Court held the will to be invalid, as it might have held it to be invalid upon proof of duress or undue influence.

APPEAL by plaintiff from the judgment of the Superior Court of the County of Butte, and from an order denying a motion for a new trial. **HUNDLEY, J.**

Action to set aside a deed and contract on the ground of fraud. The facts are stated in the opinion of the Court. After the decision in department a petition for hearing in bank was presented and denied.

York & Whitworth, for Appellant.

The exclusion of proper testimony is error fatal to a judgment, and is always ground for reversal. (*Estate of Toomes*, 54 Cal. 516, 517; *Arthurs v. Hart*, 17 How. U. S. 6; *Barstow v. City Railroad Co.*, 42 Cal. 465; *Rice v. Heath*, 39 id. 611, 612; *Jones v. Young*, 28 Am. Dec. 569; *Hilliard on New Trials*, 408.)

This proposition is founded in reason, and its soundness is unquestioned. And, in Courts of equity particularly, where fraud and imposition upon one of weak mind are of the issues, any fact or circumstance which tends to show fraud, or to cast a suspicion of unfairness upon the transaction investigated, is relevant, material, and proper testimony. (*Tracy v. Craig*, 55 Cal. 91, 93, 94; *Tracy v. Colby*, 55 id. 67; *Moran v. Abbey*, 58 id. 167, 168; 1 *Greenleaf's Ev.*, § 51, a; 1 *Story's Eq.*, § 190; *Ingersoll v. Baker*, 21 Me. 474; *Trull v. True*, 33 Me. 367; *Burkholder v. Plank*, 67 Pa. St. 233; *Stewart v. Fenner*, 81 id. 180; 3 *Wait's Actions and Defenses*, 445, 446;

Davis v. Calvert, 25 Am. Dec. 282; *Pa., Del. and Md. Steam Nav. Co. v. Dandridge*, 29 id. 543.) Nor can it be maintained that the admission of the rejected evidence, in any given case, would not have changed the result, and that, therefore, no injury was done the appellants.

Injury will be conclusively presumed from such error. The adoption of any other rule would make the rights of litigants to depend upon the uncertainties of the most unreliable speculations. No one can, by any possibility, tell what might have been the result, in a given case, if the rejected testimony had been admitted, or to what other evidence it might have led, if it had been received. (*Arthur v. Hart and Estate of Toomes*, *supra*; *Barstow v. City Railroad Co.*, 42 Cal. 465; *Jackson v. Feather River W. Co.*, 14 id. 24; *Rice v. Heath*, 39 id. 611, 612.)

The Court below in this case did exclude and refuse to entertain testimony, relevant, material, and proper, which the appellant, at the trial, sought to elicit and to introduce: 1. By sustaining defendants' objection to plaintiff's hypothetical question propounded to their own expert witness, Dr. C. F. Buckley, on cross-examination. This was a proper question on cross-examination, for the reason that the witness had been introduced by the defendants as an expert on the subject of insanity, and in his direct examination had expressed his opinion that the pathological conditions found in the brain of the deceased upon a *post mortem*, and the fits with which deceased was afflicted, were not incompatible with mental integrity of every form, etc. (*People v. Lake*, 12 N. Y. 358; *Dilleber v. Home Life Ins. Co.*, 87 id. 83.)

The hypothetical question simply assumed the same facts upon which the witness had expressed his opinion, coupled with certain other facts, and asked his opinion upon them all taken together. The hypothetical question was a proper one as such. (*Cowley v. People of the State of New York*, 83 N. Y. 464; *Guiderman v. Liverpool etc. Co.*, id. 358; *Harnett v. Garvey*, 66 id. 641; *Negro Jerry v. Townshend*, 9 Md. 159.) And whilst an error in the assumption of facts would not make the interrogatory objectionable, so long as it is within the probable range of the evidence (*Harnett v. Garvey*, *supra*);

nevertheless in this instance the facts assumed had all been proven.

2. In sustaining defendants' objection to plaintiff's offer to introduce in evidence a document, filed in said Superior Court on the fourteenth day of March, 1881, purporting to be the last will and testament of said George W. Gridley, deceased, together with the objections to the probate of the same by Charles E. Gridley and Flora D. Harris, filed in said Court on the sixth of April, 1881, and the Court's findings of fact and conclusions of law thereon, and the decree of said Court thereon rejecting said will and deciding that said George W. Gridley was unsound in mind, and incompetent by reason thereof to make a will at the date of the execution thereof, to wit, March 26, 1877.

This evidence should have been admitted. Here was the judgment of a Court that on a certain day, to wit, March 26, 1877, said Gridley was of impaired or unsound mind, to such an extent as to be, by reason thereof, incompetent to make a will. Evidence of the state of a person's mind before and after the act done is admissible to prove insanity. (2 Greenl. on Ev., § 371; *Estate of Toomes*, 54 Cal. 516, and cases cited.) The judgment was conclusive as to his condition on the day named. (Code of Civil Procedure, § 1908, Subd. 1.) It was at least *prima facie* evidence of his condition of mind on that day. (*Van Deusen v. Sweet*, 51 N. Y. 386; *Gibson v. Soper*, 6 Gray, 285-6; *Rippy v. Gant*, 4 Ired. (N. C.) Eq. 443; *Rider v. Miller*, 86 N. Y. 511; *Hicks v. Marshall*, 8 Hun, 329.)

F. C. Lusk, for all Respondents except C. E. Gridley.

Belcher & Belcher, also for all Respondents, except C. E. Gridley and D. M. and Ann E. Reavis.

Before proceeding to examine in detail the tedious list of exceptions specified under this head, amounting to nearly three hundred in all, counsel would submit that if any one of them were well taken, the error would not be a sufficient prejudice to the plaintiff to work a reversal of this case. The case shows no evidence to sustain the charge of fraud made by the plaintiff, and, on the issue of insanity, the preponderance is overwhelmingly with the defendants. In such a case, unless the error was one that might have materially injured the

plaintiff, a reversal will not be had. An inspection will satisfactorily show that the answer to any question objected to by appellant, if it had been excluded, or the admission of any answer that was excluded, could by no possibility have affected the result. If every ruling complained of had been in plaintiff's favor, the result could not have been changed. Of necessity the decision must have been for defendants.

Our Code has said, and this Court many times stated, that judgments will not be reversed for every error, but only for those where the party's substantial rights have been prejudiced.

The rule should be carefully applied in such a case as this. The trial was long, tedious, and very expensive, and after a careful and patient hearing and consideration, the learned Judge of the Court below found for the defendants. The case should not be sent back unless for weighty reasons. The record shows that a new trial could never terminate differently from the first. Counsel think none of the exceptions well taken, but if the Court in so great a number should discover any, we submit that they are entirely immaterial, and could not have damaged the appellant.

On this point we desire to call the attention of the Court to a late case in Michigan, *Fraser v. Jennison*, 42 Mich. 206, in which the issue was insanity. The result of a long trial was a decision in favor of the sanity of the party in question. Judge Cooley, in an elaborate opinion, reviewing the evidence, came to the same conclusion, but he discovered several exceptions in the admission or exclusion of evidence that he deemed well taken. After discussion, he came finally to the conclusion that the case ought not to be reversed on that ground, and on this point he said: "We have already said, that the Court erred in one instance in overruling questions, because they were leading, and in another because they called for conclusions and not facts. The Court also erred in holding that the questions put to Mary Colvin respecting family history, were objectionable, on the ground of being hearsay. It is that sort of evidence of all others that is not objectionable on this ground. (*Shields v. Boucher*, 1 De Gex & Smale, 40.) * * * The important fact they sought to bring out was that Mr. Fraser's mind weakened in the last year of his life;

and as they appear to have gone fully into the question of mental soundness, we must suppose this ground to have been covered. On the whole, we all agree that we ought not to reverse the judgment because of the rulings mentioned."

The alleged errors of this class will now be considered in detail, in the order specified by appellant. * * *

The question was not in cross-examination; nothing of that character had been asked on direct examination. It was an attempt to ask the question they had propounded to their own witness Shurtliff, as a part of their own case, on cross-examination of our witness, who was called only to disprove certain parts of Dr. Miller's testimony. He had on direct examination been asked no question as to the condition of Gridley's mind or his opinion of it. * * *

Gridley left a will. One of his family presented the will for probate, another objected to the probate on the ground that he was of unsound mind, and, without any contest, the family allowed the will to be set aside on that ground. Of course, the proceedings of the Probate Court in that regard were immaterial here and could not bind these defendants, nor affect them, for the reasons stated at the time, which were that the evidence was irrelevant and immaterial, so far as the judgment was concerned; that we were not parties to it, and could not be in any way bound by it; and that we could neither be bound by the findings nor the judgment; and that all the other papers offered in connection are incompetent to prove anything in this case as against the defendants. And further, that neither of the defendants were parties to or in any manner interested in the proceedings out of which that judgment arose; and that neither of the defendants were present at that proceeding, or had any right to or did cross-examine the witnesses therein produced.

McKINSTRY, J.:

The action, commenced by George W. Gridley in his lifetime, is prosecuted by plaintiff, appellant, as the administratrix of his estate, to obtain a decree setting aside a deed made by him September 4, 1879, to certain of the defendants (John Boggs, E. B. Pond and C. W. Clarke), and also an accompanying

contract executed by them declaring trusts in favor of named creditors of said George W. Gridley and one D. M. Reavis.

The complaint alleges that for more than five years next before the first day of December, 1880, George W. Gridley was continuously feeble and diseased in body, and feeble and weak and unsound in mind, and by reason thereof during all that time "wholly incompetent to transact business." That during such five years all the defendants had full knowledge of said Gridley's feeble and diseased condition of body, and his said weak and unsound condition of mind, and that he was so as aforesaid "wholly incompetent to transact business." That during said five years prior to December 1, 1880, and while the said defendants Boggs, Pond, Clarke and Reavis were each and all of them fully cognizant of said George W. Gridley's said weak, feeble and diseased condition of body and his said weak, feeble and unsound condition of mind, "and of his said incompetency to transact business," they conspired, confederated and colluded together to take an unfair and fraudulent advantage of him, "while in his said feeble and diseased condition of body, and while in his said weak, feeble and unsound condition of mind, and while he was so incompetent to transact business, to wrong, cheat, and defraud him out of his said property" (previously described), "and to that end, and with that intent, they wrongfully, fraudulently and falsely represented to said George W. Gridley that he was liable to pay to said Boggs, Pond, Clarke, and to certain other of the defendants, moneys due to them on certain promissory notes, all, or nearly all, signed by him and by said D. M. Reavis," etc.

The fraud charged upon the defendants especially named is, that taking advantage of the weak, feeble and diseased condition of the mind of George W. Gridley, and of his consequent incapacity to protect his own interests, they induced him, by false representations, to execute the deed and enter into the contract sought to be annulled.

The representations alleged to have been made to Gridley (with the exception, perhaps, of the alleged representation that Reavis had conveyed all this property to Boggs, Pond and Clarke, in reference to which the Court below found upon evidence that no such representation was made, but, to the contrary thereof, that the fact as to conveyance from Reavis

to Boggs, Pond and Clarke was stated to Gridley), had relation to matters in respect to which he was fully informed, and must have acted responsibly, provided he was a person of sound mind.

The Court below found: "For the five years next before the first day of December, 1880, the plaintiff's intestate, George W. Gridley, was not either feeble or diseased in body, or feeble, or weak, or unsound in mind, and was not during all, or *any* portion of that time, incompetent to attend to, manage or transact business, but, on the contrary, was during all said time and up to the time of his death of sound, healthy and vigorous and unimpaired condition of mind and body, and fully competent to transact business."

It is admitted that as to this finding, there was a substantial conflict in the evidence.

In argument counsel indulged in much criticism, some of it perhaps just, of the findings. It is obvious, however, in presence of the explicit findings that Gridley was of sound mind, and further, that defendants practiced no such arts or devices as constitute fraud when practiced upon a person of sound mind, the judgment must be affirmed, unless errors occurred at the trial.

It is contended that the Court below erred in sustaining the objection to the hypothetical question propounded by plaintiff's counsel on cross-examination to the expert witness, Dr. C. F. Buckley.

Dr. P. B. M. Miller, an expert witness called on behalf of the plaintiff, had testified that he had made a *post mortem* examination of the body of George W. Gridley, and as to the condition of the brain, pelvic viscera, and particularly the kidneys and bladder, and the prostate gland and the urethra; that he had found nitrate of urea in crystals in washing the membranes of the brain, and crystals of urea in the arachnoid sac, etc. That the kidneys were apparently in the normal state, except that they were engorged with blood; that the membranes of the brain, the *pia mater*, the arachnoid and *dura mater* were "thickened, discolored, adherent, and matted together." That the prostate gland was enlarged, thickened, and indurated and its walls pressed together. In his opinion the deceased must have been of unsound mind for five or six

years prior to his death, by reason of the facts that the condition of the prostate gland had obstructed the elimination of urea, causing it to enter in the circulation and poisoning the cranial membranes, and that the patient died of uræmic convulsions thus produced; that the thickened condition of the brain coverings established insanity, and that the thickening produced by the chronic uræmic poisoning must have been gradual, continuing several years.

In his direct examination on behalf of defendants, Dr. Buckley, after stating that he had been a practicing physician and surgeon since 1864, that he was a graduate of certain medical schools, and that he had been superintendent for about two years of an insane asylum in Lancashire, England, proceeded to testify in effect that he had never known crystals of urea to be found in the brain or any of its surroundings; that nitrate of urea is perfectly soluble in water; that uric and urea are specifically different. He added, that taking the condition of the coverings of the brain and the brain itself, and of the kidneys, the bladder, the prostate gland and the urethra, as described by Dr. Miller (and Dr. Caldwell, who assisted at the post-mortem), he could not understand how any such condition of his brain or its membranes could be attributed to uræmic poisoning, without disease of the kidneys antedating it, and declared that disease or unsoundness of mind *could not be predicated* on the condition of the coverings of the brain as described by Messrs. Miller and Caldwell.

It is apparent from the foregoing that the testimony of Dr. Buckley was addressed to the contradiction of the theory of Dr. Miller, that the diseased condition of the membranes of the brain was produced by slow uræmic poisoning, and such condition indicated insanity in Gridley, which extended backward from his death to a period of time including the acts alleged to have been done by him while incompetent to protect his business or other interests.

It is disputed between counsel for the respective parties whether there was any evidence in the case tending to prove some of the facts assumed to exist in the hypothetical question propounded, on the part of plaintiff, upon the cross-examina-

tion of Dr. Buckley, the sustaining of the objection to which by the Court below is now here urged as error.

After such examination as we have been able to give the enormous transcript of nearly *six thousand folios*, made up to a great extent of the questions and answers contained in the short-hand reporter's notes — and we consented to hear the appeal upon the unnecessarily voluminous record only out of consideration for the important interests involved — we are not prepared to say but there is to be found in it some evidence tending to prove the existence of each of the facts assumed in the question.

But the objection that the question could not be asked in accordance with any legitimate rule of cross-examination was properly sustained.

The burden of showing that George W. Gridley was insane when and before the instruments were executed, was cast upon the plaintiff. Taking up the burden and in making out her affirmative case, plaintiff, in addition to other evidence, had propounded a series of hypothetical questions to expert witnesses called on her behalf. The question put to Dr. Buckley was of the same character, and in substance the same as one put to plaintiff's witnesses, and his answer, if it sustained plaintiff's views, would have constituted part of plaintiff's case, which should have been made out before she rested. His direct examination had been limited to the expression of his opinion as to the correctness of the theory of Dr. Miller, one of plaintiff's witnesses, a theory based upon certain conditions of the bodily organs as the same appeared at the post-mortem. The question put by plaintiff was much broader than was justified by the matters drawn out on the direct examination. Nor can the question be justified as testing the capacity of the expert. If the answer of Dr. Buckley had been the same as that given by plaintiff's experts, it would have strengthened the plaintiff's affirmative case; if it had been different it would no more tend to prove the incompetency of Buckley than it would tend to prove the incompetency of the experts called by plaintiff.

Appellant also claims the Court below erred in sustaining defendant's objection to plaintiff's offer to introduce in evidence a document filed in the Superior Court on the fourteenth day

of March, 1881, purporting to be the last will and testament of George W. Gridley, deceased, together with the objections to the probate of the same by Charles W. Gridley and Flora D. Harris, and the Court's findings of fact and conclusions of law thereon, and the decree of said Court thereon rejecting said will, "and deciding that said George W. Gridley was unsound in mind and incompetent by reason thereof to make a will at the date of the execution thereof, to wit, March 26, 1879."

It is said the judgment was conclusive as to Gridley's mental condition, or was at least *prima facie* evidence of his mental condition on that day. Section 1908 of the Code of Civil Procedure reads: "The effect of a judgment or final order in an action or special proceeding before a Court or Judge of this State or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: 1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition of a particular person, the judgment or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person."

With respect to a judgment in a proceeding *de lunatico inquirendo* it was said in *L'Amoureux v. Crosby* (2 Paige Ch. 427), that as to the acts done by the lunatic before the issuing the commission, and which were overreached by the retrospective finding of the jury, the inquisition is only presumptive but not conclusive evidence of incapacity. It would seem that as to acts done after the finding, the inquisition, in the absence of the statute, would be only presumptive evidence. (*Van Deusen v. Sweet*, 51 N. Y. 386; *Rider v. Miller*, 86 id. 511; *Gibson v. Soper*, 6 Gray, 285-6; *Rippy v. Gant*, 4 Ired. Eq. 443; *Griswold v. Miller*, 15 Barb. 523, and cases there cited.) But there can be no doubt, that, under the section of the Code of Civil Procedure above quoted, the judgment in a proceeding whose direct purpose and end is to obtain a determination "of the personal, political, or legal condition of a particular person" is conclusive upon such condition. Was the judgment rejecting the will such a judgment?

Mr. Starkie says: "In many instances a court possesses a

jurisdiction which enables it to pronounce on the nature and qualities of the particular subject-matter, where the proceeding is, as it is technically termed, *in rem*; as where the Ordinary or Court Christian decides upon a question of marriage or bastardy; or the Court of Exchequer upon condemnations; or the Court of Admiralty upon questions of prize, or a Court of Quarter Sessions upon settlement cases. Decisions of this sort are for the most part binding and conclusive upon all the world." (Starkie Ev., p. 36, 10th Am. ed.) Such a judgment is conclusive unless impeached for fraud, on those who were neither parties nor privies to it. (Id. 384.) And the reasons given by Professor Greenleaf are: "These decisions are binding and conclusive, not only upon the parties actually litigating in the cause, but upon all others; partly upon the ground that in most cases of this kind, and especially upon cases of property seized or proceeded against, every one who can possibly be affected by the decision has a right to appear and assert his own rights, *by becoming an actual party to the proceedings*; and partly upon the more general ground of public policy and convenience, it being essential to the peace of society that questions of this kind should not be left doubtful," etc. (1 Green. Ev., 525.)

If the defendants in the present cause are bound by the judgment of the Superior Court, as being a judgment declaring George W. Gridley to have been insane at the date of the offered will, it must be upon "the more general ground" mentioned by Mr. Greenleaf. Certainly all those who might be affected by a judgment that Gridley was insane when the will was executed, did not have the right to appear and assert their rights in the proceeding for the probate of the will. The legal notice of that proceeding ran only to those interested in Gridley's estate. And as to "the more general ground," public policy only requires, at most, that a judgment as to the *status* of a particular person, which shall be conclusive as against those not parties to it, shall be a judgment which simply determines such *status* in a proceeding whose sole end and aim is to determine it. The judgment of the Superior Court determined that a certain instrument, purporting to be the last will and testament of George W. Gridley, was not his last will and testament. The proceeding was

not a special inquiry to determine his *status* as to sanity or insanity. The finding of insanity was of a probative fact upon which the Court held the will to be invalid, as it might have held it to be invalid upon proof of duress or undue influence.

If there remains doubt of the correctness of this conclusion, it should be dispelled by the wording of the section of the Code of Civil Procedure. There a judgment "in respect to the probate of a will" is spoken of as a separate and distinct thing from a judgment "in respect to the personal, political, or legal condition or relation of a particular person." It would be difficult more explicitly to declare that a judgment in respect to the probate of a will should be evidence that the offered instrument had been rejected or admitted to probate—that it was or was not the last will and testament of the decedent—neither more nor less.

We find no substantial errors in the record.

Judgment and order affirmed.

Ross and McKee, JJ., concurred.

[No. 3,685. — Department One.]
November 27, 1882.

JAMES KITTS v. THE SUPERIOR COURT OF NEVADA COUNTY.

JURISDICTION — APPEAL FROM JUSTICE'S COURT — AMENDMENT OF COMPLAINT — CERTIORARI. — Certiorari to review an order of the Superior Court allowing the plaintiff to amend his complaint in the case appealed from the Justice's Court. *Held:* There was no excess of jurisdiction.

APPLICATION for writ of certiorari to the Superior Court of Nevada County.

The complaint in the Justice's Court was an account entitled "Mr. James Kitts to Wm. Seaman, Dr." The amended complaint alleged an indebtedness from the defendant to the plaintiff and one "K." as partners, and an assignment by "K." to the plaintiff.

Dibble & Kitts, for Plaintiff.

The Superior Court can not allow amendments in appealed cases. (*People ex rel. Jones v. The County Court of El Dorado Co.*, 10 Cal. 19; *Santa Cruz v. Santa Cruz R. R. Co.*, 6 P. C. L. J. 473; *Gould et al., Com. of Highways, v. Glass*, 19 Barb. 179; *Fowler v. Hyland et al.*, 12 N. W. Reporter, 26; *Cross et al. v. Eaton*, id. 35; *Rickey v. Superior Court Nevada Co.*, 59 Cal. 661; *S. P. R. R. Co. v. Superior Court of Kern Co.*, 59 id. 471.)

The COURT:

The petition here discloses no excess of jurisdiction on the part of the Superior Court.

Writ denied.

[No. 10,760. — In Bank.]

November 28, 1882.

THE PEOPLE v. YE PARK.

ASSAULT TO COMMIT MURDER — MERETRICIOUS UNION — INSTRUCTION. — The defendant was charged with an assault upon Chung Tan, with intent to commit murder. On the trial the Court instructed the jury that if they found that the defendant and one Toy Ping were living together as man and wife, in meretricious union, that such union, as a matter of law, would not be sufficient to give the defendant the right or power to control or restrain the acts and liberty or power of locomotion of said Toy Ping; that in such union either the man or woman has perfect right to go and come as he or she pleases, unrestrained by the other; and it was claimed on appeal, that there was no evidence that the defendant and said Toy Ping were living together in meretricious union, and therefore that it was error for the Court to state what their relative rights would be in such a case.

Held: That the instruction was as to an irrelevant and immaterial fact and could have had no tendency to prejudice the defendant.

Id. — DEFINITION — INSTRUCTIONS. — The Court charged the jury that the Supreme Court of this State had said that assault to commit murder is the attempt to kill a person, coupled with the present ability to do so, but, in another instruction, given at the request of the defendant, gave a correct and full definition of the crime.

Held: The first instruction was erroneous, in not containing a full definition of the crime, but that it was supplemented by the latter and the error cured.

Id.—Id.—QUESTION OF LAW.—The Court instructed the jury that a conflict of testimony on immaterial questions should not be considered by them, without telling the jury what questions were immaterial; and it was objected on appeal that the instruction left to the jury the question as to what was or was not an immaterial issue or question; it was a question of law for the Court and not for the jury to determine.

Held: Conceding the question was one of law the Court is not prepared to say that it was submitted by the instruction to the jury.

Id.—Id.—The Court, upon the request of the defendant, instructed the jury: "Before you can find the defendant guilty of the charge laid in the information, you must be convinced beyond a reasonable doubt by the evidence produced on the part of the prosecution, that the defendant in this case, with premeditation and malice aforethought, made the assault upon Chung Tan with the intention then and there to murder him;" and then added the following: "Two elements for your consideration on this point are the character of the weapon and the nature of the wound." **Held:** There was no error in the additional clause.

Id.—Id.—JUSTIFICATION.—The Court refused to instruct the jury at the request of the defendant as follows: "If you believe from all the evidence that the circumstances were such as to excite the fears of a reasonable man, and the defendant in this action acted under such fears when he made the assault upon Chung Tan, even though the defendant was mistaken in the circumstances and they turned out to be false, you will acquit him."

Held: In order to justify homicide under the circumstances stated, the circumstances must not only be sufficient to excite the fears of a reasonable person, but the party killing must have acted under the impulse of such fears alone.

Id.—Id.—FLIGHT.—The Court instructed the jury: "If you believe from the testimony that defendant had sufficient cause, from the conduct of Chung Tan, to believe that he, the defendant, was in imminent danger of his life or of great bodily harm from Chung Tan, then the defendant had a right to use all lawful means to secure his own safety; but if the testimony shows that the defendant could have more readily avoided danger to himself by flight than in any other way, then an assault by him is not justifiable."

Held: The exception of the defendant to the portion of the instruction italicized is well taken.

Id.—Id.—ID.—FELONIOUS ASSAULT.—Where an attack is made with murderous intent, the person attacked is under no obligation to flee. He may stand his ground, and, if necessary, kill his adversary. It is otherwise in cases of mere assault and in cases of mutual quarrel, where the attacking party has not the purpose of murder in his heart.

APPEAL from a judgment of conviction and from an order denying a new trial in the Superior Court of the County of Mono. WIGGINS, J.

Bennett & Reddy, for Appellant.

A. L. Hart, Attorney General, for Respondents.

SHARPSTEIN, J.:

The first ground upon which it is contended that this judgment should be reversed is, that the Court erred in instructing the jury that if they found that the defendant and one Toy Ping were living together "as man and wife in meretricious union, that such union as a matter of law would not be sufficient to give defendant the right or power to control or restrain the acts and liberty or power of locomotion of said Toy Ping; that in such a union either the man or woman has a perfect right to go and come as he or she pleases, unrestrained by the other." As an abstract proposition the correctness of what the Court said is not disputed. But the defendant's counsel insists that there was no evidence that the defendant and said Toy Ping were living together "in a meretricious union," and, therefore, it was error for the Court to state what their relative rights would be in case the jury should find that they were so living together. And it is claimed that the defendant's case might have been prejudiced by instructions which were apparently based upon the assumption that there was evidence which, at least, tended to prove that such a union had existed between the defendant and said Toy Ping. As there was no such evidence, it is urged that the instructions were calculated to mislead the jury.

If the defendant would have had "the right or power to control or restrain the acts and liberty or power of locomotion of said Toy Ping," if they had not been living together in a meretricious union, we could readily see that the jury might have been misled by the instructions referred to in this connection. But we do not understand that if the parties had not been living together in a *meretricious* union, that either would have had the right or power "to control or restrain the acts and liberty or power of locomotion" of the other, and, therefore, can not see that the jury could have been misled by said instructions.

The Court, doubtless, erred in charging the jury "that the Supreme Court of this State" had said "that assault to commit murder is the attempt to kill a person, coupled with the present ability to do so." That instruction does not contain a full definition of the crime with which the defendant was

charged, but the Court, in another instruction given at the request of the defendant's counsel, did give a correct and full definition of that crime. We think that the latter supplemented the former, and cured the error complained of.

The instruction "that a conflict of testimony on immaterial questions should not be considered" by them without telling the jury what questions were immaterial, is objected to on the ground that it "left to the jury the question as to what was or was not an immaterial issue or question," which was a question of law for the Court and not for the jury to determine. Conceding that the question was one of law, we are not prepared to say that the Court submitted such question to the jury.

The Court was requested by the defendant to give, and did give the following instruction: "Before you can find the defendant guilty of the charge laid in the information, you must be convinced beyond a reasonable doubt by the evidence produced on the part of the prosecution, that the defendant in this case, with premeditation and malice aforethought, made the assault upon Chung Tan with the intention then and there to murder him;" and then added the following: "Two elements for your consideration on this point are the character of the weapon and the nature of the wound."

It is claimed by defendant's counsel that the jury might have been misled by the addition of this clause to the instruction which he requested the Court to give. We do not think so. Nor can we see that it would be improper for the jury to consider the two elements mentioned by the Court while deliberating upon the questions of premeditation, malice aforethought, and intent to murder.

We do not think that the Court erred in refusing to give the following instruction asked by the defendant: "If you believe from all the evidence that the circumstances were such as to excite the fears of a reasonable man, and the defendant in this action acted under such fears when he made the assault upon Chung Tan, even though the defendant was mistaken in the circumstances, and they turned out to be false, you will acquit him." In order to justify a homicide under the circumstances stated, the circumstances must not only be sufficient to excite the fears of a reasonable person,

but "the party killing must have acted under the influence of such fears *alone*."

Another instruction to which exception is taken reads as follows: "If you believe from the testimony that defendant had sufficient cause, from the conduct of Chung Tan, to believe that he, the defendant, was in imminent danger of his life, or of great bodily harm from Chung Tan, then the defendant had a right to use all lawful means to secure his own safety; *but if the testimony shows that the defendant could have more readily avoided danger to himself by flight than in any other way, then an assault by him is not justifiable.*" The defendant excepts to the portion of the instruction which we have italicized, and we think that the exception is well taken.

"Where an attack is made with murderous intent, the person attacked is under no obligation to fly; he may stand his ground, and, if necessary, kill his adversary." (Bishop's Criminal Law, 850.) It is otherwise in case of mere assault and cases of mutual quarrel, where the attacking party has not the purpose of murder in his heart. (Id.) Assuming, however, as the Court did in this instance, that the defendant had sufficient cause from the conduct of Chung Tan to believe that he, the defendant, was in imminent danger of his life or great bodily harm from Chung Tan, it was not incumbent on the defendant to fly for safety, even if he might more readily have secured it by flight than by standing his ground, and, if necessary, killing his adversary.

This entire instruction is extremely faulty. The jury, in one part of it, is, in effect, told that a man in defense of his life has "a right to use all *lawful means* to secure his own safety;" but the jury was not informed as to what would be *lawful means* under such circumstances, although the jury might have inferred from the language of the Court that if the defendant could not have saved his life by flight an *assault* would be justifiable. But whether the Court meant a simple assault, or a more serious one, does not appear. The right of self-defense is quite as sacred as any other, and assuming that the defendant was placed in the position which, for the purposes of this instruction, he was assumed to be in, the instruction, as a whole, does not fully state his rights, and

was calculated to mislead the jury as to them. For this error the judgment and order denying the motion for a new trial must be reversed.

Judgment and order reversed, and cause remanded for a new trial.

McKINSTRY, ROSS, and McKEE, JJ., concurred.

[No. 8,023. — In Bank.]

November 28, 1882.

THE PEOPLE v. J. D. STEPHENS ET AL.

WATER SUPPLY.—Prior to the adoption of the Constitution of 1879, the right of laying pipes in the streets of any incorporated city or town in this State for the purpose of supplying the inhabitants of such city or town with fresh water lay only in grant from the Legislature.

CONSTITUTION.—The provisions of the Constitution of 1879 in reference to the supplying of municipalities with fresh water, made many changes from the pre-existing condition of things.

CONSTITUTION — CONSTRUCTION OF.—All of these provisions of the Constitution, to wit, Art. xl., § 19, Art. xiv., § 1, and Art. xiv., § 2, must be taken and read together, and effect given to each of them. They must, like all other provisions of the Constitution, receive a practical common-sense construction, and be considered with reference to the prior state of the law and the mischief intended to be remedied by the change.

WATER — PUBLIC USE.—By Sec. 1 of Art. xiv. of the Constitution, the use of all water heretofore or hereafter appropriated for sale, rental, or distribution, is expressly declared to be a public use, and it is not now left to the Legislature, as formerly, to say whether it shall be a public use or not. The Constitution itself declares it to be such, and then makes the use subject to the regulation and control of the State; that is, to say, of the Legislature, in the manner to be prescribed by statute, subject, however, to certain enumerated provisions contained in the Constitution itself, and among them to the provisions in respect to the rates or compensation to be collected by any person, company, or corporation for the use of water supplied to any city and county, or city or town, or the inhabitants thereof.

RATES — FIXING OF.—The Constitution expressly declares that such rates or compensation shall be fixed in a certain specified manner, at a certain time, and by a certain body; and the body failing to do so is expressly made subject to peremptory process to compel action at the suit of any party interested and liable to such further processes and penalties as the Legislature may prescribe.

RATES — RIGHT TO COLLECT — FRANCHISE.—By the Constitution the right to collect the rates or compensation so established is declared to be a fran-

chise, and can not be exercised except by authority and in the manner prescribed by statute.

LEGISLATURE — DUTY OF.—The Constitution contemplated the enacting by the Legislature, where they did not exist, of all laws necessary to give effect to its commands, and that none should be passed in contravention of its provisions. When, therefore, the Constitution fixed the manner of establishing such rates or compensation, and further declared that the right to collect such rates or compensation so established is a franchise, and can not be exercised except by authority of and in the manner prescribed by law, it was the duty of the Legislature, if they did not exist, to provide the needful laws.

LEGISLATURE — FAILURE TO ENACT LAWS — EFFECT OF.—But the failure of the Legislature to enact such laws, if failure there was, could not prevent the establishment of the rates or compensation specifically required to be established by the Constitution.

WATER — GAS — PUBLIC STREETS.—Sec. 19, Art. xi. of the Constitution expressly grants to any individual or company incorporated for that purpose, subject to the direction of the Superintendent of Streets or other officer in control thereof, and under such general regulation as the municipality may prescribe for damages and indemnity of damages, the privilege of laying pipes in the public streets and thoroughfares of any city (where there are no public works owned and controlled by the municipality), so far as may be necessary for introducing into and supplying such city and its inhabitants with gas, or other illuminating light, or with fresh water, subject to the condition that the municipal government shall have the right to regulate the charges thereof.

CITY — TOWN.—The word "City" in Sec. 19 of Art. xi. of the Constitution includes towns.

CONSTITUTION — CONSTRUCTION OF.—The provisions of Sec. 1, Art. xiv. of the Constitution, requiring the rates or compensation to be fixed, has no application to water furnished by a municipality itself. Those provisions refer to the rates or compensation to be collected for water authorized by Sec. 19 of Art. xi. of the Constitution to be introduced into cities by individuals or companies incorporated for that purpose.

APPEAL by the plaintiff from a judgment in favor of the defendants in the Superior Court of the County of Yolo, and from an order denying plaintiff's motion for a new trial, and also from an order made after judgment. BUSH, J.

The action was brought by the Attorney General in the name of the People against the defendants, to require the defendants to show by what right or authority they were claiming and exercising certain franchises in the town of Woodland, and to obtain judgment against them, adjudging that they were doing so unlawfully; that they be debarred therefrom, and that they be enjoined from making any excavations in the public

streets of that town without the consent of the proper authorities, etc. The following is a statement of the facts: On the seventh day of February, A. D. 1871, one J. W. Peek was the owner of certain water works in Woodland, in the county of Yolo, which works were intended for the purpose of supplying the inhabitants of the town with pure fresh water. At that time Woodland was unincorporated, but on the twenty-second day of February, A. D. 1871, the Board of Supervisors of Yolo County in pursuance of an Act of the Legislature entitled "An Act to provide for the incorporation of towns," approved April 19, 1856, made an order incorporating the town. It was subsequently by an Act of the Legislature, approved March 24, 1874, reincorporated, and has ever since continued its corporate existence under this Act. On the seventh day of February, A. D. 1871, the Board of Supervisors of Yolo County made an order, of which the following is a copy, viz.:

"In the matter of granting to the Woodland Water Works Company the privilege to lay down water pipes in the streets and alleys of Woodland: The petition of Giles E. Sill, agent of the Woodland Water Works Company, asking permission to lay down water pipes through the streets and alleys of Woodland, in this county, coming on to be heard, and the premises, all and singular, being fully considered, it is ordered by the Board that said petition be granted; provided that the said company shall at all times during its use of the privilege above granted, repair and keep in good order all the streets and alleys, or parts thereof, torn up by said water company."

Peek at this time was the only person interested in the Woodland Water Works Company, which name was in reality the name under which he then proposed to, and afterwards did, carry on the business. The Board of Supervisors made no other order granting or purporting to grant any privileges to Peek. After the twenty-second day of February, 1871, Peek, under the name of the Woodland Water Works Company, laid down main and branch water pipes in some of the streets and alleys of Woodland, and continuously until the tenth of April, 1880, was engaged in the business of furnishing water to the inhabitants of the town, and complied with all the conditions and requirements of the Board of Supervisors. On December 3, 1877, the Board of Trustees of Woodland

adopted a resolution in the following words: "Whereas, it is expedient and necessary that the town should secure an adequate supply of water for use in cases of fire and other public necessities: and, whereas, J. W. Peek has procured and set up at his water works a new pump of sufficient capacity to provide such supply of water, and is willing to convey a controlling interest therein for the sum of four hundred dollars, in gold coin, upon certain conditions set forth in a deed for the same this day tendered by him; now, therefore, be it

"Resolved, That the said deed be and is hereby accepted; and the President of the Board of Trustees be and he is hereby authorized and directed to execute the same on the part of the town; and the Town Clerk is hereby directed to draw his warrant for the sum of four hundred dollars in gold coin in favor of said J. W. Peek in payment therefor."

On the same day there was duly executed by and on behalf of Peek and the town of Woodland, in pursuance of the resolution, an indenture by which Peek sold and transferred to the town an "undivided four-seventh of that certain pump used by the party of the first part (Peek) in raising water at his water works in said town, being the new pump lately put in by him," and "also, the use of said system of water works in connection with said pump in the manner and to the extent specified in the covenants hereinafter contained." It was covenanted that Peek should run the water works at his own expense and for his own profit; that he should furnish water to the town for all municipal uses, at all points in his then present system of pipe service, in preference to all other customers, and that the town in like manner should have the benefit of any extension of the system; that the Board of Trustees might regulate the use of the water by private individuals, so as to secure for the town a sufficient supply of water in cases of fire or other public necessity, and that he (Peek) should receive a reasonable compensation for water furnished. On the sixth day of October, A. D. 1879, the supply of water for said town and its inhabitants was insufficient for use in case of fire and for the ordinary use of the citizens of said town, and it became necessary to increase the same; and it became and was necessary that said water works should be under the control and management of the authorities of said

town, both as to the rates to be charged for water furnished, and as to the manner and extent of the supply thereof; and on that day the said Board of Trustees duly adopted and published the ordinance, which is as follows: "Ordinance No. 25. To procure a supply of water for use in cases of fire and other purposes. Whereas, the present supply of water in the town of Woodland is insufficient for the needs of the town in cases of fire or other great necessity, as well as insufficient for the ordinary use of the citizens; and whereas, the necessity for an increased supply of water for such purposes is urgent; and whereas, J. W. Peek, the proprietor of the present water works in said town, has signified his willingness to provide a sufficient supply of water for such purposes, and to furnish all water required in cases of fire free of charge, in consideration of the grant hereinafter contained; now, therefore,

"Be it ordained by the Board of Trustees of the Town of Woodland: Section 1. There is hereby granted to J. W. Peek, his associates and assigns, the exclusive right for the period of ten years from the date of the adoption of this ordinance to lay down and maintain main and branch pipes for the purpose of supplying said town and its inhabitants with pure fresh water, in any and all of the streets and alleys in said town in which there are at present main or branch pipes, from the water works of said Peek, or which are at present supplied with water from said water works; and also the right, but not exclusive, to lay down and maintain main and branch pipes for said purpose in any and all of the streets and alleys in said town not at present supplied with water from said water works.

"Section 2. Within eighty days from the date of the adoption of this ordinance the said J. W. Peek, his associates or assigns, shall lay down a new main pipe not less than seven (7) inches in internal diameter from the said present water works, near the corner of Main and Fourth streets, in said town, and extending westerly through Main street to the intersection of Main and First streets, and shall connect the same with all branch pipes leading from Main street within said distance, including the branch mains leading northerly and southerly through First street.

"Section 3. The said J. W. Peek, his associates and as-

signs, shall at all times within the period of said ten years, furnish water to said town for use in case of fire, at all points to which such water service does or may extend, to the extent of the full capacity of the said water works, without any charge or compensation whatever, and in preference to, and, if necessary, to the exclusion of all other customers whatever.

“Section 4. The rates to be charged and collected by said J. W. Peek, his associates or assigns, for furnishing water to said town and its inhabitants for domestic and other purposes, except for use in case of fire, shall be the same as are now charged and received by said J. W. Peek for such services, until the Board of Trustees of said town shall alter or change said rates, or shall establish new rates therefor.

“Section 5. The Board of Trustees of said town shall have the right at all times to regulate the mode and manner of laying such pipes within the streets, alleys, and other public places of said town, and to make reasonable rules and regulations governing the supply and use of water, so as to secure a sufficient supply and to prevent unnecessary waste thereof; and the ordinances heretofore adopted on said subjects shall remain in force until altered or repealed.

“Section 6. Nothing in this ordinance contained shall be so construed as to take away or impair the right of said town, through its proper authorities, to establish and regulate the rates to be charged and received by the proprietors of said water works for furnishing water to said town and the inhabitants thereof, as now or hereafter to be provided by law; nor the right of said town to acquire by purchase or condemnation the title to said water works and franchise, in the manner now or hereafter to be provided by law.

“Section 7. Within three days after the date of the adoption of this ordinance, the said J. W. Peek shall file with the Town Clerk his written agreement, under his hand and seal, to accept and abide by the grant and conditions in this ordinance contained; and in case of a failure to file such agreement within said time, or to lay down and connect the new main herein provided for within the time herein allowed, the grant herein contained shall become and remain wholly null and void.

“Section 8. Nothing in this ordinance contained shall be

so construed as to prevent the Board of Trustees of said town from granting to any person or corporation the right to supply water to any portion of the town in which no exclusive right is granted by this ordinance, and, for that purpose only, to grant to such person or corporation the right to lay main pipes along or across any street in which said Peek, his associates or assigns, has such exclusive right."

That the said Peek accepted of the conditions and grant in the last mentioned ordinance contained, and on the tenth of December, 1879, completed the work of laying down and connecting the new main pipes referred to in section two of the ordinance. All the conditions and provisions of the ordinance except as to the additional supply and the furnishing of water free in case of fire, were disadvantageous to the town and its inhabitants. On the twenty-third day of April, 1880, the Board of Trustees ordered a further extension of the pipes, and Peek complied with the order. That the supply of water from the works of Peek, his associates or assigns, has at all times been either inadequate or not sufficiently extended to meet all the demands of the town or its inhabitants. That the town has never owned or controlled any public works for supplying the town and its inhabitants with water.

In the answer of the defendants it was alleged and found by the Court substantially, as follows: That on the tenth day of October, 1879, the defendants being desirous of laying down pipes in all of the public streets and alleys, and of supplying the town and its inhabitants with water, presented to the Board of Trustees a memorial and draft of ordinance granting the right to defendants, which memorial and ordinance were rejected. Thereupon the defendants presented to the Board of Trustees and asked the adoption of an ordinance granting to them the right to lay down pipes and conduct water through the streets for their individual use. This was also denied. On the seventeenth of October, 1879, the defendants asked of the Trustees the right to lay down and maintain pipes, and to sell water in that portion of the town wherein no exclusive right had been granted to J. W. Peek, but the Trustees again refused to grant their request. On January 16, 1880, a petition was presented by the defendants to the Board of Trustees, suggesting that they, the defendants,

were ready to proceed to use the public streets in laying down water pipes, etc., and requesting the Board to adopt proper regulations for the use of the streets by persons and corporations supplying the town and its inhabitants with water. This the Board did, and adopted an ordinance to that effect on the second day of February, 1880, but on the twenty seventh day of March, 1880, the Board repealed this ordinance.

On the fourteenth day of March, A. D. 1880, the defendants served on the Town Marshal of said town a notice in writing that the defendants would commence excavating Main street at a point near its junction with Fourth street, in the town of Woodland, for the purpose of laying pipes to furnish said town and its inhabitants with water, on the fifteenth day of March, A. D. 1880, at the hour of nine o'clock, A. M., at which time and place said Marshal might be present and superintend the same. There has been no other Superintendent of Streets in said town than the Town Marshal.

On the fifteenth day of March, A. D. 1880, the defendants, for the sole purpose of laying down water pipes in the streets and alleys of said town, and of furnishing an adequate supply of pure fresh water to said town and its inhabitants, and in pursuance of said last mentioned notice, commenced making excavations in said streets and alleys, at or near the corner of Main and Fourth streets, and they continued to make such excavations therein, from time to time, for such purpose only, up to the time of the commencement of this action.

At the time of making the first excavations referred to, the Town Marshal was present and gave directions as to where, and the manner in which, said excavations should be made, and the defendants in all respects complied with such directions, but the said Town Marshal was not present at nor did he give any directions in regard to any subsequent excavations made by the defendants. The defendants intend to make other and further excavations in the streets, alleys, and highways of said town, and to lay pipes therein, for the purpose of supplying said town and its inhabitants with water, and they have made excavations and laid water pipes for such purpose in streets in which J. W. Peek, his associates and assigns, had previously and still continue to maintain such

water pipes. The defendants made no excavations in any of the streets, alleys, or highways of said town, except so far as was necessary to enable them to lay down water pipes for the purpose of supplying said town and its inhabitants with water; and all the excavations so made by them were made in the usual and ordinary manner in which works of a like character are made, and there was no interference with the free use of such streets, alleys, and highways by the public as a passage way for themselves and vehicles, except such temporary and unimportant interference as was necessarily incident to the prosecution of such work.

On the twenty-eighth day of February, A. D. 1880, the Board of Trustees of said town, in pursuance of the provisions of Art. xiv. of the Constitution of this State, duly adopted an ordinance fixing the annual rates of compensation to be collected by all persons, companies, and corporations for the use of water supplied to said town, which said ordinance was passed to take effect on the first day of July, A. D. 1880, and said ordinance was in force up to and including the time of the trial of this action.

The Court also found that the defendants have never collected or demanded from said town or its inhabitants, any compensation for any water furnished by them to it or them; but the defendants have furnished water to certain inhabitants of said town for a certain defined consideration, in the amount of which consideration the persons so receiving said water are indebted to defendants, and which constitutes a charge upon such persons so receiving said water, in favor of said defendants.

After the decision of this case in bank, a petition for rehearing was filed, and the same was denied.

A. L. Hart, Attorney General, *S. M. Wilson* and *W. B. Treadwell*, for Appellant.

The right to use the public streets of a municipality for the purpose of laying down gas or water pipes is a franchise. (*S. J. G. Co. v. January*, 57 Cal. 614; *Reg. v. L. G. Co.*, 29 L. J. (M. C.) 118; *Reg. v. S. G. C. Co.*, 22 Eng. L. and Eq. 200; *Milhau v. Sharp*, 15 Barb. 210; *Smith v. M. G. L. Co.*, 12 How. Pr. 189; *Galbreath v. Armour*, 4 Bell. App. Cases, 884; *Dil-*

lon M. Corp. §§ 546, 551, 691, 697; Pol. Code, § 2634; C. C., § 548.) The right to collect rates or compensation for the use of water supplied to any town or the inhabitants thereof, is a franchise, and can not be exercised except by authority of and in the manner prescribed by law. (Const. Cal., Art. xiv., § 2; *Spring V. W. W. v. Bryant*, 52 Cal. 140.)

The clause of the Constitution under which defendants claim their authority to act, furnishes no foundation for their claim. That clause is not self-executing, but requires legislation to enforce it. (Cooley Const. Lim., 4th ed., 99, 100, 101; *Myers v. English*, 9 Cal. 341; *Lamb v. Lane*, 4 Ohio St. 167; *People v. Supervisors*, 3 Barb. 332; *People v. McRoberts*, 62 Ill. 41.) That clause applies to cities as distinguished from towns, and therefore has no application to this case. (Abbott's New Law Dict., Titles "City" and "Town.")

To recapitulate our argument on the point under consideration we say: That the last clause of Section 19 of Article xi. of the Constitution furnishes no justification for the acts of defendants, and does not, of itself, and without further legislation, authorize such acts: Because a consideration of the language used in view of the subject-matter and the evil to be remedied, viz., the prevention of monopolies, does not require such a construction. Because the right intended to be conferred is a right on the part of the public to receive water freely, and not a right conferred for the private advantage of those furnishing the water; and this clause contains, in itself, no sufficient rule by which that right can be enjoyed or protected. Because, by the terms of that clause, this right is to be exercised only so far as may be necessary to secure the object intended, and no sufficient rule is therein contained by which that necessity can be ascertained. Because Sections 1 and 2 of Article xiv., which are in *pari materia* with the clause under consideration, clearly imply an intention to leave the whole matter subject to the principles laid down, to further legislative action, and clearly require such action before this right can be exercised. Because the clause in question evinces an intention to require further legislation, both to secure the right intended to be granted, and to guard against abuses and evils which must be deemed to have been foreseen by its framers. Because if this clause

is intended to go into full operation of itself, and not as a mere principle or guide for the Legislature, it will not be competent for the Legislature to enact the laws necessary to suppress those evils. Because this clause requires that, in connection with the exercise of the right, the municipality shall enact certain regulations for the protection of the public and third persons; which regulations are to be deemed conditions precedent, and which have not been enacted; and, because the whole Constitution evinces an intention to leave all such matters to be determined by the municipalities whose interests are to be affected, subject to general rules prescribed for their guidance; and this clause evinces no contrary intention.

Section 19 of Article xi. of the Constitution does not apply to towns as contradistinguished from cities. Owing to the unavoidable length to which the discussion on the last point has extended, we shall be compelled in this and the succeeding point to confine ourselves to an exceedingly brief outline of the argument. The Constitution uses the words "city" and "town" in many cases, sometimes together and sometimes apart. Is any distinction intended between the words, and, if so, when can one be construed to include the other? These words are used together in the following sections: (Art. iv., §§ 22, 30; Art. vi., §§ 1, 11; Art. xi., §§ 6, 9, 10, 11, 12, 13, 14, 16, 17, 18; Art. xiii., § 10; Art. xiv., § 1; Art. xv. § 3; Art. xix., §§ 1, 4.)

The word "city" is used apart from "town" in the following sections: (Art. iv., §§ 25, 31; Art. xi., §§ 7, 8, 19.)

The word "town" is used apart from "city" only in Art. xiv., § 2. Section 31 of Art. iv., although omitting "town," contains the words "or other political corporation;" so that the omission of the word "town" has no significance. In Section 25 of Article iv., the omission of the word "town" is obviously unintentional, while in Sections 7 and 8 of Article xi. it is obviously intentional. There remains only Section 19 of Article xi. and Section 2 of Article xiv. to be construed. The word "town" is a generic word, while a "city" is only a particular kind of "town." Blackstone says, 1 Com. 114: "The word town or vill is, indeed, by the alteration of times and language, now become a generical term, comprehending under

it the several species of cities, boroughs, and common towns. A city is a town incorporated, which is or hath been the see of a bishop. * * * A borough is * * * a town, either corporate or not, that sendeth burgesses to parliament." In Abbott's Law Dictionary, under the title "Town," where is contained a somewhat extended discussion of the subject, we find the following:

"This term is differently used in different parts of the United States, in some regions signifying a civil division of a county, irrespective of incorporation or powers of government, such as is elsewhere called a township; in others, denoting a species of municipality more highly organized than a village, and less so than a city."

In the New England States, and in some others that have borrowed their system, a town is a civil division of a county, possessing certain corporate powers, but of very slight organization, principally characterized by the purely democratic form of its government, there being no representative body. In most of the other States the word signifies an inferior municipal corporation as stated by Abbott; some of those States (*e. g.* West Virginia) having also what are called "townships," corresponding to the New England "towns." (See Constitution of West Virginia, 1861-63, Art. vii., also Art. vi., § 17.) The former Constitution of this State (Art. iv., § 37) provided for the organization of "cities and incorporated villages," and (Art. xi., § 4) for a "system of county and town governments." The word "town," as there used, had the signification given to it in New England. (*Ex parte Wall*, 48 Cal. 318.) This provision of the Constitution was never carried out by the Legislature.

On the eleventh day of March, 1850, the Legislature passed an Act for the incorporation of cities (Stats. 1850, 87), and on the twenty-seventh day of March, 1850, an Act for the incorporation of towns. (Stats. 1850, 128.) By the latter Act, and those afterwards substituted for it, a town was an incorporated place of small size, distinguished by having no separate departments of government; the whole government being vested in a Board of Trustees. By the former Act, a city was a larger incorporated place, having the executive, judicial, and legislative departments separate, their powers being vested

respectively in the Mayor, Recorder, and Common Council. By numerous special Acts thereafter passed, particular "cities" and "towns" were incorporated under special charters, the above mentioned distinguishing characteristics existing in all. The same distinction exists in all other States where cities and towns, as municipal corporations, exist. (See the statutes of those States, *passim*.) In this state of things the present Constitution was adopted, in which a new provision (Art. xi., § 6) was made, as follows:

"Corporations for municipal purposes shall not be created by special laws; but the Legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns. * * Cities and towns heretofore organized or incorporated may become organized under such general laws; * * and cities or towns heretofore or hereafter organized * * shall be subject to and controlled by general laws."

Can it be for a moment doubted that the intention here was to distinguish between these two classes of municipal corporations, and to perpetuate the distinction then and before recognized by the laws of the State? The next section provides for the consolidation of "city" (not "town") and "county" governments into one government, which is, throughout the Constitution, called a "city and county," and provides that the provisions of the Constitution applicable to "cities," and those applicable to "counties" shall apply to such consolidated government. The next section makes certain provisions for a "city" containing a population of more than one hundred thousand. In all these cases the distinction is obvious. Then follow numerous provisions, some applying to cities and towns, some including all municipal corporations and *quasi* corporations, and some including also counties and townships. But when we reach Section 19 of Article xi. we find two new and extraordinary provisions relating, by their terms, to "cities" only. We may safely assert that, under such circumstances, "towns" are, *prima facie*, excluded. But it is not to be denied that these words are sometimes construed as interchangeable, and it is therefore important to see if there is any rule of construction by which we can be guided in determining whether this omission was intentional. With-

out entering into any discussion of the question, we will assert the rule to be that the word "town" is the generic word, and will be held to include "city" unless the context requires otherwise; while the word "city" denotes a particular species, and will not be held to include "town" unless the context demands it. This is only a special case of the rules, that general words will usually be held to include particulars, but particular words will not usually be extended so as to include general ones, and that technical words will usually be considered as used in the technical rather than in the popular sense. (*Rafter v. Sullivan*, 13 Abb. Pr. 262; *Peck v. Weddell*, 17 Ohio St. 271; *Abbott's Law Dict.*, titles "City" and "Town.")

Can any reason be shown why the word "city" as used in this section, should be extended so as to include "town" and can not good reasons be given for denying such an interpretation? In the first place the care observable throughout the Constitution furnishes strong ground for supposing a deliberate intention. There can be no possible reason suggested why "county" should be held to be included, yet all the argument made by respondents requires the inclusion of this word as well as that of "town." The whole scope of both parts of the section shows that it is intended to apply to large, thickly settled, and highly organized places. To hold that the first clause applies to the smallest municipalities would be to create an almost intolerable hardship in opposition to the express letter of the law; yet, if the last clause is so construed, we must treat the first in the same manner. In both cases the evil intended to be remedied presses heavily on large places and but slightly on small ones, and therefore the scope of the remedy should be held to be no more than co-extensive with the mischief.

With regard to Section 2 of Art. xiv., respondents call attention to the use of the word "county" in that section, and its omission in Section 1 of the same Article, and say that the Court, in construing Section 1, should insert the word "county." Here, at least, they have fallen into a grave error. That portion of the section following the word "provided" was offered as an amendment by Mr. Barbour, in the morning session of February 14, 1879. As offered by him, it contained

the word "county" in every place. (Debates, Vol. 3, 1371.) In the afternoon session of the same day, this amendment, before action taken upon it, was amended by its author, by consent, by striking out the word "county" wherever it occurred, and, as so amended, was adopted. (Id. 1372.)

Again, counsel for respondents say that the word "city" should be interpolated into Section 2 of Article xix. In this we heartily agree with them for the following reasons: first, as we have before shown, the word "town" should generally be held to include "city"; second, the context undoubtedly requires its inclusion; and third, because the word was omitted solely through a clerical error. As to this last matter, the facts are these; that section was offered as an amendment by Mr. Herrington, in committee of the whole, January 15, 1879. As offered, it contained the word "city." (Debates, Vol. 2, 1029.) On the debate, it was referred to as including "cities." (See remarks of Messrs. Herrington and Reynolds, id. 1029, 1030.) Before action, the section was again read for information, and then adopted by the committee. As so read and adopted, it contained the word "city." (Id. 1030.) On February 14, 1879, in Convention, the President announced the question as being upon concurrence with the Committee of the Whole in adopting the section. The section was then read and the report concurred in, without debate. As so read and adopted the word "city" was omitted. (Debates, Vol. 3, 1375.) This word, then, was left out solely by the unauthorized act of the Secretary, probably through a mistake of the printer, and the error passed unnoticed.

Counsel for respondents, in their points on file, call attention to certain sections of the Constitution in which the word "city" is used, but not "city and county," and argue that, as those sections have been held to apply to a "city and county," by parity of reasoning "city," in this section, should be held to include "town." But they forget that the reason why it was necessarily so held, was that Section 7 of Art. xi. expressly provides that "the provisions of this Constitution applicable to cities * * * shall be applicable to such consolidated [i. e. city and county] governments." When counsel can show a similar provision with reference to towns, we will admit this to be a case in point.

As to Section 27, Article iv. (with which should be compared Section 6 of the same Article), it will be observed that Assembly, Senatorial, and Congressional Districts are intended to be composed of counties, and the only reason why a city and county is mentioned in that connection is, because such a government does not, by its consolidation, lose its character as a county. Counsel for respondents say truly, that this provision "would not apply literally to San Francisco should it become a city;" to which we may add that it would not so apply either literally or in spirit.

We have thus examined every provision mentioned, and have, as we believe, shown that only one change (*viz.*, the insertion of "city" in § 2, Art. xiv.) is necessary to make the Constitution entirely harmonious; and that this change is not only warranted by both the letter and the spirit of that section, but is in conformity with the actual intention of the Convention, which only failed of its intended form of expression through a clerical error. In this state of the case we respectfully submit that, to adopt the construction contended for by respondents upon no better reason than those advanced by them, would be an extreme case of judicial legislation. The construction to be given to a Constitution on such a question is somewhat different from that adopted in the case of a statute. The Constitution purports to cover the entire ground of government, and when its provisions are so drawn that an intention is manifest to distinguish between certain cognate terms, that intention must be presumed to have existed throughout, unless strong and grave reasons are shown to the contrary. The Courts can not say that because such a provision might well have been made to apply to cases not within its terms, therefore it was intended so to apply; but, before adopting such construction, it is necessary to show that it is inconceivable or, at any rate, highly improbable that it was not so intended. As we have shown, a clear and deliberate intention is manifested in other sections to distinguish between these words; and, inasmuch as no other section has been pointed out in which the word "city," standing alone, can, with the slightest plausibility, be claimed to include "town," reasons of a nature very different to and much stronger than those advanced by respondents will be required

to overthrow the almost conclusive presumption thus created.

Woodland is a "town" both in fact and in law. (Stats. 1873-4, 557.) Section 4356 of the Political Code, cited by respondents, has no application. (Pol. Code, §§ 19, 4478, 4479; *Ex parte Simpson*, 47 Cal. 128; *Babcock v. Goodrich*, 47 id. 488.)

The constitutional provision relied on does not, therefore, furnish any justification for defendants' acts. (*Rafter v. Sullivan*, 13 Abb. Pr. 262; *Peck v. Weddell*, 17 Ohio St. 271.)

Under the facts of this case the town of Woodland, owning an interest in the Peek water works, and having the entire control of them, is within the exception contained in that clause, which, for that reason, does not apply here.

C. P. Sprague, Jo. Craig, and Rhodes & Barstow, for Respondents.

The words of the clause of that section which are involved in this controversy are: "In any city where there are no public works owned and controlled by the municipality, for supplying the same with water or artificial light, any individual or company * * * shall, under the direction of the Superintendent of Streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein," etc.

Our position is that the word "city" means, in that connection, "municipality;" that the purpose of that clause was to give to an individual or corporation, the right to introduce water into a municipality which does not own and control public works of its own, by which the municipality and its inhabitants are supplied with water. And we contend that there is nothing in the Constitution which leads to the conclusion that the intent was to limit this right to cities alone, excluding cities and counties, towns and municipalities of any other name or description. The word "city" is used in every instance in that section in its generic sense. Blackstone (1 Com. 114) says that "a city is a town incorporated." (See

Bouv. Law Dic.; Webster's Dic.) See also *Mason v. Finch*, 2 Scam. 223; *Burke v. Monroe Co.*, 77 Ill. 610, in which the word "city" was held to include a "town." The Political Code, § 4356, defines a city, and Woodland comes within the definition. (*Winbigler v. Los Angeles*, 45 Cal. 38.)

The Court has, it is to be presumed, often had occasion to notice that the Constitution has not always employed the same word or words to express the same idea, but that, on the contrary, it has, apparently, studiously avoided the repetition of words and phrases in the same or different sections, where there is not a shade of difference in the idea. Art. vi, Sec. 4, confers on this Court appellate jurisdiction "in all cases at law which involve the title or possession of real estate," while Section 5 confers upon the Superior Court original jurisdiction "in all cases at law which involve the title or possession of real property." By the same sections, jurisdiction is given to this Court "in cases of forcible entry and detainer," and to the Superior Court, jurisdiction "of actions of forcible entry and detainer." The Justices of this Court are to be elected "at the general State elections at the times and places at which State officers are elected" (Sec. 3); and Judges of the Superior Courts are to be elected "at the general State election" (Sec. 6). Evidently, the two sections refer to the same elections — the general elections.

The words "law," "act," "bill," and sometimes "legislation," are used synonymously, and as having the sense of "law." And so it will be found that, in many instances, the terms "city," "city and county," "town," "municipality," and "municipal corporation" have been employed in such sense that one of those terms will include the meaning of one or more, and sometimes all of the other terms. These several terms occur, either separately or combined, in the following sections: Art. iv., §§ 22, 25, 27, 30, 31, 32; Art. vi. §§ 1, 6, 7, 11; Art. ix., § 3; Art. xi., §§ 5-10, 11, 12, 14, 16-19; Art. xiii., §§ 4, 9, 10; Art. xiv., §§ 1, 2; Art. xv., § 3; Art. xix., §§ 1, 3, 4; Art. xxii., §§ 6, 8.

It is provided by Art. xi., § 8, that "any city containing a population of more than one hundred thousand inhabitants may frame a charter for its own government," etc. The words of the provision are not "any city, or city and county," and

yet there can be no doubt that it was intended that the word "city" should embrace "city and county." The City and County of San Francisco, in Art. xi., §§ 6, 7, and perhaps in others portions of the Constitution, is recognized as an existing municipality. This Court, in upholding the election of the Board of Freeholders in San Francisco (see *People v. Hoge*, 55 Cal. 612), necessarily affirmed that the term "city" in that section comprehended "city and county." In the first portion of the section involved in this point (Art. ii., § 19), provision is made in respect to assessments, etc., for improvements in "any city," and this Court, in *McDonald v. Patterson*, 54 Cal. 245, held that the provision was inapplicable to the "city and county" of San Francisco.

The provisions in relation to the formation of congressional districts (Art. iv., § 27) mentions "county, or city and county," but not city; and it would not apply literally to San Francisco should it become a city. The power granted by Art. xi., § 11, to make police and sanitary regulations, is not expressly extended to a city and county. Nor does the provision of Art. xi., § 18, in respect to incurring indebtedness, extend expressly to cities and counties. Art. iv., § 25, Sub. 28, prohibits special laws creating offices "in counties, cities, cities and counties, townships, election or school districts," and we think there would be no hesitation in saying that the provision was intended to extend to towns also.

It will be noticed that in the several instances above cited, by reference to article and section, the words differ, though the idea intended to be conveyed may be identical. It is worthy of attention that Art. xiv., § 1, provides that the rates for water supplied to any "city and county, or city or town, or the inhabitants thereof," shall be fixed, etc., and that § 2 of same Article provides that the right to collect rates, etc., for water supplied to any "county, city and county, or town or the inhabitants thereof," is a franchise, etc. The omission of "county" in the first instance, and of "city" in the second, would be very significant were these several clauses to receive a literal reading; but there is no manner of doubt that the Court will, when the question shall be presented, decide that those clauses are to be read as they would be, were the words "county" and "city" inserted in the respective clauses.

In the second section the word "town" may properly be construed as comprehending a city, for it would be absurd to contend that the intent of the instrument was to declare that the right to collect rates for water supplied to a town was, but to a city was not, a franchise. It will be noticed that in each section the word "town" is employed, and it is obvious that it was intended that water might be introduced for the use of towns and their inhabitants, not only by the towns, but by individuals and corporations. It is equally obvious, that the Constitution did not intend to provide that the towns might fix the rates for water supplied by themselves as municipalities; nor did it intend to declare that a right exercised by towns to collect rates for water supplied by themselves, should be deemed a franchise. By the first section, the "governing body" of the town is required to fix the rates in respect to that which, in the second section, is declared to be a franchise. The last clause of the first section places the matter beyond question, for it is there declared that, for the collection of rates, otherwise than as so established by the town, the water works shall be forfeited to the town. No one, we think, will contend that a right exercised by a town to collect rates for water supplied by itself is, in the sense of the second section, a franchise; nor that the public water works of a town should be forfeited to itself, because of its collection of rates otherwise than is provided by the Constitution.

Reading those two sections of Art. xiv. in connection with Sec. 19, Art. xi., the conclusion is inevitable, that the intent of the instrument is to secure to individuals and companies the right to introduce water into the same classes of municipalities that have a right to fix the rates for its use; and that it intends to declare that the right to collect the rates upon water so introduced is a franchise; that it does not intend to limit this right to cities, but to grant it in respect to cities and counties, and towns as well; and that it employs the term city as synonymous with the word employed in that section as its exact equivalent — "municipality." By no other construction can the several sections above referred to be brought into harmony.

The provision is, that "In any city where there are no pub-

lic works owned and controlled by the municipality, for supplying the same with water or artificial light, any individual or company * * * shall, under the direction of the Superintendent of Streets, * * * and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof and laying down pipes," etc. The right thus given does not require any legislation for its security and certainly none for its creation. The right is as fully and completely granted and secured by the Constitution, as is the right to the free exercise of religious profession, or liberty of speech, or trial by jury, or mechanic's lien. It is not claimed that the right to introduce water is, in its exercise, free from all conditions or restrictions. In that respect it is like the other rights above mentioned. Laws may be passed providing for the impaneling of juries, or the securing and enforcement of mechanics' liens. And so here. The water pipes may be laid down under the direction of the Superintendent of Streets and under municipal regulations for damages. But the right to a trial by jury is not dependent upon the question whether an effectual law has been passed for the impaneling of juries. The lien of the mechanic for labor performed, does not depend upon the passage of a law for its enforcement. Should the municipality fail or refuse to prescribe general regulations for damages that might be occasioned by the laying down of water pipes, the right would not cease; but the purpose of the Constitution is to secure that right, and to subject it, in its exercise, to the operation of such general regulations. The Constitution does not declare that the individual or company may lay down water pipes, if such general regulations shall have been prescribed. The existence of those regulations is not a condition precedent. If there be no Superintendent of Streets or other officer in charge thereof, that fact can not impair the right in question. Any person may travel upon a turnpike, but he is subject to reasonable rules and regulations made by the company for the maintenance and protection of the turnpike. His right to travel on the turnpike is not dependent upon the existence of such rules or regulations. If the municipality, by refusing to make, or by repealing such regulations, or by

failing or refusing to give the control of the streets to any officer, could prevent the exercise of the right to introduce water; or it could effectually destroy all competition, if the municipality was disposed to favor a company which had already laid down its water pipes. The purpose of securing competition in supplying water, in all towns which do not own and control public water works, is manifest from the several provisions of the Constitution.

It is difficult, if not impossible, to give an accurate definition of a self-executing Constitutional provision; but where the provision clearly confers a right, it is none the less self-executing because there is also a provision that the right is to be exercised in conformity with the rules or regulations that some authority may make. The right granted to introduce water is not dependent upon the exercise by the municipality of its authority to make regulations in respect to damages that may occur in the laying down of the water pipes. Had that been the intent, the Constitution would have declared that municipalities might permit the introduction of water, under such rules and regulations as it might prescribe. The first portion of this section was, in *McDonald v. Patterson*, 54 Cal. 245, respecting street improvements, held to be self-executing. There was the same ruling in *People v. Hoge*, 55 id. 612, involving the election of a Board of Freeholders. (See also, *People v. Bd. of Education*, 55 id. 381; *Weber v. Supervisors*, 8 P. C. L. J. 493; *Barton v. Kalloch*, 5 id. 330.)

It will be noticed — and it is a matter of great significance — that the plaintiffs allege in their complaint that the town refused and still refuses to make or prescribe any regulations for damages, or indemnity for damages, for the use of the street in laying down water pipes. The Trustees evidently were of the opinion that by failing to perform their duty — by neglecting to keep a condition subsequent — they could defeat the constitutional grant of the right in question.

The only possible ground upon which it can be pretended that the town owned or controlled any water works for supplying the town or its inhabitants, is based on Exhibits "A" and "B," by which the town, for four hundred dollars, purchased from Peek "four undivided sevenths of that certain pump, used by the party of the first part in raising water at

his water works in said town." The indenture contains this further clause: "And for the same consideration, the party of the first part grants to the party of the second part, the use of said system of water works in connection with said pump, in the manner and to the extent of the covenants hereinafter contained." Then follow covenants to the effect that Peek shall run the pump and water works; that he shall supply water for municipal uses where his pipes may run; that the town may make regulations respecting the use of water, so as to supply water in cases of fire and other public necessity; and that Peek shall receive for water supplied for the last mentioned purposes, only a reasonable compensation.

The ownership of four sevenths of a pump does not constitute ownership of the works to which the pump may be attached. That is all the ownership that the town has in the water works.

The town does not control the works, but they are controlled by Peek, subject, of course, to municipal regulation, as are all water works which supply municipalities or their inhabitants.

They are not public works, for the reason above given, and because, by the terms of the indenture, Peek is to run and manage them.

The covenant to furnish water for municipal uses—in cases of fire and other public necessity—is no more than is required by all companies furnishing water to towns and their inhabitants. (C. C. § 549; *Spring Valley W. W. v. San Francisco*, 52 Cal. 111.)

That the works are not public, and are not owned and controlled by the town, is apparent from the fact that Peek is to be paid a "reasonable compensation" for the water furnished for fires and other public necessity.

Ross, J.:

The gist of the very able argument of appellant's counsel is that, under the provisions of the present Constitution, no company or individual possesses the right to lay pipes in the streets of any incorporated city or town of the State for the purpose of supplying the inhabitants thereof with fresh water, until

the Legislature has prescribed the terms and conditions under which all of this may be done.

Prior to the adoption of the present Constitution, the Legislature had that power. It could delegate to the municipal government, or itself exercise, the power of prescribing the terms and conditions upon which pipes might be laid and water furnished. The privilege lay only in grant from the Legislature, which might be, and which experience showed had been, abused. As with many others, in dealing with this subject, the framers of the Constitution of 1879, determined to, and did make many radical changes from the pre-existing condition of things. They enacted several provisions in relation to the subject to be considered, all of which must be taken and read together, and to each of which effect must be given. Those provisions are:

“Article xi., Section 19. * * * In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this State, shall, under the direction of the Superintendent of Streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof.

“Article xiv., Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; *provided*, that the rates or compensation to be collected by any person, company, or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the Board of Supervisors, or city and

county, or City or Town Council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative Acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July, thereafter. Any Board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action, at the suit of any party interested, and shall be liable to such further processes and penalties as the Legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town, in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company or corporation, to the city and county, or city or town, where the same are collected, for the public use.

"Art. xiv., Sec. 2. The right to collect rates, or compensation, for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and can not be exercised except by authority of and in the manner prescribed by law."

Now, these provisions, as well as all other provisions of the Constitution, must receive a practical common-sense construction. They must be considered with reference to the prior state of the law, and with reference to the mischief intended to be remedied by the change. If the framers of the instrument had intended to leave the entire matter where it previously rested—in the hands of the Legislature—they would have said so in appropriate language. But it is perfectly evident that there were some things in regard to the subject that they were unwilling to trust to the Legislature. It was not with the view of "liberating the great public uses of water and gas from legislative control, and making them independent of the State," that the changes were made, but, on the contrary, it was intended, in certain enumerated respects, to lay a stronger hand upon them than that of the Legislature—to wit, the hand of the Constitution itself. So

it was, that by Section 1 of Art. xiv., the use of all water heretofore or hereafter appropriated for sale, rental, or distribution, is expressly declared to be a public use. It is not left to the Legislature, as formerly, to say whether it shall be a public use or not, but the Constitution itself declares it to be such, and then makes the use subject to the regulation and control of the State; that is to say, of the Legislature, in the manner to be prescribed by law, to wit, by statute law, subject, however, to certain enumerated provisions contained in the Constitution itself; among them, to provisions in respect to the rates or compensation to be collected by any person, company, or corporation, for the use of water supplied to any city and county, or city or town, or the inhabitants thereof. Such rates or compensation, the Constitution expressly declares shall be fixed in a certain specified manner, at a certain time, and by a certain body; and the body failing to do so is expressly made "subject to peremptory process to compel action, and at the suit of any party interested, and liable to such further processes and penalties as the Legislature may prescribe."

But by the next section of the same article of the Constitution, the right to collect the rates or compensation so established is declared to be a franchise, "and can not be exercised except by authority and in the manner prescribed by law"—that is, by statute law. But, of course, the Constitution contemplated the enacting by the Legislature, where they did not exist, of all laws necessary to give effect to its commands, and that none should be passed in contravention of its provisions. When, therefore, the Constitution fixed the manner of establishing the rates or compensation to be charged for water furnished to any city and county, or city or town, or the inhabitants thereof, and further declared that the right to collect the rates or compensation so established is a franchise, and can not be exercised except by authority of and in the manner prescribed by law, it was the duty of the Legislature, if they did not exist, to provide the needful laws. But the failure of the Legislature to do so, if failure there was, could not prevent the establishment of the rates or compensation specifically required to be established by the Constitution. And so with respect to the privilege granted by Section 19 of Article xi. of the Constitution of laying pipes in

the public streets and thoroughfares of any city (where there are no public works owned and controlled by the municipality), so far as may be necessary for introducing into and supplying such city and its inhabitants with gas or other illuminating light or with fresh water. That privilege is expressly granted by the section of the Constitution cited, subject to the direction of the Superintendent of Streets or other officer in control thereof, and under such general regulation as the municipality may prescribe for damages and indemnity for damages, and upon the condition that the municipal government shall have the right to regulate the charges thereof. The purpose of this provision was thus explained by the gentleman at whose instance it was inserted in, and became a part of the Constitution: "It gives to any individual, as well as to any incorporated company, the right to the use of the streets for laying down pipes for the supply of gas and water, or either. I think that the objection that was taken to the section as formerly introduced was well taken — that it should not be limited to corporations; that any individual, for the public good, should have the right to use the streets for laying down pipes for supplying water or gas. It is in the public interest that it should be conceded, and it prevents monopoly in any sense. It also provides that the city authorities may make a regulation in relation to damages and indemnity; that is, that they may make a regulation requiring all work to be done under the supervision of the Superintendent of Streets, and also, if any damage should be likely to occur, they may, by security or otherwise, guard against it. * * * Then it provides that the city and county shall have the right to regulate the price to be paid by the inhabitants for the gas and for the water. This is also a necessary regulation, I think, against the abuses of monopoly. Now, in Los Angeles we have a gas company with a monopoly for twenty years, and several parties have endeavored to get the privilege for laying down pipes in the streets for the purpose of supplying the city and competing with this company, but the company has always had sufficient influence in the municipal government to prevent this being done, and this company has a prospect of exclusive right for twenty years to come. Now, I submit to the Convention that this is a great

abuse of public authority and that it ought to be corrected. We have, also, there, a water company that claims the monopoly, and the private individual who did succeed in laying down pipes and is to some extent supplying the city with water in opposition to the monopoly, is threatened constantly with suits and injunctions, and if this thing goes on we will have a monopoly, not only of water and gas, but of all domestic necessities, and then we will have some company peddling it by the tin cupful. It is time this abuse was corrected, and, therefore, I offer this amendment"—which "amendment" is the clause of the Constitution now under consideration. (Debates Cons. Con., Vol. 2, p. 1075.)

We have quoted at length the remarks accompanying the introduction of the provision, for the purpose of showing that the members of the Constitutional Convention had distinctly put before them the evils intended to be remedied, and the purpose of the enactment; and thus informed, they adopted it. Yet we are asked to hold, in effect, that after all, the whole matter rests where it did before — with the Legislature. This we can not do. Nor under our construction of the provisions in question, do we discover any indication of a return "to the doctrine of the *Dartmouth College Case*," nor any fostering of monopolies, but, on the contrary, the most manifest intent to prevent them as respects the important subjects treated of — gas and water. By the adoption of those provisions the people asserted their willingness to leave the entire subject in the hands of the Legislature, and in the particulars already indicated, declared the rule that should govern, in the organic law itself, and gave to the Legislature the "regulation and control" in all other respects.

It is also claimed on the part of the appellant that the word "city" used in Section 19 of Art. xi., *supra*, does not include towns, and therefore does apply to the town of Woodland. But in this position, also, we are unable to agree with the learned counsel for appellant. As already said, all of the provisions of the Constitution above quoted must be taken and read together. Indeed, this is conceded by counsel. Now, Section 1 of Art. xiv. provides that the rates or compensation to be collected by *any person, company, or corporation* in this State for the use of water supplied to *any city and*

county, or city or town, or the inhabitants thereof, shall be fixed, etc.

Is it not too plain for argument that the rates or compensation required to be fixed by this provision of the Constitution are the rates or compensation to be collected by the individual or corporation introducing water "in any city where there are no public works owned and controlled by the municipality," as provided by Section 19 of Art. xi.?

That the provision of the Constitution requiring the rates or compensation to be fixed has no application to water furnished by a municipality itself, is conclusively shown by the concluding clause of the provision, which is in these words: "Any person, company, or corporation, collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use." It would be absurd to say that the Constitution meant to provide for the forfeiting of the water works of a city and county, or city or town to itself. We think it clear that the rates or compensation required to be fixed by Section 1 of Article xiv. are the rates or compensation to be collected for water authorized to be introduced by Section 19 of Article xi., and that the latter section secures to individuals and to corporations duly incorporated for such purpose under and by authority of the laws of the State, the right to introduce water into the classes of municipalities that by Section 19 of Article xi. are given the right to fix the rates or compensation for its use — that is to say, cities, towns, and cities and counties. This construction brings the several sections into harmony, and gives effect to the evident purpose of the Constitution.

Other points are made which need not be noticed in detail.

Our conclusion is that the judgment and order ought to be affirmed, and it is so ordered.

MORRISON, C. J., and MYRICK and SHARPSTEIN, JJ., concurred.

THORNTON, MCKINSTRY, and MCKEE, JJ., dissented.

[No. 7,469.— In Bank.]

November 28, 1882.

TOWN OF WOODLAND v. J. D. STEPHENS ET AL.

WATER SUPPLY FOR MUNICIPALITIES — CONSTITUTION — CITY AND COUNTY GAS FRANCHISE — INJUNCTION. — The case of the *People v. J. D. Stephens et al.*, No. 8,023, decided November 28, 1882, followed. (See ante, 209.)

APPEAL from the Superior Court of the County of Yolo, from an order dissolving a preliminary injunction. BUSH, J.

Action to restrain the defendants from making excavations in the streets of the Town of Woodland. A preliminary injunction was granted upon the complaint alone. Defendants filed an answer, and set up, as a defense, that the excavations made and threatened to be made by defendants in the streets of said town were for the purpose of laying pipes to supply the inhabitants of the town with water, and pleaded certain matters as facts under which they claimed the right to so supply water. Defendants also filed their own affidavit, containing, substantially, the same matters as in the answer; and upon the affidavit and answer, moved to dissolve the injunction. Upon the hearing of the motion counter affidavits were read, and the Court dissolved the injunction. From the said order dissolving said preliminary injunction plaintiff appealed.

After decision in bank a petition for rehearing was filed and the same denied.

S. M. Wilson and W. B. Treadwell, for Appellant.

For argument, see appellant's points in *People v. Stephens*, ante, 209.

Henry Edgerton, C. P. Sprague, and Craig & Grant, for Respondents.

For argument, see respondents' points in *People v. Stephens*, ante, 209.

The Court:

On the authority of *People v. Stephens*, No. 8,023, order dissolving injunction affirmed.

[No. 6,287.—In Bank.]

November 28, 1882.

SANTA CRUZ RAILROAD CO. v. BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CRUZ.

COUNTY BOND — MANDAMUS — NEGOTIABLE INSTRUMENT — STATUTE — BOARD OF SUPERVISORS — CONTRACT.

APPEAL by defendant from the judgment of the District Court of the Twentieth Judicial District in and for the County of Santa Cruz, and from an order denying a motion for a new trial. BELDEN, J.

Application for a writ of mandate. The Court below found the following facts: 1. On or about the eighteenth of June, 1873, the plaintiff duly incorporated under the laws of the State of California for the construction of a railroad, from a point upon the "Southern Pacific Railroad," in the County of Monterey, and extending in a westerly direction across Santa Cruz County to a point called "New Year's Ranch," upon the western boundary of Santa Cruz County. 2. Upon the twenty-fifth day of September, 1872, in pursuance of an Act of the Legislature of the State of California, approved "April 4, 1870," the Board of Supervisors of Santa Cruz County submitted to a vote of the electors of said county, the question of granting the aid of said county in the form of bonds to the amount of six thousand dollars per mile, to aid in the construction of said road. Said order was by the Board of Supervisors regularly made and entered upon their minutes, and after a proper petition requesting said submission had been filed with said Board. 3. That upon the fifth day of November, 1872, after due and regular notice, by publication as by law required, the electors of Santa Cruz County voted upon said proposition, and there was then cast in favor of granting said proposed aid nine hundred and twenty-seven votes, and against granting such aid five hundred and sixty-four votes, and thereafter and in due time and form said "Board of Supervisors" canvassed said vote so cast and returned, and did enter upon their minutes that the vote was as above set forth, and that the proposition to grant said aid,

as in said proposition submitted, had carried at said election. 4. That in pursuance of said election and vote and order thereupon as above set forth, the defendant did, upon August 4, 1873, make and execute upon behalf of the County of Santa Cruz the contract in writing set forth in plaintiff's complaint, and which is as follows:

"This contract, made and entered into on the fourth day of August, A. D. 1873, by and between the County of Santa Cruz, in the State of California, acting by and through the Board of Supervisors of said county, as the party of the first part, and that certain corporation, organized, acting, and existing under and by virtue of the laws of said State, and known, designated, and called the Santa Cruz Railroad Company, as the party of the second part.

"Witnesseth, that the Board of Supervisors of said county, having by an order duly made on September 25, 1872, and recorded at large in volume 3, pages 236-8 of the minutes of the proceedings of said Board, proposed that said county shall aid in the construction of a railroad of not less than three-foot gauge, the route of which road is definitely described in said proceedings, as beginning at or near the Pajaro Depot on the Southern Pacific Railroad, and thence running in the most practicably direct route through the Counties of Monterey and Santa Cruz, crossing the Pajaro River near Watsonville, and crossing the San Lorenzo River between the county road leading to Soquel and the Bay of Monterey, and thence along or near the coast to the boundary of said county near the south-east corner of the point New Year's Rancho, by the issue of county bonds, payable within twenty years, and bearing interest payable semi-annually at the rate of seven per cent. per annum, to the amount of six thousand dollars per mile, but not exceeding in the aggregate the sum of two hundred and forty thousand dollars: such aid to be in lieu of the aid of one hundred thousand dollars heretofore authorized to be granted in the construction of a railroad connecting the town of Santa Cruz with the Southern Pacific Railroad: And the Board of Supervisors of said county, under and in pursuance of an Act of the Legislature of said State, approved April 4, 1870, and entitled "An act to empower the Board of Supervisors of the several counties of the State to aid in the con-

struction of a railroad in their respective counties," and of the Act of April 4, A. D. 1870, supplemental thereto, having at the election held in said county on the fifth day of November, A. D. 1872, of which election at least thirty days' notice was given by publication once a week in a newspaper printed and published in said county, which notice stated the day on which, and the places where such election was to be held in said county, and the amount of bonds of said county to be issued for railroad aid, and definitely described the route of the railroad for which aid was proposed, submitted to the qualified electors of said county the question whether such railroad aid shall be granted by said county to aid in the construction of a railroad on the route hereinbefore described; and at such election a majority of the electors voting at such election, having cast their votes in favor of such railroad aid, and the result of said election after a full and fair canvass by said Board, having been declared by said Board to be in favor of granting such railroad aid, and the sum of two hundred and forty thousand dollars, authorized by the said vote as aforesaid to be granted in and to such railroad, being less than five per cent. of the value of the taxable property of said county, and no aid whatever to any railroad having ever been granted by said county: And a certain agreement dated January 18, A. D. 1872, between said county and the Board of Supervisors thereof, and the Santa Cruz and Watsonville Railroad Company, having been fully and forever canceled and annulled, and said county released and discharged from all liability thereunder, and covenants therein: And the said party of the second part having been heretofore duly organized as a corporation under the laws of said state for constructing and maintaining a railroad on the entire route first hereinbefore mentioned and described, and proposing to construct on said route, first, the section of such railroad between a point at or near said Pajaro Depot, and a point on the westerly side of said San Lorenzo River, and within the corporate limits of the Town of Santa Cruz, which point last referred to is hereafter to be located by said party of the second part; and said party of the second part having solicited the said Board to grant the aid of said county in the construction of

such railroad, and the terms offered by said party of the second part appearing to said Board to be advantageous to said county, and it appearing that said county will be greatly benefited by the construction of such railroad, or any part thereof: Now, therefore, this contract witnesseth, that in consideration of the premises, and of the agreements herein named, to be done and performed by said party of the second part, the said party of the first part has agreed and hereby does agree with said party of the second part, to issue, deliver, and donate unto said party of the second part, in aid of the construction of such railroads, bonds of the said County of Santa Cruz, in amounts, and at the times, and upon the terms as herein stated, said bonds as herein provided shall be payable in gold coin to said party of the second part, or to the holders of such bonds, within twenty years from the date of their issue, at the office of the Treasurer of said county, and shall bear interest in like coin at the rate of seven per cent. per annum: and the installments of interest shall be payable semi-annually on the first Mondays of January and July of each year, on coupons to be issued and delivered with such bonds, and each of such bonds shall be of the denomination of not less than one hundred dollars, nor more than one thousand dollars, signed by the chairman of said Board, and by the Treasurer and Clerk of said county, and under the seal of said county; the interest coupons to be signed by the Treasurer and Clerk of said county: such bonds are to be prepared for signing in the following form, to wit:

“Number —. State of California. — Dollars. Bond of the County of Santa Cruz.

“In pursuance of an Act of the Legislature of the State of California, entitled ‘An Act to empower the Board of Supervisors of the several counties of the State, to aid in the construction of a railroad in their respective counties, approved April 4, 1870,’ and of an Act supplementary thereto, approved April 4, 1870, and in accordance with the terms of a contract entered into by the Board of Supervisors of said county, on the fourth day of August, 1873, with the Santa Cruz Railroad Company, which said contract is entered upon the minutes of the Board of Supervisors, in Vol. 3, pp. 279-286: The county of Santa Cruz owes and will pay at the office of the County

Treasurer, in the town of Santa Cruz, State of California, to the Santa Cruz Railroad Company, or the holder of this bond, within twenty years from the date of these presents, the sum of _____ dollars, in United States gold coin, with interest thereon at the rate of seven per cent. per annum, in like gold coin, from the date hereof, until paid, interest payable semi-annually, on the first Mondays of January and July of each year, on the surrender to said County Treasurer of the coupon for said interest. In testimony whereof, and by virtue of the authority upon them conferred by the Board of Supervisors of said county, the chairman of the Board of Supervisors of said county, the County Treasurer, and the County Clerk have hereunto set their hands, and caused the seal of the county to be affixed, this _____ day of _____ A. D. one thousand eight hundred and seventy _____

Chairman Board of Supervisors. County Clerk. County Treasurer.

Coupon No. _____ On the first Monday of _____ A. D., _____ the County of Santa Cruz will pay to the Santa Cruz Railroad Company, or bearer, at the County Treasurer's office, _____ dollars in United States gold coin, interest due on bond No. _____

County Clerk. County Treasurer.

"Said bonds, with their respective coupons, shall be issued and delivered as follows, to wit: When five miles of said first section of said railroad shall have been constructed, and a construction train run over the same, there shall be issued and delivered to said party of the second part, by said party of the first part, bonds of said county, as aforesaid, to the amount of thirty thousand dollars, and upon the construction of every mile of track thereafter, of such railroad, and the passage of a construction train over the same, there shall be issued and delivered as last aforesaid, to said party of the second part, bonds of said county to the amount of six thousand dollars, and so on until the construction of said railroad is completed. When said party of the second part shall have constructed the first five miles of said railroad as herein designated, a written notice to that effect, signed by the President, Secretary, or Chief Engineer of said party of the second part, shall be delivered to the County Clerk of said county, and within fifteen days after the delivery of such notice to such Clerk, the

said Board of Supervisors shall inspect, or cause to be inspected, the said five miles of such road, and if found constructed in accordance with this contract, said Board shall issue and deliver to the said party of the second part the bonds of said county, as aforesaid, to the amount of thirty thousand dollars, and thereafter as each mile of said railroad is constructed as stipulated, a similar notice to that effect shall be delivered to said clerk, and thereafter within fifteen days, said Board shall inspect, or cause to be inspected, such mile of the road so constructed, and if found constructed in accordance with this contract, said Board shall issue and deliver to said party of the second part the bonds of said county as aforesaid to the amount of six thousand dollars. And in case said Board, after inspection as aforesaid, shall determine that the part of the road so inspected has not been constructed according to this contract, said Board shall, within fifteen days after such notice shall have been delivered to said Clerk, cause a written notice, signed by the chairman of said Board, or by said County Clerk, stating the objections of said Board to the materials used in said railroad, or to the style of the work, or to the defects in its construction, or other objections, to be delivered to the President, Secretary, or Chief Engineer of said party of the second part, or left at its office; and in default thereof said bonds shall be issued; but after the ninety thousand dollars of said bonds, with their coupons, shall have been delivered to the said party of the second part, no other or further bond or bonds shall be issued or delivered to the said party of the second part, until a railroad bridge shall have been built, constructed, and finished over and across the said San Lorenzo River, on the line of said railroad, between the county road leading to Soquel and the Bay of Monterey, and the track of such railroad shall have been constructed, and the rails laid to within three hundred feet of the Bay of Monterey, on the westerly side of the river last named. And the said party of the second part has agreed, and hereby does agree to and with the said party of the first part, to build, construct, and furnish such last named bridge, and to lay the track of said railroad from the easterly bank of said last named river, to a point on the westerly side thereof, within three hundred feet of said bay, in three months after said bonds of said county, to

the amount of ninety thousand dollars shall have been issued and delivered to said party of the second part. And if on the completion of the laying of the track of said first section of said railroad, there shall be in the whole distance thereof a fractional part of a mile, said Board of Supervisors shall issue and deliver to said party of the second part, such bonds of said county therefor, at the rate of six thousand dollars per mile. The aid of said county is granted to said party of the second part upon the following conditions, to wit: 1. Work upon the construction of said railroad must commence within three months from the date of this contract, and must thenceforth be prosecuted to the completion of said first section of said railroad, with all the reasonable diligence permitted by the means at the disposal of the said party of the second part. 2. The construction of the road-bed of said railroad may be commenced or prosecuted or carried on at any part of the route of said railroad, but the laying of the rails must commence on the eastern bank of said San Lorenzo River, or within one hundred yards thereof, and thence be continued on the said route of said railroad towards the said Pajaro Depot. 3. The said railroad shall be of not less than a three-feet gauge, the rails used shall be of iron, and weigh on an average not less than thirty pounds to the yard, but no rail used shall weigh less than twenty-five pounds to the yard; the railroad ties shall be of redwood; the rail joints shall be united by fish-plates; the grades adopted shall be practical for the economical transportation of heavy freight; the bridges and trestles shall be substantially built, and of approved style, and the whole work shall be first-class. 4. The said railroad, when the first section shall have been constructed, must be equipped with passenger and freight cars and locomotives, sufficient to accommodate the travel and trade, and the rolling stock thereof shall be an average of that used on other railroads in the United States of the same gauge, and the road-bed shall be well ballasted. 5. The westerly terminus of said first section of said railroad shall be at such point on the western side of said San Lorenzo River and within the corporate limits of the said town of Santa Cruz, as shall hereafter be selected by said party of the second part. 6. Said Board of Supervisors shall not grant the aid authorized to be granted as aforesaid as to

any part of such railroad between said town of Santa Cruz and said Pajaro Depot, which shall not have been completed and in full operation on or before the thirty-first day of December, A. D. 1875, and no bond shall be issued for such uncompleted portion thereof. In witness whereof, the said party of the first part has caused this contract to be executed for and on behalf thereof, by the members of its Board of Supervisors, to wit, Bernard Peyton, P. F. Dean, and Frank P. Porter, and its seal to be hereto affixed; and the said party of the second part has duly authorized and directed its President, F. A. Hihn, and its Secretary, J. N. Besse, for and on its behalf, to execute this contract."

5. That thereafter said plaintiff proceeded to construct said road in accordance with the terms and provisions of said contract. That said plaintiff began the construction of said road at a point on the east bank of the San Lorenzo River, and from then thereafter prosecuted said work with all reasonable dispatch, until the completion of the same, from the Town of Santa Cruz to the required junction with the "Southern Pacific Railroad." That while said road was in process of construction, and about the time that the first five-mile section was completed, and said plaintiff under the provisions of said contract should have been entitled to receive, upon said first section, thirty thousand dollars of the bonds of said county, two suits were brought by two several taxpayers of Santa Cruz County against said Board of Supervisors, to enjoin the payment and delivery of such bonds, and a regular order was made and served upon said Board on or about the ninth of December, 1874, enjoining and restraining said Board of Supervisors from delivering said bonds to said plaintiff, and upon appeal taken from said order to the Supreme Court of the State of California, said injunction order was affirmed and the same remained in full force, restraining the delivery of said bonds or any portion of the same, until the day of February, 1876, when said injunction was dissolved and said bonds to the amount of thirty thousand dollars were delivered by said county to this plaintiff. That said injunction was procured and maintained against the wish and will and earnest effort of both said plaintiff and also of said Board of

Supervisors, and that said Board of Supervisors employed counsel to procure the dissolution of the same.

6 That upon account of said injunction and the failure of plaintiff to receive said bonds, the plaintiff was greatly hindered and delayed in the construction of the said road, and was unable to procure money or credit to the extent that was required for the most expeditious prosecution of said work; and when said injunction was removed and said bonds were delivered to plaintiff, it did proceed to prosecute, and did complete said work within the points above designated, to wit, Santa Cruz Town and the Southern Pacific Railroad, with all reasonable and proper diligence and dispatch.

7. That after the fixing of the line of this road, and the execution of the contract as above set forth, and after a portion of said road near the town of Watsonville had been constructed and the rails laid, the Legislature of the State of California did authorize and empower said Board of Supervisors to so modify and change said route of said road, and also the contract of said plaintiff with the County of Santa Cruz, as to permit the former to so change the original route of said road, that the same might be constructed through the Town of Watsonville.

8. That thereafter and after the passage of said Act of the Legislature, said parties, the railroad company, upon the one hand, and the Board of Supervisors acting upon behalf of said Santa Cruz County upon the other, did so modify and change said contract that the line of said road was changed to, and did pass through the Town of Watsonville. The order of said Board authorizing and permitting said change, was made by said Board upon the seventeenth of April, 1876. That in said Act of the Legislature it was provided that no additional liability against said county should be created by reason of said change, and such alteration of said route. That thereafter and in pursuance of the several Acts and orders permitting such change, the plaintiff took up one mile and 570-1000 of one mile of track then laid, upon so much road then finished, and relaid the same upon the route through the Town of Watsonville. The line of said road as changed to pass through the Town of Watsonville is three fourths of a mile ($\frac{3}{4}$) longer than the line as originally pro-

jected, and before said track was taken up. Upon the seventeenth of August, 1876, the portion of said road extending from the town of Santa Cruz to the Southern Pacific Railroad was completed and in actual operation. The road so constructed was from the depot in the Town of Santa Cruz to the connection with the Southern Pacific Railroad at Pajaro Station, twenty-one miles 362-1000 of a mile. Of this distance one mile and two hundred and twenty feet was east of the eastern boundary of Santa Cruz County, and in the County of Monterey.

9. The entire line of the proposed road, from the point of connection with the S. P. Railroad to "New Year's Ranch," upon the western boundary of Santa Cruz County, has been surveyed and mapped, and is a distance of 39 695-1000 miles as surveyed. No work has been done of any other kind than to make such survey from the Town of Santa Cruz to the western terminus of said road. The surveyed line of said road is 19 miles 279-1000 of one mile.

The construction of this western portion of the road is practicable, and the same can be constructed at a length not exceeding twenty miles, and twenty miles will be required for said road. No contract has been made by the Board of Supervisors of Santa Cruz County, for the construction of the portion of said road surveyed west of the Town of Santa Cruz, nor has any work whatever been expended upon such portion of the road, other than making such survey.

10. The entire length of said road as completed, from the Town of Santa Cruz to the point of junction with the Southern Pacific Railroad, is 21 362-1000 miles. This section of the road was made three fourths ($\frac{3}{4}$) of a mile longer by the change of the route through the Town of Watsonville, than had it been completed upon the route as originally surveyed.

11. The road in question, between the points when the same was constructed, would have been fully completed and in running order by the thirty-first of December, 1875, but for the injunctions restraining the delivery of the bonds, as heretofore set forth. Said road, as to material, construction, and equipment, was in all respects in conformity with the terms of said contract, and the Board of Supervisors has at no time objected to the same, upon any of the grounds last

suggested, or in any form or matter protested as to the character or position of said road, or the material employed therein.

12. That upon the twenty-third day of February, 1874, the first section of said road was fully completed and in working order, to wit, five miles of the same east from the west bank of the San Lorenzo River, and said section was then, by said Board, examined, approved, and accepted, and the bonds of said county for the sum of thirty thousand dollars, or six thousand dollars per mile, for said section were then delivered to said plaintiff.

That thereafter, upon the first day of March, 1876, fourteen additional miles of said road were examined, approved, and accepted by said Board, and bonds for the same, to the amount of eighty-four thousand dollars, or six thousand dollars per mile, were then delivered to said plaintiff, making in all one hundred and fourteen thousand dollars in bonds so delivered, and nineteen miles of road so accepted. That after the first day of March, 1876, the plaintiff changed the line of its road to pass through the Town of Watsonville, the plaintiff completed said road to its junction with the Southern Pacific Railroad, and thereafter served due notice of such completion upon the Board of Supervisors, and demanded that they issue the county bonds, at the rate of six thousand dollars per mile, for such road so completed. But said Board then did and ever since have failed and refused to issue any other bonds to plaintiff, than the one hundred and fourteen thousand dollars heretofore mentioned.

13. That the whole length of road constructed from the Town of Santa Cruz to the Southern Pacific Railroad, deducting therefrom the increased length caused by passing through the Town of Watsonville, is twenty miles and three thousand two hundred and thirty-one feet.

14. That the compensation to which plaintiff is entitled from the County of Santa Cruz, under the several Acts of the Legislature, and the contracts heretofore referred to, for the road so constructed, is to bear such a proportion to the entire aid voted (\$240,000) as the amount of road constructed (20 miles, 3,231 feet) bears to the entire length of the road (40 miles, 3,231 feet). The Court found as conclusion of law that the entire amount so payable is one hundred and twenty-

one thousand eight hundred and sixty-two dollars. That the entire amount paid is one hundred and fourteen thousand dollars. That the plaintiff is entitled to receive from the defendant bonds in accordance with said contract, to the amount of seven thousand eight hundred and sixty-two dollars (\$7,862); and ordered that a writ of mandate issue accordingly.

J. H. Logan, W. D. Storey, and J. H. Skirm, for Appellant.

Charles B. Younger and Taylor & Haight, for Respondent.

The COURT:

We are satisfied, from the record, that the conditions precedent upon which the respondent was entitled to have the bonds issued to it, had all been performed by it, before the commencement of this proceeding, and therefore that the judgment appealed from should be affirmed. (*Nevada Bank v. Steinmetz*, 10 P. C. L. J. 459.)

Judgment affirmed.

McKEE, MYRIOK, and THORNTON, JJ., dissented.

[No. 6,974.—In Bank.]

November 28, 1882.

E. I. UPHAM v. WILLIAM HOSKING.

TITLE TO LANDS UNDER CURATIVE ACT OF MARCH 27, 1872.—Plaintiff claims title to a portion of the lands sued for in this action of ejectment under State patent issued May 18, 1872. The premises embraced in the patent are below high-water mark, and include a wharf which extends into the water to such depth that vessels can be moored at it for receiving and discharging cargo.

Held: 1. Such tide lands were not subject to sale under the Act of 1868. 2. But the curative Act of March 27, 1872, validated sales of such lands, and the title of the State vested in the plaintiff under that Act.

PRESUMPTION AS TO THE DISCHARGE OF OFFICIAL DUTY.—To the objection that it did not appear that plaintiff had a certificate of purchase when the Act of 1872 went into operation and therefore was not entitled to the benefit of its provisions.

Held: The plaintiff is entitled to the presumption that the officer issuing the patent, regularly performed his duty in issuing it to him, and that he

would not have issued it had not the plaintiff brought himself within the provisions of the curative Act.

TOWN.—The evidence shows that the place called Collinsville was not a town.

RESERVATION IN DEED—HOUSE NO PART OF WHARF.—In a deed of conveyance from one B. to the plaintiff for a part of the premises in dispute, there was a reservation of "the wharf and wharf franchises."

Held: A house, a portion of which was on the premises in controversy, and which according to the evidence was built on piles adjoining and "butting up" against the wharf, was no part of the wharf, and therefore not included in the reservation.

FORFEITURE OF FRANCHISE DECLARED BY STATUTE.—As to the remaining portion of the premises there had not been a compliance with the terms of a grant by the Legislature to one C., under whom the defendant claimed, and all rights thereunder had been forfeited to the state before the accrual of the title claimed by the plaintiff. No action was necessary to enforce or to judicially establish the forfeiture. It was declared by statute, and when so declared the title to the thing forfeited immediately vested in the state upon the happening of the event or the commission of the offense for which the forfeiture was declared.

APPEAL by defendant from the judgment of the District Court of the Seventh Judicial District in and for the County of Solano, and from an order denying a motion for a new trial.
WALLACE, J.

Action of ejectment. The evidence as to the house claimed to have been reserved in the deed, and from one Brown to the plaintiff, was as follows:

Testimony of C. K. Marshall:

"Question. You know the end of the house that extends over into the swamp land?

"Answer. Yes, sir.

"Q. Is that building the same structure as the wharf itself—a body of piles altogether—a wharf on portion and a house on portion, altogether?

"A. It is built on piles.

"Q. The house joins the wharf itself?

"A. Yes, sir.

"Q. The house and wharf are all together, are they not?

"A. They are both on piles right together.

"Q. Joined right together?

"A. Yes, sir; butt up together.

"Q. It does not extend any further on the wharf now—or how is it—than then?

"A. No, sir.

"Q. It is precisely as built in 1861, as far as the foundation is concerned?"

"A. Yes, sir."

The Court below found that the land included in the plaintiff's location and in the patent to him is not and never has been situated within two miles of any town whatever. This finding was attacked by the defendant on the ground that it was within two miles of a place called and known as Collinsville, and that Collinsville was a town. The evidence relied on to show that Collinsville was a town, was as follows: 1. An Act of the Legislature of March 30, 1868, entitled "an Act to authorize the establishment of a steam ferry between Collinsville in Solano County and New York Landing and Antioch in Contra Costa County." 2. In the patent from the State to the plaintiff, the "bridge leading on to Collinsville wharf" is mentioned as one of the calls in the description of the land. 3. In the deed of conveyance from Brown to the plaintiff, he, the plaintiff, is described as "of Collinsville." 4. One of the witnesses (Hooper) testified that between the years 1867 and 1876, considerable business was done at and over the wharf, and that a portion of that time several steamers occasionally landed there. 5. Another witness (Charles J. Collins) testified that after the building of the wharf in 1861, "the town was named Collinsville after that; about that time we applied for a post-office there, and they named it Collinsville." Q. "Was there a post-office there at that time or soon after?" A. "Soon after." 6. Another witness (Turner) testified that he ran a ferry from Antioch to Collinsville. 7. Another witness (Marshall) testified that his home since 1853 had been in Collinsville, but at the time of the trial he was County Recorder and lived in Fairfield.

The other facts are stated in the opinion of the Court.

B. S. Brooks and Wm. Leviston, for Appellant.

The existence of Collinsville is assumed all through the case, and it appears to be a place of considerable importance. It has existed since 1861, is a post-town, a place where all steamers on the river land, and where a large business is done; and is clearly a town or village. Plaintiff names it in his

deed as the town where he resides. Respondent does not question the existence of Collinsville. The defense was expressly alleged in the answer that said land is situated within two miles of the Town of Collinsville, Solano County, and was at time of survey.

The finding is, "is not and never has been situated within two miles of any town whatever." This does not meet the issue. If it means that the land is not within two miles of Collinsville, the patent confutes the finding, for one of the calls of the patent is the Collinsville wharf. It certainly is not a finding that Collinsville has no existence. Nor that it is not a town or village. The confirmatory Act of 1872 does not apply. That Act was only intended to cure defects in the proceedings under the Acts providing for the sale of such land as had been authorized by the State. In *Yoakum v. Brower*, 52 Cal. 376, cited by respondent, it was said that the "purpose of the Act was to afford relief to those who had become purchasers of State lands, but who, because of some defect in the proceedings or default on their part, could not, under the laws then in force, procure title by means of the proceedings already instituted." In *Rowell v. Perkins*, 56 Cal. 220, there were a defective application and a default in payment, and the decision was to the same effect. Anything in these decisions to the effect that the land granted was any land that might have been applied for, is *obiter dictum*. No such matter was before the Court.

The Act of 1872 is to be construed in connection with the acts providing for the sale of lands of the State, and to which it evidently refers. To hold that it grants the land in controversy, is directly contrary to the decision in *Kimball v. MacPherson*, 46 Cal. 103, which says that the Act of 1868 (under which plaintiff claims) although it mentions "tide lands," does not authorize or provide for the sale of the class of land in controversy.

J. F. Wendell, for Respondent.

The testimony shows, without contradiction, and the Court finds, that although eighteen years had elapsed since the passage of the Act, no ferry was ever established, and the grantee utterly failed to comply with any of the requirements

of the Act save the building of a wharf on the Solano side. This worked a forfeiture. No judicial proceedings were necessary on the part of the State, but the rights conferred at once ceased and determined upon the happening of the event for which the statute denounced the forfeiture. (*Oakland R. R. Co. v. O. B. & F. V. R. R. Co.*, 45 Cal. 365; *Borland v. Lewis*, 43 Cal. 569; *Clarke v. Calloway*, 1 Sneed (Ky.), 46; reported in vol. 2 Am. Dec., p. 706.)

The only ground of attack upon the patent alleged in defendant's answer is that the premises granted are situated within two miles of the town of Collinsville. The Act of March 28, 1868, providing for the sale of State lands (Stat. 1867-8, p. 514), Section 70 as amended April 4, 1870 (Stat. 1869-70, p. 877), reserved from sale "tide-lands * * * within two miles of any town or village." Upon this point the Court finds that the land is not situated within two miles of any town. Webster defines a town as "any collection of houses larger than a village and not incorporated as a city." There was no evidence of any town incorporation or of any such collection of houses as would constitute a town in fact. A town on paper or in name only would not come within the exceptions. All post-offices have names. The inference from the entire testimony is that there was no town in fact, and in the absence of express testimony the presumption that the patent was legally issued sufficiently sustains the finding of the Court.

Even were the patent objectionable on the grounds urged by the defendant, the defect would be absolutely cured by the curative Act of March 27, 1872 (Stat. 1871-2, p. 587), entitled "An Act for the relief of purchasers of State lands;" Section 1 of which provides that "when application has been made to purchase lands from the State and payment made to the Treasurer of the proper county for the same in whole or in part, and a certificate of purchase or patent issued * * * the title of the State is hereby vested in said applicant," etc. The record shows that the patent in question was issued May 18, 1872, upon a location surveyed in April, 1870, and approved August 6, 1870.

The record does not show the date of the payments or of the certificate of purchase, but under the law it must have

been in 1870, and the patent itself is *prima facie* evidence, at least, that the law was complied with. The burden of proof is on the defendant to show that the patent was not authorized by the curative Act of 1872, even though it could be successfully assailed in the absence of that Act. "A party claiming land under a patent has the benefit of the presumption that the officers rightfully performed all their duties in selling the land and issuing the patent, and it devolves upon the party assailing the patent to show that it was issued without authority of law." (*Collins v. Bartlett*, 44 Cal. 383; *Hodapp v. Sharp*, 40 Cal. 69; *Toland v. Mandell*, 38 Cal. 30.) "The burden of proof is cast on the one who undertakes to impeach the patent to establish the facts necessary for its overthrow." (*People v. Stratton*, 25 Cal. 243; *Summers v. Dickinson*, 9 Cal. 556; *Durfee v. Plaisted*, 38 Cal. 83.)

THORTON, J.:

Action to recover possession of certain lands described in the complaint, situate in the County of Solano. The plaintiff had judgment. Defendant moved for a new trial, which was denied, and he prosecutes this appeal from the judgment and order just mentioned.

As to a portion of the land sued for (part of Swamp Land Survey No. 17), on which was a portion of a building, it is admitted that the title was in one Brown, and that the conveyance from him to plaintiff passed to the latter Brown's title to that portion of the lot which was covered by the building, unless excluded from the operation of the conveyance by a reservation contained in it of "the wharf and wharf franchises." On the premises in controversy was a wharf and a part of the building above mentioned.

It is contended here that this building constituted a portion of the wharf, and was embraced in the reservation aforesaid, and, therefore, did not pass to the plaintiff under Brown's conveyance.

On an examination of the evidence, we are of opinion that this contention is untenable, that the building did not constitute a part of the wharf, and was not, therefore, reserved from the operation of the deed.

As to the remaining portion of the premises sued for, the

defendant claimed under a grant on certain conditions made to one Collins, in which grant it was provided that on failure to comply with the conditions, all the rights granted by the Act should become forfeited to the State. The Court below found and held that there had not been a compliance with the terms of the grant, and that all rights under the Act had been forfeited to the State before the accrual of the title claimed by plaintiff. This matter will be better understood from the findings of the Court in regard thereto. They are as follows:

"As to the affirmative matter alleged in defendant's answer, the Court finds: That a private statute of the State of California was enacted by the Legislature thereof entitled and approved as alleged in said answer, the whole of which statute is contained in the printed statutes of California for the year 1861, on page 300 thereof. That by the terms thereof there was granted to one C. J. Collins, his associates and assigns, for the term of twenty years from the date of May 6, 1861, the right to establish a ferry across the upper end of Suisun Bay, from the point known on Ringold's map of Suisun Bay as 'Point Collberg' in Solano County, to a place known as New York in Contra Costa County, and said parties were also authorized to construct a wharf at each of the landing places of said ferry, one in Solano County and one in Contra Costa County, which wharves were required by said Act to be substantially built, of such materials and of such dimensions as to make said wharves sufficient for all the purposes of a steam ferry as well as for the local business of the two points; and from time to time said wharves were required to be enlarged as the commerce of the places might require.

"That by the terms of the said Act there was granted to the said C. J. Collins, his associates and assigns, for the purposes of the ferry and wharves aforesaid, the use and occupation of a strip of land at each of the said wharves, commencing at high tide six hundred (600) feet wide along the water-line in Solano County and three hundred (300) feet wide along the water-line in Contra Costa County, and commencing at high-water mark and running into the bay to a point where the water is ten feet deep at low tide.

"That all of said grants, rights, and privileges, however,

were made upon the terms and conditions expressed in Section 4 of said Act, which is as follows:

"Section 4. The said parties herein named shall within six months from the passage of this Act commence the building of the wharves herein provided for, and within nine months shall have the steam ferry in operation, with a steam ferry boat running between said wharves of sufficient capacity to accommodate the public travel; *provided*, that if the said parties shall fail to commence and complete the said wharves and establish the said ferry within the time prescribed in this Act, or in any other manner violate its provisions, then all the rights granted by this Act shall become forfeited to the State.

"That neither the said C. J. Collins, his associates or assigns, being the parties in said Act named, ever complied with any of the requirements of said Section 4 of said Act, except that the wharf described in plaintiff's complaint was commenced by said Collins within six months from the passage of said Act and thereafter completed by him.

"That neither said Collins, his associates or assigns, ever established or put in operation any ferry of any kind between the points named in said Act, or between either of said points and any other point, and never commenced building, or completed, or owned any wharf whatever in said Contra Costa County, but totally failed to comply with each and every requirement of said Act, except as to building the wharf in Solano County, as aforesaid. That eighteen years have elapsed since the passage of said Act.

"That by reason of such non-compliance, all the rights and privileges granted by said Act to said Collins, his associates and assigns, became forfeited to the State of California.

"That said land at all the times mentioned in said answer was subject to sale, and had never been at any time reserved by the State of California from sale."

In regard to this last proposition the Court decided correctly both in point of law and fact. No action was necessary to enforce the forfeiture. It needed not to be established judicially. The forfeiture was declared by statute, and when so declared, the title to the thing forfeited immediately vests in

the State, upon the happening of the event or the commission of the offense for which the forfeiture is declared. This is settled law in this State; so held under like circumstances in *Borland v. Lewis*, 43 Cal. 572, and *O. R. R. Co. v. O. B. & F. V. R. R. Co.*, 45 id. 377. The plaintiff claims title to the said last mentioned portion of land under a patent from the State of California, bearing date the eighteenth day of May, 1872. The premises embraced in the patent are below high-water mark and include the wharf, which extends into the water of such depth that vessels can be moored at it for receiving and discharging cargo.

On an examination of the cases of *Taylor v. Underhill*, 40 Cal. 471; *Kimball v. MacPherson*, 46 id. 103; and *People v. Cowell*, 60 Cal. 400, we are of opinion that such tide lands were not subject to sale under the Act of 1868. Such we think is the proper interpretation of the judgment of this Court in *Kimball v. MacPherson*, which case arose under the Act of 1868—the same Act under which the plaintiff made his application. At the close of the opinion in this case the Court used this language: “Nothing short of a very explicit provision to that effect would justify us in holding that the Legislature intended to permit the shore of the ocean between high and low-water mark to be converted to private ownership.” *People v. Cowell* is in the same line of decision. (See also *People v. Morrill*, 26 Cal. 336.) *Taylor v. Underhill* was also an application under the Act of 1868, and although the point in judgment was that tide land belonging to the State by virtue of its sovereignty could not be purchased under an application for swamp and overflowed land, the remarks of the Court as regards the Act of 1868 accord with the conclusions reached in *Kimball v. MacPherson*.

Although the land sought to be purchased was on the shore of the ocean still the same reasoning applies to the land between high and low-water mark everywhere. We do not think that the Court intended to hold that such portions of the tide lands between high and low-water mark, which could be used for commercial purposes, as could be reclaimed for agricultural purposes, were subject to sale, and those which could not be reclaimed were not subject to sale, but that in

their judgment the tide lands subject to sale and purchase were those described in *People v. Morrill*, 26 Cal. 355, as the channels of greater or less width within the ebb and flow of the tide, 'threading the swamp lands, which channels are of little or no use either in the way of fishing or navigation. Note the observations of the Court on this point in 26 Cal. 356.

But it is said that this defect is cured by the fourth section of the Act of twenty-seventh of March, 1872. It was said in *Rowell v. Perkins*, 56 Cal. 226, of this Act: "The Act of March 27, 1872, is very broad and comprehensive. It validates every application to purchase land from the State when payment has been made, in whole or in part, to the Treasurer of the proper county. When the Act of 1872 was passed, the State owned the land, and by that Act disposed of it. It had received a portion of its value, and had full power to conform or perfect, conditionally or otherwise, any attempted purchase, even if when the application was made there was an entire failure on the part of the applicant to comply with the existing laws, or if the State did not then own the land or had adopted no legislation for the disposition of it." This ruling was approved and followed in *Muller v. Carey*, 58 Cal. 538.

That the State is the owner of the land embraced in the patent is declared by Section 670 of the Civil Code, and in accordance with the rule laid down in the cases just cited, we hold that the title of the State vested in the plaintiff by virtue of the Act of March 27, 1872.

It is urged that the Act of 1872 is retrospective (it was so held in *Johnson v. Squires*, 55 Cal. 103), and that inasmuch as it does not appear that the plaintiff had a certificate of purchase when the Act of 1872 went into operation, he is not entitled to the benefit of its provisions. But we think that the plaintiff is entitled to the presumption that the officer issuing the patent regularly performed his duty in issuing it to him, and that he would not have issued it, had not plaintiff brought himself within the provisions of the curative Act of 1872.

An objection is made to the title of plaintiff that the land patented to him was within two miles of the Town of Collinsville. But the Court in its findings negatived this, and we

think such finding is sustained by the evidence. The evidence shows to us that the place called Collinsville was not a town.

Judgment and order affirmed.

MORRISON, C. J., and MCKEE and SHARPSTEIN, JJ., concurred.

McKINSTY and MYRICK, JJ., concurred in the judgment.

[No. 7,495.— Department One.]

December 2, 1882.

JOSHUA HENDY v. C. DESMOND ET AL.

NOTARY'S CERTIFICATE OF PROTEST.—Action on promissory note against the maker and indorser. The indorser (Sweeney) denied that the note was presented to the maker for payment, at maturity, and also that notice was given to him (the indorser) of the non-payment by the maker. On the trial of the case, the plaintiff introduced in evidence the protest of the notary, which recites: "I do hereby certify that on the second day of November, A. D. 1875, notice in writing of protest, demand, and non-payment of the above-mentioned note was served upon John Sweeney, the indorser of said note, in the City of San Francisco, by letter addressed to him, and personally delivering the same at his reputed place of business, No. 775 Market street, in this city, he being absent from his place of business, by direction of said holders."

Held: The facts stated in the protest did not show that the notice of dishonor was given as required by § 8,144 of the Civil Code.

Id.—**ORDER GRANTING NEW TRIAL REVERSED.**—The notary was twice examined as a witness on the trial, and testified that he could not recollect anything more about the service of the notice than was stated in the certificate of protest. The trial Court gave judgment in favor of Sweeney, the indorser; plaintiff moved for a new trial, basing his motion on an affidavit of the notary, in which he states that after his examination as a witness in the case, he examined the city directory, thinking that if he could ascertain the business of Sweeney he might be able to recall the manner of the service of the notice of protest; that in the directory he found Sweeney described as keeping certain marble works, and that that fact brought the manner of his service of the notice of protest distinctly back to his mind; and the affiant then proceeds to detail the manner of service of the notice, which shows a compliance with the statutory requirements. On the strength of this affidavit the Court below granted a new trial.

Held: The affidavit discloses a mere want of recollection. The city directory was open to the witness as well before as after the trial, and an examination of it before the trial would have disclosed the business of

Sweeney as well as an examination of it afterwards. Due attention, in due season, would have afforded the witness the data which he deposes refreshed his memory; and that being so, its subsequent discovery is not sufficient ground for a new trial. And the order granting it must be reversed.

APPEAL by defendant, J. Sweeney, from order of the Superior Court of the City and County of San Francisco, granting a new trial. WILSON, J.

Action on promissory note. The facts are stated in the opinion of the Court. After the decision in department, a petition for hearing in bank was denied.

J. R. Brandon, for Appellant.

Arthur Rogers and Wm. H. H. Hart, for Respondent.

ROSS, J.:

We must reverse the order of the Court below granting a new trial. The action is against Desmond, as maker, and Sweeney, as indorser, of a promissory note for five hundred and sixty-five dollars and interest. Desmond suffered default, but Sweeney answered in the cause, denying that the note was presented to the maker at maturity for payment, and denying that notice was given to him (Sweeney) of the nonpayment by Desmond.

On the trial of the case, the plaintiff introduced in evidence the protest of the notary, which recites: "I do hereby certify that on the second day of November, A. D. 1875, notice in writing of protest, demand, and non-payment of the above mentioned note was served upon John Sweeney, the indorser of said note, in the City of San Francisco, by letter addressed to him, and personally delivering the same at his reputed place of business, No. 775 Market street, in this city, he being absent from his place of business, by direction of said holders." The notary was twice examined as a witness on the trial, and testified that he could not recollect anything more about the service of the notice than was stated in the certificate of protest. By Statute — Political Code, Section 795 — the protest of a notary is made *prima facie* evidence of the facts therein stated. But the facts stated in the protest in this case did

not show that the notice required by the law was given. Section 3144 of the Civil Code provides that notice of dishonor may be given:

“1. By delivering it to the party to be charged, personally, at any place; or,

“2. By delivering it to some person of discretion at the place of residence or business of such party, apparently acting for him; or,

“3. By properly folding the notice, directing it to the party to be charged, at his place of residence, according to the best information that the person giving the notice can obtain, depositing it in the post-office most conveniently accessible from the place where the presentment was made, and paying the postage thereon.”

As the notice of the dishonor of the note required by the law was not given to the defendant Sweeney, the trial Court properly gave him judgment. But after this the plaintiff moved for a new trial, basing his motion on an affidavit of the notary, in which he states that after his examination as a witness in the case, he examined the city directory, thinking that if he could ascertain the business of Sweeney he might be able to recall the manner of the service of the notice of protest; that in the directory he found Sweeney described as keeping certain marble works, and that that fact brought the manner of his service of the notice of protest distinctly back to his mind; and the affiant then proceeds to detail the manner of service of the notice, which shows a compliance with the statutory requirements. On the strength of this affidavit the Court below granted a new trial. But the affidavit discloses a mere want of recollection. The city directory was open to the witness as well before as after the trial, and an examination of it before the trial would have disclosed the business of Sweeney as well as an examination of it afterwards. Due attention, in due season, would have afforded the witness the data which he deposes refreshed his memory; and that being so, its subsequent discovery is not sufficient ground for a new trial.

While we do not, of course, impute to the witness in this case anything of the sort, it is manifest that the sanction of such a practice would open the door to the unscrupulous for

the perpetration of perjury, and would be fraught with great danger. (See *Arnold v. Skaggs*, 35 Cal. 684; *Graham and Waterman on New Trials*, vol. 1. pp. 477-479; id., vol. 2, pp. 1031, 1095-6; *Bond v. Cutler*, 7 Mass. 205; *Harbour v. Rayburn*, 7 Yerg. 432.)

Order reversed.

McKINSTY and McKEE, JJ., concurred.

[No. 10,692.—In Bank.]

December 2, 1882.

EX PARTE R. D. JOHNSON.

MEDICAL EXAMINERS — LICENSE TO PRACTICE MEDICINE — CONSTITUTIONAL LAW.—Section 8 of the Act of April 1, 1878, making it a misdemeanor to practice medicine without having first procured a certificate as required by that Act, is not unconstitutional.

APPLICATION for discharge on writ of *habeas corpus*.

E. N. Deuprey, for Petitioner.

The COURT:

Upon the authority of *Ex parte Frazer*, 54 Cal. 94, writ dismissed and petitioner remanded.

[No. 7,532.—Department Two.]

December 4, 1882.

W. W. DODGE ET AL. v. W. B. RIDENOUR ET AL.

SETTING ASIDE JUDGMENT ON GROUND OF SURPRISE, INADVERTENCE, OR MISTAKE — JUDGMENT — PRACTICE — NEW TRIAL — DEFAULT.—In this case, Held: The Court below should have granted the defendant's motion to set aside the judgment. The case is within Section 473, C. C. P.

APPEAL by Samuel Crozier, one of the defendants, from the judgments of the Superior Court of the City and County of San Francisco, the one rendered May 27, 1880, for six thousand five hundred and fifty dollars and seventy-five cents, and

the other May 29, 1880, for seven thousand one hundred and seventy-seven dollars and seventy-five cents, and from the order refusing to vacate and set aside said judgments, and to grant a new trial. SULLIVAN, J.

Action on contract. The plaintiffs, W. W. Dodge & Co., on April 26, 1879, commenced the action in the 12th District Court against the defendants, W. B. Ridenour and Samuel Crozier, as copartners under the firm name of Ridenour & Crozier, to recover judgment against them; 1. On a promissory note executed in the name of the firm, San Francisco, October 28, 1878, payable on demand for four thousand five hundred dollars and interest at one per cent. per month; 2. Upon balance of account for money laid out, etc., amounting to nine hundred and seventy-three dollars and forty-nine cents; and 3. Upon an indebtedness of six hundred and eighty-five dollars for money loaned, etc., which note and indebtedness all accrued to and was assigned to plaintiffs by W. W. Dodge. Both defendants separately appeared and demurred to the complaint and their demurrers were overruled July 11, 1879, and ten days given each to answer. Ridenour filed no answer. Crozier, July 21, 1879, filed his answer, in which he admitted the partnership between himself and Ridenour, but alleged that it was confined to merchandising in the Territory of Arizona, and denied the making of the note, and all indebtedness to the plaintiffs therein or otherwise from himself or the firm of Ridenour & Crozier. On May 27, 1880, Mr. M. M. Estee appearing for plaintiff, no one appearing for the defendants, the case was tried by the Court and judgment ordered in favor of plaintiffs against the defendants for six thousand five hundred and fifty dollars and seventy-five cents, and on May 29, 1880, an order reciting a mistake in the calculation of interest as made on the twenty-seventh of May was made, that judgment be entered for plaintiffs against defendants for seven thousand one hundred and seventy-seven dollars and seventy-five cents and costs. Judgment was entered in accordance therewith.

The defendant Crozier on July 14, 1880, gave notice of motion as follows: 1. To relieve him, the said Samuel Crozier, from the judgment rendered in the above entitled action on May 27, 1880, for six thousand five hundred and fifty dollars

and seventy-five cents. 2. To relieve him, the said Samuel Crozier, from the judgment rendered in the above entitled action on May 29, 1880, for seven thousand one hundred and seventy-seven dollars and seventy-five cents. 3. To set aside and vacate both of the said judgments, as to the said Samuel Crozier, and award him a new trial of the said action.

The said motion will rest upon the following and other grounds: The said Crozier was prevented from having a fair trial by reason that the setting of the said cause for hearing on May 27, 1880, was irregular, because that day was within vacation, and there was no written consent of parties that the cause might be tried in vacation filed in the above mentioned department, or elsewhere, as was required by a resolution to that effect, adopted and promulgated by the Judges of the said Superior Court about April 12, 1880. There was mistake, because said Crozier knew nothing to the contrary, and the conviction of his counsel was, that the said cause would not be tried until after July 6, 1880, when said vacation closed. There was inadvertence, because Crozier's counsel inferred, from the conduct of plaintiffs' counsel, that this defendant had until the end of vacation, at least, within which to take Ridenour's deposition. There was surprise, because said Crozier knew nothing to the contrary, and his counsel was under the conviction that the cause was postponed until after vacation, and that conviction continued until said counsel was informed that the first mentioned judgment had been entered. If there was neglect, it was excusable, because it was not to be presumed that in the face of the above mentioned resolution of the Judges, the cause would be taken up in vacation without the written consent of the parties litigant. Because, as to the judgment of May 29, 1880, there was no notice whatever, and the Court was without jurisdiction to render the same, and it is excessive.

Upon the hearing of the said motion, there will be used the record, pleadings, papers, minutes, etc., of, in, and pertaining to the above entitled action, and the affidavits and papers heretofore served and filed in the said action on said Crozier's motion of June 18, 1880, to be relieved from the said judgment of May 27, 1880.

The following affidavits were used upon the hearing:

SAMUEL CROZIER, being duly sworn according to law, deposes and says: That he is one of the defendants in an action pending in the Superior Court, in and for the City and County of San Francisco, State of California, wherein W. W. Dodge *et al.* are plaintiffs, and W. B. Ridenour and Samuel Crozier are defendants. That he resides in the County of Mohave, Territory of Arizona. That on the eleventh day of April, 1880, he received a communication from D. L. Smoot, Esq., of said City of San Francisco, who is his — affiant's — attorney in said action, notifying him that said action had been set down for trial on the twenty-first instant, and notifying him to be present at Court on that day with his witnesses; that he had not received any notification thereof before that time; that the said notification is so brief, that it is impossible for affiant to reach the said City of San Francisco with his witnesses in time for the said trial. That affiant and W. B. Ridenour, defendants in said action, are both witnesses material and necessary for affiant in his defense of said action; that both said witnesses reside in the Territory of Arizona; that the evidence of each of said witnesses is material for defendant's defense. That he will prove by said witnesses that W. B. Ridenour, one of the defendants, made and executed the promissory note upon which the said action is brought. That at the time of said Ridenour making and delivering said notes, affiant and he were partners, doing business as merchants only, in the County of Mohave, Territory of Arizona. That said note was made and delivered by said Ridenour for certain mining stock, purchased by him at that time. That the said Ridenour had no authority, either by the terms of their copartnership, or by the usages of their business, or by any other authority, direct or implied, to give the said promissory note in the firm name of Ridenour & Crozier, or to purchase any mining stock whatever for or on account of the said partnership. But, on the contrary, it had before, and at the time of the making of the said note, been specifically agreed and understood by and between affiant and said Ridenour, that said partnership should not purchase any mining stock whatever, or deal in anything outside the proper and legitimate business of merchandising. That affiant has not, in any way, ever ratified or acquiesced in the

making of said note or purchase of said stock and said partnership; nor has affiant ever accepted or received said stock, or any of the benefits thereof in any way. That said facts can not be proven by any other witnesses.

This affidavit is not made for delay merely, but that justice may be done in the premises; and affiant verily believes that if this cause be continued for this term of this Court, he will be able to be present in person to testify in said action, and will be able to have the deposition of the said W. B. Ridenour to offer in evidence at that time. And affiant further says, that he can not be present at the day set for the trial of this cause, because he can not now leave his family, for the reason that his wife has but recently been confined and is now in a delicate state of health, requiring the personal care and attention of affiant. And further, affiant saith not.

D. L. SMOOT, having been duly sworn, April 27, 1880, deposes as follows: That he is the attorney of Samuel Crozier, one of the defendants in the above entitled action. That from the sworn answer of said Crozier, the oral statements of said Crozier and Ridenour, and documents shown me by said Ridenour, I am convinced that the said Crozier has a good and substantial defense on the merits to the said action. That said Ridenour informed affiant that he had employed Messrs. Garber & Thornton to defend the said action for him; and said Ridenour gave affiant to understand that he would attend the trial and testify, and that his testimony would exonerate the said Crozier. That the said Ridenour and Crozier are living in Arizona Territory. That when the trial of the said action was fixed for April 21, 1880, affiant was under the impression that the said Ridenour would attend promptly on notification. That affiant wrote promptly to said Crozier, but the letter did not reach him until a week or so before the twenty-first; and instead of the said Crozier attending Court as requested, he is prevented by sickness in his family; and instead of the said Ridenour attending, as it was understood he would, he now, as affiant is informed, abandons the defense of the said action, and refuses to come forward and testify in behalf of his co-defendant, Crozier. That the evidence of said Ridenour is material and indispensable to the defense of said Crozier; that the same facts can not be proved by any other per-

son who is not a party to the action; that the trial, so far as said Crozier is concerned, can not safely proceed without the testimony of the said Ridenour; and that since hearing of said Ridenour's abandonment of the said defense and his refusal to appear at the trial and testify, neither the affiant nor the said Crozier has had time to prepare for and have the deposition of the said Ridenour taken in the said Territory of Arizona, where he resides and now is.

D. L. Smoot, having been duly sworn, June 9, 1880, deposes and says: That he is the only attorney of Samuel Crozier, one of the defendants in the above entitled action. That from the sworn answer of said Crozier filed in said action, from the oral statements of said Crozier and his co-defendant, W. B. Ridenour, made to affiant, and from documents shown to affiant by said Ridenour, and in the possession of said Ridenour, affiant is convinced that the said Crozier has a good and substantial defense on the merits to the said action. That the trial of the said action was fixed for April 21, 1880. That finding that the said Crozier, because of sickness in his family, at his home in Arizona Territory, could not attend on April 21st, and that said Ridenour, after promising to attend as a witness on behalf of said Crozier, refused to leave his home in Arizona Territory and keep his promise, this affiant was prepared with affidavits setting forth good and sufficient grounds for a postponement of the trial of the said action, for a length of time sufficient to enable him to sue out a commission and take the other necessary steps to have the deposition of the said Ridenour taken in Arizona. That on April 21st, when the said action was called, and answered "ready" on behalf of the plaintiffs, this affiant stated that he was not ready on behalf of said Crozier, and was prepared, by affidavits and otherwise, to move for a postponement, and exhibit grounds sufficient to obtain the same. That because of business undisposed of, and which was ahead of the said action, the Court directed the motion for a postponement to abide until the business ahead of the said action was disposed of and the action reached. That day after day affiant watched the business of the Court, prepared to make the said motion. That on Thursday, April 29, 1880, while affiant was engaged in Department One of the Superior Court, in the trial of the

case of *J. N. Wood v. The Maryland Consolidated Gold and Silver Mining Company*, he was notified that said action of *Dodge et al. v. Ridenour & Crozier* was called in Department Two. That thereupon, affiant, with the permission of the Judge of Department One, went into Department Two and stated the ground upon which he moved for a postponement of the case. The affidavits which affiant had were not read or filed: the motion was not resisted, and the hearing of the case, according to the understanding of affiant, was postponed until after vacation. That affiant immediately returned to Department One, and resumed the trial of the case of *Wood v. Maryland Consolidated Gold and Silver Mining Company*. That pending the application for postponement, Mr. Wilson, one of the counsel representing *Dodge et al.*, said to affiant, substantially, that if the postponement was granted, the counsel for *Dodge et al.* would facilitate the taking of the deposition, by waiving notice of application for order directing commission to issue, etc. That on May 20th, or 21st, affiant prepared an order for the Judge to sign, awarding the commission, and attached thereto, for plaintiffs' counsel to sign, a written waiver of notice. That on the last named day, affiant sent said order to plaintiffs' counsel for inspection, with the request that the written waiver should be signed. That Mr. Wilson declined to sign the waiver, until he saw the interrogatories. That upon this report being made to affiant, he made preparations to frame and write out the interrogatories which he wished propounded to said Ridenour. That on May 27, 1880, upon affiant's arrival at his office, at half past ten o'clock A. M., he was informed by the clerk that a judgment by default had been entered that morning by the Court against Ridenour & Crozier, upon the application of plaintiffs' counsel. That affiant was greatly surprised, and immediately went to Department Two and found that a recess had been taken until two P. M. of that day; and he also found, and learned for the first time, that a minute was on the clerk's book, as of April 29, 1880, setting the cause for trial on May 27, 1880. Of this order, neither the affiant nor his client, Crozier, had any knowledge or notice whatever, nor did the plaintiffs' counsel, at the time he demanded to have the interrogatories before signing the waiver, or at any other time, mention any-

thing about the said cause being set for May 27th. That at two P. M., on May 27th, when Department Two re-opened, this affiant called the attention of the Court to the facts of this matter, and asked that the said judgment be vacated without delay, and be made to stand as if never rendered. But the Court, deeming it proper that the plaintiffs should be present, directed that notice of the motion be given in the usual way and a stay of proceedings entered.

And this affiant further deposes and says: That about April 12, 1880, the Judges of the Superior Court of the City and County of San Francisco resolved upon a vacation, beginning April 30th and ending July 5, 1880; and further resolved, that no causes should be heard in either of the first eight departments during that time, except by written consent filed in the department. That this determination was published in "The Daily Law Journal" on April 12, 1880, and became and was generally known to others as well as affiant, long prior to April 29th. That the postponement aforesaid was granted on the day before said vacation commenced, and that with the said action of the superior Judges in mind, this affiant understood and believed, and never thought otherwise than that the postponement extended to July 5th. That no written consent was given and filed by this affiant, or any one else, that the said cause should be taken up on May 27th, or any other day during said vacation; nor was he ever asked by plaintiffs' counsel, or any one else, to enter into or waive such written consent. That the rendering of the said judgment, and the action of the plaintiffs herein, is a great surprise to affiant and his client, and a great injury to the said Crozier.

The affidavits alluded to are hereto attached — they are the affidavit of Samuel Crozier, dated April 12, 1880, and the affidavit of D. L. Smoot, dated April 27, 1880.

RAMON E. WILSON, being duly sworn, deposes and says: That he is now, and for more than five years last past has been, a regularly licensed attorney and counselor at law. That he is an assistant in the law firm of Estee & Boalt, the attorneys for the plaintiffs in the above entitled action, and was such at all the times hereinafter mentioned. That he has principally had the charge of and the management of the

above entitled cause, representing the said law firm of Estee & Boalt. That thereafter, to wit, on or about the — day of January, 1880, said cause was set for trial on Wednesday, the thirty-first day of March, 1880. That on said last mentioned day, plaintiffs, with their counsel, appeared and answered ready upon the calling of the case. That the defendant Crozier was not ready, and asked for a continuance. That thereupon, and against the objections of plaintiffs, the Court ordered a continuance, and set the cause specially for trial on the twenty-first day of April, 1880 — and, as affiant then understood, peremptorily. That the defendant then and there waived a jury trial. That on the twenty-first day of April, 1880, the plaintiffs and their counsel again appeared in Court, and upon the calling of the case answered ready. That when the same was reached on the day-calendar, neither defendant nor his counsel were present; and thereupon, at the suggestion of affiant, the Court directed the Sheriff to call Mr. Smoot, defendant's counsel. After some delay, Mr. Smoot appeared, and stated that the defendant was not ready to proceed with the trial, for the reason that his client's family was sick and that he had not been able to secure the attendance of the co-defendant, Ridenour. That thereupon, and against the objections of the plaintiffs, the Court ordered another continuance, and set said cause for trial on the twenty-seventh day of May, 1880, at the suggestion and consent of the defendant Crozier, made in open Court, through his counsel, D. L. Smoot, Esq.; but said order was made upon the express agreement of both parties — made in open Court and entered in the minutes — that said cause was peremptorily set for said last mentioned day, and to be tried on said day. That to that end, counsel for defendant asked plaintiffs, through affiant, to waive the statutory notice, so that he might get a commission to take the testimony of the defendant Ridenour without delay; that plaintiffs then and there, in open Court, waived said notice. That at that time the question was discussed, between Court and counsel, as to whether defendant would have time between the said day and the twenty-seventh day of May, 1880, to secure said deposition, and the Court said that plaintiffs having waived the notice, defendant would have ample time. At the same time the question of the summer vacation was

discussed, and the Court remarked that it would set no cases in June, as it desired a vacation. Counsel for defendant further said that he would immediately prepare interrogatories and submit them to affiant. That neither affiant nor said firm of Estee & Boalt heard from Mr. Smoot, defendant's counsel, relative to said case, until the twenty-first day of May, 1880, when the office-boy of said Mr. Smoot, or some one representing him, called at the office of affiant, and said that Col. Smoot had sent him to affiant with a stipulation that a commission might issue in the case of *Dodge v. Ridenour* (meaning the above entitled cause), to take a deposition. Affiant replied that such stipulation had already been made in open Court, and to tell the colonel (Mr. Smoot meaning) to prepare his interrogatories, and that affiant would sign it when the interrogatories were settled. That said Mr. Smoot has never submitted any interrogatories in said cause to affiant, or to said Estee & Boalt. That affiant and said Estee & Boalt were at all times ready and willing to facilitate the taking of said deposition. That on said twenty-seventh day of May, 1880, plaintiffs and their counsel appeared in Court, and upon the calling of the calendar answered ready to said cause — and when the same was regularly reached on the calendar, was tried. Affiant denies that the said Mr. Smoot did not know of the order of the Court setting said cause for trial on the twenty-seventh day of May, 1880, for the reason that he was present in Court at the time the same was made and consented to it.

Affiant denies that plaintiffs did not contest defendant's motion for a continuance on said twenty-ninth day of April, 1880; but, on the contrary, affiant says that plaintiffs were at all times ready to proceed with the trial, and objected to every motion for continuance made by the defendant.

WALTER DICKINS, being duly sworn, deposes and says: That he is now, and at all the times hereinafter mentioned was, a bookkeeper of the plaintiffs. That he has always been present in Court when the above entitled cause has been called for trial, representing the plaintiffs. That plaintiffs have at all times been ready for trial, and have always objected to any and every continuance. That he was present in the court-room on the twenty-ninth day of April, 1880, when

said cause was reached and called for trial. That Mr. R. E. Wilson was present as counsel, representing the plaintiffs, and D. L. Smoot, Esq., was present, representing the defendant Crozier. That Mr. Smoot moved for a continuance, which motion Mr. Wilson opposed. That thereupon the Court ordered a continuance, and by consent of both parties said cause was specially and peremptorily set for the twenty-seventh day of May, 1880. That the Court then and there remarked that the case must be tried on that day, and that Mr. Smoot must secure his testimony by that time. Mr. Smoot was present when said cause was set for the twenty-seventh day of May, 1880, and in open Court consented to the same.

W. B. SMITH, being duly sworn, deposes and says: That he is now, and at all the times hereinafter mentioned was, the Court-room Clerk of Department Two of the Superior Court, to which Court the above entitled cause was assigned. That the above entitled cause was specially set in said Court for the thirty-first day of March, 1880. That on said day, on motion of defendant's counsel, said cause was continued, and again specially set for the twenty-first day of April, 1880. That on said last mentioned day, said cause was answered ready by the plaintiffs. That subsequently, on the twenty-ninth day of April, 1880, when said cause was regularly reached on the day-calendar, the defendant announced that he was not ready, for the reason that he had not been able to secure the attendance of the defendant, W. B. Ridenour, and on account of sickness in the family of defendant Crozier. That thereupon the Court ordered a continuance, and set said cause peremptorily for the twenty-seventh day of May, 1880, with the understanding that defendant's counsel should secure the deposition of his absent witnesses; and to that end, plaintiffs' counsel waived, in open Court, the statutory notice, and consented that a commission might issue. That Mr. R. E. Wilson represented the plaintiffs, and Mr. D. L. Smoot represented the defendant; that Mr. Smoot was present when said cause was so peremptorily set. That affiant entered said order in his minutes.

M. J. O'NEILL, being duly sworn, deposes and says: That he is now, and at all the times hereinafter mentioned was,

a Deputy Sheriff in the city and county of San Francisco, and the bailiff of the Superior Court No. 2. That he was present in the court-room on the twenty-ninth day of April, 1880, when the above entitled cause was called for trial. That D. L. Smoot, Esq., moved for a continuance of the case, and thereupon the Court continued the case, and set the same peremptorily for the twenty-seventh day of May, 1880. That he remembers distinctly that the Court ordered the case to be set peremptorily, and that the Court said the case must be tried on that day. That Mr. Smoot was present when said order was made.

CHARLES CREIGHTON, having been duly sworn, deposes and says: That he is a clerk in the office of D. L. Smoot, attorney for the defendant Crozier in the above entitled action. That on or about the twenty-first day of May, 1880, there was placed in affiant's hands a writing in the following words and figures, viz.:

"Upon the application of Samuel Crozier, one of the defendants in the above entitled action, made by D. L. Smoot, his attorney, it is hereby ordered that a commission, to take the deposition of W. B. Ridenour, a witness on behalf of said Crozier, residing in the Territory of Arizona, be issued according to law — notice of this application having been waived by counsel for plaintiffs. Dated May , A. D. 1880. Notice of above application waived. Dated May , A. D. 1880. , Attorney for Plaintiffs."

That affiant's principal directed him to take the aforesaid writing to plaintiffs' counsel and get them to sign the underwritten waiver of notice. That affiant went to office of plaintiffs' counsel and saw Mr. R. E. Wilson and Mr. Estee. That Mr. Wilson refused to sign the said waiver of notice, and told affiant to tell Col. Smoot that "I (meaning Mr. Wilson) will not sign the waiver until I have seen the interrogatories." That he never told affiant that he (Mr. Wilson), or any one else, had waived the said notice. That neither Mr. Wilson, nor any one else, told affiant that the said cause had been set for trial on May 27, A. D. 1880, or any other date.

D. L. Smoot, having been duly sworn, deposes and says: That no judgment was entered against said Ridenour on July

22, 1879, as is stated in the affidavit of R. E. Wilson, Esq., and that, according to affiant's information, no judgment was rendered or entered against said Ridenour until the judgment of May 27, A. D. 1880, was rendered against said Ridenour and Crozier. That when, in January, 1880, the said case was called and set for March 31st, Crozier was not present in person or by counsel. A jury trial had not been waived, and such setting was not consented to by Crozier or his representatives, nor did either become aware of it until on or about March 31, 1880. That on March 31, 1880, the case was set for April 21st, to give affiant an opportunity to get Crozier and Crozier's only witness from Arizona. And the plaintiffs made no objection to the postponement when affiant agreed to waive a jury trial, and thereby advance the trial of the suit, which, because of the unsettled condition of the jury system, could not have been reached for a long time, as this Court was not then trying or preparing to try jury cases. While not assuming to question the accuracy of the recollections of Messrs. Wilson, Dickins, Smith, and O'Neill, as to what occurred on April 29, 1880, in this department, and while not pretending to be able to explain, and while not attempting to excuse the obliteration of those things from affiant's memory, yet it is true now, as it was at the making of affiant's former affidavits, that he had and still has no recollection different from what is stated in said last mentioned affidavits, and that by inadvertence he got under the impression that the case would not come up until after the close of the vacation. That no minute was made of the waiver by plaintiffs of the notice of application for an order authorizing a commission to take Ridenour's deposition. That Samuel Crozier returned to his home in Arizona Territory a few days after the summons in this case was served upon him. That he has remained from here ever since, and that for this reason affiant has been compelled to make the affidavits required by the practice in this case. That in this suit, affiant has sought only to secure his client a fair trial by taking the steps necessary to get the deposition of Ridenour, after learning that Ridenour refused to appear and testify, as he had promised to do. And that this affiant wishes and intends his affidavits to be read and received as simply his best recollections at the

time of making them, touching the matters therein mentioned.

The Court below denied the motion.

D. L. Smoot, for Appellant.

As to Crozier, the record shows a judgment obtained through accident, mistake, inadvertence, surprise, and excusable neglect. Section 473 declares that "The Court may, in furtherance of justice * * * relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." Dr. Worcester defines "inadvertence" to be, among other things, an "oversight," an "involuntary accident," "the effect of inattention." He defines mistake to be, among other things, a "slip," a "blunder."

An examination of the facts in the light of the statute and these definitions will show a case within both the letter and spirit of the remedy. On April 29th, Crozier's counsel, whilst engaged in the trial of another cause before another Judge, was required to appear and make response as to this. Being physically unable to try two cases at the same time, and absolutely unable to establish the defense without Ridenour's deposition, a postponement was asked. The case was set down for May 27, 1880. Ridenour's counsel returned to the department from which he had been hurried and resumed the trial therein depending. Vacation set in the day following, viz., April 30th. The order of the court fixing the trial for May 27th passed entirely from the memory of Crozier's counsel; and with the resolution of the Judges as to vacation trials in mind, he got under the impression that this case would not come up until the close of vacation in July. While under this impression, viz., on May 21st, six days before the time of trial, he sent to the plaintiffs' counsel for a waiver of notice, the order to take Ridenour's deposition. The plaintiffs' counsel acted as if the trial was not imminent; as if there was ample time to take the deposition, and as if the case would not be reached before the close of vacation, when they expressed themselves as willing to sign the waiver upon the presentation of the interrogatories: Had there been a

doubt in the mind of Crozier's counsel as to the case going over until after vacation, this conduct of the plaintiffs' counsel would have removed it. The lapse of memory as to the day set for trial was an accident — an event "without design" and against the interests of the defendant.

Concluding from the answer of the plaintiffs' counsel, and the resolution of the Judges, that the case would not be tried until after vacation was a mistake — a "slip," a "blunder." Falling into the conviction that Crozier had until July 6th within which to procure Ridenour's deposition was an inadvertence — an "oversight," an "involuntary accident," an "effect of inattention."

The taking of the judgment on May 27th, after the plaintiffs' counsel had indicated by their answer on May 21st, that an effort to get Ridenour's deposition would not be in vain, was a surprise; because the conduct of the plaintiffs' counsel implied that no trial would take place within the time necessary to procure the deposition from Arizona. Relying upon the implication involved in the answer of plaintiffs' counsel was, under the circumstances, excusable neglect.

In the case of *Mosby v. Haskins et al.*, 4 Hen. & Munf. 427, relief was granted where the party had made the mistake of supposing that the summons served upon him was process in a pending chancery suit, instead of primal process in an action at law. In the case of *Howe v. Independence Co.*, 29 Cal. 72, V. E. Howard, the attorney of the moving party, like Crozier's counsel, was District Attorney, and much pressed by his civil and public business. Through inadvertence he got under the impression that an answer had been filed. Judgment by default was taken, but subsequently set aside upon an exhibition of merits and the foregoing facts. The order was affirmed on appeal. In *Francis v. Cox*, 33 Cal. 323, counsel for the defense knew that the summons was served on the eleventh, but in the midst of his professional cares fell into the conviction that the time to answer did not expire until the twenty-third. Upon a showing of these facts and merits an order vacating the default was made in the Court below and affirmed on appeal. At page 325 the Court says: "The judgment was opened on affidavits showing, substantially, that the failure to answer was by mistake." This mistake

and the one at bar are strikingly alike — both being errors arising from lapse of memory.

In the case of *McKinley v. Tuttle*, 34 Cal. 235, relief was granted by Judge S. B. McKee, and sustained by the Supreme Court, where the moving defendants got under the impression that W. H. L. Barnes had been retained to defend them. The order of Judge McKee speaks of it as “a mutual and honest mistake on the part of both of them (counsel and clients) as to the retainer of the said Barnes as attorney for them in the action.” The plaintiffs had nothing to do with this mistake, and it rises no higher than the plane of inadvertence. The case at bar is a stronger one than this, as will appear upon comparison.

In *Watson v. S. F. & H. B. R. R. Co.*, 41 Cal. 17, the Court, at page 20, says: “Applications of this character are addressed to the discretion — the legal discretion — of the Court in which the default has occurred, and should be disposed of by it as substantial justice may seem to require. Each case must be determined upon its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration. As a general rule, however, in cases where, as here, the application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the Court ought to incline to relieve. The exercise of the mere discretion of the Court ought to tend in a reasonable degree, at least, to bring about a judgment on the very merits of the case, and where the circumstances are such as to lead the Court to hesitate upon the motion to open the default, it is better as a general rule that the doubt should be resolved in favor of the application.” *Watson v. S. F. & H. B. R. R. Co.* shows that the application was made on the day the default was entered, and that the only ground of the motion was that the defendant’s secretary had been misled by a “printed sheet” as to the time when the suit was commenced. The motion to set aside was granted and upon appeal affirmed.

Now the summons was served upon the Secretary, and nobody better than he knew when it was served, and with the summons in his hand he needed no other and could have gotten no better information as to when the defense should be

made. The information from the "printed sheet" as to when the suit was commenced furnished no light whatever as to when default would be taken, and yet the Court above set the judgment aside and the Court above declared that it was right so to do. In the case on hand, an oral motion was made to set aside the judgment on the very day it was rendered, and the grounds upon which this written motion rests are far stronger than those in the last case cited.

In *Santa Barbara Live Stock and Farming Co. v. Thompson & Hall*, 46 Cal. 63, the default was set aside, and the ruling was sustained as to Hall upon the sole ground that he relied upon Thompson's promises to see him harmless in the litigation. In *Ryan v. Mooney et al.*, 49 id. 33, the judgment was set aside upon the sole ground that the case was placed on the calendar after defendant's attorney had examined the calendar and left the court-room. In the case of *Reidy v. Scott*, 53 id. 69, the sheriff returned that the summons was served as to Scott on April 25th. Scott told his attorney that the service was on April 26th. Answer not having been filed within ten days after April 25th, judgment by default was entered. A motion to set aside was made and supported by the affidavits of Scott and his counsel. Scott in his affidavit stated that he was under the belief that he had been summoned on the twenty-sixth. The Court below refused to set aside the judgment, but the Court above reversed the ruling and remanded the cause, saying: "We are satisfied that, under the views expressed in *Watson v. S. F. & H. B. R. R. Co.*, 41 Cal. 17, the Court should have granted the motion to open the default." It is for such relief in the case at bar that we hopefully petition. In the case of *Walsh v. Hutchings et al.*, 6 P. C. L. J. 592, an order setting aside a default where the defendant had neglected to file an answer in time was sustained, though a doubt existed as to the neglect being excusable. The Court was materially influenced by the merits of the defense and the views expressed in *Watson v. S. F. & H. B. R. R. Co.*

The plaintiffs' counsel cite in their brief the case of *Coleman v. Rankin*, 37 Cal. 248, and make it the occasion of an ungenerous assault upon a brother lawyer's chances of professional success. In the case at bar there was an obliteration

of memory — a misfortune that may overtake even the plaintiff's counsel. It was not a negligence, a carelessness, or a lack of diligence. It was a misfortune, in itself burdensome enough without being stigmatized as "negligence, carelessness, and lack of diligence." Against the faults of memory no man is perfectly secure. The black screen of oblivion stands ready at the subtle touch of countless forces to obscure that mirror of the mind called memory, at any time. In *Coleman v. Rankin* there was not a lapse of memory, but a pure and simple neglect to employ counsel and make defense within ten days. And that distinguishes the case of *Coleman v. Rankin* from the case at bar, and the cases *supra* of *Howe v. Independence Co.*; *Francis v. Cox*; *McKinley v. Tuttle*; *Watson v. S. F. & H. B. R. R. Co.*, and *Reidy v. Scott*.

View the case at bar as we may, the fact stands prominently forth that there was a lapse of memory, and that the plaintiffs' counsel had it in their power to correct it, but they did it not — preferring, it would seem, a judgment by default, with all its infirmities, to a risk of a trial upon the merits. The moral needs no finger-board. And now looking back to the remarks of the Court in *Watson v. S. F. & H. B. R. R. Co.*, it is respectfully and earnestly urged that this is one of those cases in which the doubt, if any, should be resolved in favor of giving Samuel Crozier a fair chance to show that he is in no wise liable for the debts set up in the complaint, and that his name and credit have been used without his authority, express or implied; and that he has derived no benefit whatever, proximate or remote, from the unauthorized transactions.

Estee & Boalt, for Respondents.

We waited nearly a whole year for the trial of this cause; three times we submitted to a continuance of it, on defendant's application; finally, when it did come to trial, counsel was not present—it was tried in his absence; and now he asks for a new trial, on the sole ground that he forgot the case was set for trial on the day it was tried, when, by his own showing, had he been present he was not ready for trial, had not taken any testimony, and could not have shown good ground

for a continuance. In a word, counsel asks this appellate Court to do for him what a Court of original jurisdiction, in the exercise of a wise discretion and knowing all the facts, refused to do. In addition to the cases cited in the brief on file, we beg to call the attention of the Court to the following:

In the case of *Davison v. Heffron*, 31 Vt. 689, counsel forgot the time of trial and neglected to attend. Upon motion to set aside the judgment the Court said, "It is not the business of the Courts to open anew a scene of litigation to relieve a party of his own gross carelessness. To hold that mere forgetfulness of the day of the Court was a good ground to set aside a judgment would be fraught with evil consequences, and we think does not come within the spirit of the law."

In the case of *Babcock v. Brown*, 25 Vt. 552, counsel forgot the day of the Court, and Bennet, J., delivering the opinion of the Court, held that the forgetfulness of the attorney was negligence, and his negligence must be regarded as the negligence of the party, and refused to set aside the judgment. In *Jones v. Leech*, 46 Iowa, 186, defendant sought to have a judgment vacated on the ground, among others, that the attorney he had employed had failed to appear and attend at the trial. The Court held, "The law regards the neglect of an attorney as the client's own neglect, and will give no relief from the consequences thereof." (See cases cited.) In *State of Iowa v. Elgin*, 11 id. 218, the Court held that forgetfulness of counsel was no excuse.

In *Field v. Matson*, 8 Mo. 686, it was held that a judgment by default will not be set aside on account of the mistake or negligence of the defendant's attorney. No distinction is made between the negligence of the party and the negligence of his attorney. In this Court in the case of *Bailey v. Taaffe*, 29 Cal. 423, the following principle was laid down: "Orders like the present (setting aside judgment) in legal parlance rest very much in the discretion of the Court below, and will not be disturbed by this Court unless we are satisfied that the order is so plainly erroneous as to amount to an abuse of discretion." This same principle was laid down in the following cases: *Roland v. Kreyenhagen*, 18 Cal. 445;

Haight v. Green, 19 id. 113; *Mulholland v. Heyneman*, id. 605; *Barrett v. Graham*, id. 632; *Woodward v. Backus*, 20 id. 137; *People v. O'Connell*, 23 id. 281; *Howe v. Independent Con. G. & S. Mining Co.*, 29 id. 72; *Coleman v. Rankin*, 37 id. 249. None of these cases have ever been reversed. The case of *Watson v. S. F. & H. B. R. R. Co.*, 41 Cal. 17, cited by respondent and quoted from at some length by appellant, in no wise modifies the principle above suggested. Very properly the court says: "Each case must be determined upon its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration." In the *Watson* case the parties were misled by an incorrect publication of the time of the commencement of the suit appearing in a printed sheet regularly issued and containing information of Court proceedings relied upon by the business community.

In the case at bar the defendant had three opportunities of trying his case, but at neither time from his own showing was he prepared to go to trial. It seems to us as though this case is materially different from the one where a default had been entered, for the reason that more than a year had elapsed between the time issue was joined and the trial, during which time the defendant could have been prepared for trial, but that during all of that time no effort in that direction was made. A very strong case in point is *Ekel v. Swift*, 47 Cal. 620.

The Court:

We think the Court below should have granted the motion to set aside the judgment. The case is within Section 473, C. C. P. The judgment and order are reversed, and the cause is remanded for further proceedings with instructions, that a new trial be granted.

[No. 8,482.— Department Two.]

December 5, 1882.

EVERETT PIERCE v. A. SCHADEN ET AL.

VERDICT AS TO MATTERS NOT IN ISSUE — SURPLUSAGE — MOTION FOR JUDGMENT IN AMOUNT EXCEEDING VERDICT.— Action against indorsers to recover four hundred and sixty-six dollars and thirty-seven cents, and interest due on a promissory note, the execution of which was admitted. Under the pleadings the only issues for the jury were as to presentation, demand, refusal to pay, and notice. The jury returned a verdict in the following form: "We, the jury in the above entitled cause, find for the plaintiff, and assess his damages at the sum of two hundred and ninety-four dollars and fifty cents." The plaintiff moved for judgment for the amount of the note and interest, which motion was denied, and judgment was entered for the amount named in the verdict.

Held: The plaintiff was entitled to his motion. The jury had nothing to do with matters not in issue, and a verdict referring to such matters is, so far, surplusage. So far as the verdict related to matters in issue, it was in favor of plaintiff. The Court should have computed the amount due on the note for principal and interest, and rendered judgment accordingly.

APPEAL by plaintiff from the judgment of the Superior Court of the County of Sacramento. **DENSON, J.**

Action on promissory note. The note was given for the sum of five hundred dollars, with interest at one and one fourth per cent. per month, from February 24, 1876, until paid. The complaint admitted the payment of the interest to May 24, 1876, and also a payment of two hundred and five dollars and fifty cents, on September 10, 1878. The prayer of the complaint was for judgment for the sum of four hundred and sixty-six dollars and thirty-seven cents, and interest thereon, from September 10, 1878, according to the terms of the note, and for costs. The amount claimed at the time to be due and for which the plaintiff moved the Court to give judgment was the sum of seven hundred and ten dollars. After the denial of his motion plaintiff filed a bill of exceptions and took this appeal. The other facts are stated in the opinion of the Court.

L. S. Taylor, for Appellant.

The verdict of the jury on matters not in issue is mere

surplusage, and should be disregarded. (*O'Brien v. Palmer*, 49 Ill. 74; *Austin v. Jones*, Gilm. (Va.) 356-7; Vin. Abr. 736; *Tevis v. Hicks*, 41 Cal. 127; *Fitzpatrick v. Himmelmann*, 48 id. 588; *Benedict v. Bray*, 2 id. 254; 4 B. Monroe (Ky.), 6; Proffatt on Jury Trial, § 445; C. C. P., § 656; *Watson v. Damon*, 54 Cal. 278; *McLaughlin v. Kelly*, 22 Cal. 220.)

Freeman & Bates, for Respondent Schaden.

The only point made by the plaintiff is that the verdict was upon a matter not in issue, and should be disregarded. But there were three questions in issue, viz.: whether the note was presented and payment of the whole or any part demanded; whether payment of the whole or any part was ever refused by Gardener, and whether defendant had notice of any presentment, demand, or refusal. Under these issues it might have appeared, either from plaintiff's or defendants' evidence, that payment of a part only of the note had been demanded, or that plaintiff's notice of dishonor to defendants had stated that only a part of the note remained unpaid, or that plaintiff had notified defendants that he should look to them for the payment of some sum less than two hundred and ninety-four dollars and fifty cents. In either of these cases judgment could have gone for plaintiff only for the amount for which he demanded payment, or for the amount which he notified defendants remained unpaid. Or it may be that, at the trial, plaintiff consented to have payments allowed which were made *pendente lite* or otherwise, notwithstanding they were not pleaded. If such evidence had been offered or such consent given, it would not appear in the judgment roll. The verdict of the jury ought to be presumed to be right, as long as the plaintiff does not choose to attack it by any statement of the evidence or proceedings. It may be urged that because the jury found for the plaintiff as to part, it ought to be deemed to have found for him as to the whole. With like force it may be said that the jury found for defendants as to part of the claim, and therefore it must be that they found there was no demand, notice, etc., for otherwise their finding should have been for the whole. The defendants might as well move for a judgment wholly exon-

erating them, as for the plaintiff to move for a judgment for the whole sum claimed by him.

The amount of recovery must always be found by the jury, and there is no authority for judgment for any other amount. (C. C. P., § 626; *Watson v. Damon*, 54 Cal. 278.)

It is evident that the jury did not intend to find a verdict for seven hundred and ten dollars, and it is probable that rather than do so they would have found for the defendant. Neither party has considered it safe to attack the finding, nor to move for a new trial. This Court ought not to assume the province of the jury and direct judgment for seven hundred and ten dollars. Neither ought this Court to direct a new trial, for that has not been sought by either party.

The Court:

This was an action against indorsers to recover the amount due for the principal and interest of a promissory note. The answer denied the presentation of the note to the maker, the demand of payment, the refusal to pay, and notice of presentation, demand, and refusal. There was no denial of the execution or indorsement of the note, and no plea of payment. There was, therefore, no issue to go to the jury except as to presentation, demand, refusal to pay, and notice. The jury returned a verdict in the following form: "We, the jury in the above entitled cause, find for the plaintiff, and assess his damages at the sum of two hundred and ninety-four dollars and fifty cents." The plaintiff moved for judgment for the amount of the note and interest, which motion was denied, and judgment was entered for the amount named in the verdict. The plaintiff was entitled to his motion. The jury had nothing to do with matters not in issue, and a verdict referring to such matters is, so far, surplusage. So far as the verdict related to matters in issue, it was in favor of plaintiff. The Court should have computed the amount due on the note for principal and interest, and rendered judgment accordingly.

Judgment vacated and cause remanded, with instructions to make computation and render judgment in accordance with this opinion.

[No. 7,884.—Department Two.]

December 5, 1882.

R. TIERNAN v. HIS CREDITORS.

ESTIMATE OF VALUE IN DECLARATION OF HOMESTEAD.—Appeal by creditor from an order in insolvent proceedings setting apart a homestead to the insolvent. In the declaration of homestead, the value of the premises was stated to be eight thousand dollars.

Held: On the authority of *Ham v. Santa Rosa Bank*, 10 P. C. L. J. 411, the objection to the order on this ground can not be maintained.

DOUBLE-TENEMENT HOUSE AS A HOMESTEAD.—The premises consisted of a lot of land in San Francisco, thirty-five feet in width and one hundred and twenty-two and one half feet in depth, which with the improvements were of the value of eight thousand dollars. Upon the land was a double house intended for two families. The insolvent never occupied more than the southerly half of the same—the other half has always been and is occupied by his tenants. The double house has two distinct entrances, and there is no connection between the two tenements by which a person can go, within, from one house to the other.

Held: The Court erred in setting apart as a homestead that portion of the premises not occupied by the insolvent.

OBJECTION TO BE MADE IN COURT BELOW.—Objection by the insolvent to the right of creditors to contest the setting apart of a homestead to him on the ground that they had not proved their claims, must be made in the Court below; if not, it is too late to raise the objection in the Supreme Court.

MORTGAGE ON HOMESTEAD OF INSOLVENT.—At the time the homestead was set apart by the Court below to the insolvent the property was incumbered by a mortgage to the German Savings and Loan Society of San Francisco, upon which there was due the sum of three thousand dollars. The Court in the order setting apart the homestead found its value to be not more than five thousand dollars exclusive of incumbrances thereon:

Held: The existence of a mortgage on the premises in this case is no element in the ascertainment of the property to be set apart as a homestead or of its value.

APPEAL by contestants from an order of the Superior Court, of the City and County of San Francisco, setting apart a homestead to the insolvent debtor. **HALSEY, J.**

Proceeding in insolvency. On the twenty-seventh day of April, 1880, Richard Tiernan filed in the Superior Court of the City and County of San Francisco, his petition in insolvency, under the provisions of "An act for the relief of insolvent debtors and protection of creditors, approved May 4, 1852," and the Acts amendatory thereof and supplemental

thereto. On the eighth day of July, 1880, the said Richard Tiernan applied to the Court to exempt and set apart for the use and benefit of himself, the real property described in the declaration of homestead; which was made and filed by him for record March 1, 1880. Davis & Cowell, the appellants, who were creditors of said insolvent, filed their opposition to said petition upon the grounds that the premises asked to be set apart were of greater value than five thousand dollars; that the house upon the land claimed was a double tenement, one half only of which was occupied by Tiernan, and the other half was by him rented and occupied by his tenant when he filed his declaration and ever since, and there was a separate entrance to each tenement, and no means of communication between them; that the alleged declaration of homestead which Tiernan claimed to have filed on March 1, 1880, did not comply with the laws of the State providing for the making and recording of a homestead declaration. The matter was heard and tried upon affidavits, which were submitted without objection, and the homestead declaration of Tiernan. This declaration recites the cash value of the premises claimed, to be eight thousand dollars. An exception to the introduction of this declaration in evidence was reserved by the opposing creditors. The only evidence as to the character of the house upon the premises claimed as a homestead was the affidavit of Isaac E. Davis, which stated that it was a double house, intended for two families; that Tiernan never occupied but one half of it, and the other half had always been and then was occupied by a tenant of Tiernan; that the building had separate entrances, and there were no means of communication between the tenements inside.

In the petition of the insolvent for the order it was shown that the property was incumbered by a mortgage to the German Savings and Loan Society of the City and County of San Francisco, and that there was then due on the mortgage the sum of three thousand dollars. The Court granted the petition, and made an order setting apart the property claimed as a homestead. In its order the Court recited "that the property, together with the improvements thereon, is of the value of not more than five thousand dollars exclusive of in-

cumbrances thereon." The contestants excepted to the order, and filed their bills of exceptions.

Pillsbury & Titus, for Appellants.

The pretended declaration of homestead stated the value of the premises claimed to be eight thousand dollars, and was fatally defective for that reason. (*Ham v. Santa Rosa Bank*, 10 P. C. L. J. 411; *Ashley v. Olmstead*, 54 Cal. 616.) In no event was Tiernan entitled to hold as a homestead more than the half of the premises upon which he lived — the south half — and the Court erred in setting apart both tenements; actual residence in both tenements was essential to enable him to impress upon them the condition of a homestead. (*Aucker v. McCoy*, 56 Cal. 524; *Estate of Henry Reck*, Myrick's Pre-Rep. 59.)

John H. B. Wilkins, for Respondent.

The question of the validity of a declaration of homestead which states the value of the premises claimed to be eight thousand dollars, is before this Court in the case of *Ham v. Santa Rosa Bank*. The real property described in the declaration of homestead is a city lot thirty-five feet front by one hundred and twenty-two feet six inches deep; the building, and the only one, erected upon which is so constructed that it can be used as one dwelling, or as two tenements, and is covered by one roof; it is claimed, therefore, that only one half of the building is exempt — the half occupied by the insolvent at the time of filing his petition in insolvency. The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this title provided. (Civil Code, § 1237.)

No limitations are imposed by the Legislature upon the use which shall be made of the homestead, nor does the owner forfeit the benefit of his exemption by devoting some portion of the building to another use than a mere residence of his family. (Thompson on Homesteads, § 137; *Phelps v. Rooney*, 9 Wis. 70; *Smith v. Stewart*, 13 Nev. 65; *Ackley v. Chamberlain*, 16 Cal. 181; *Ornbaum v. His Creditors*, 10 P. C. L. J. 225.)

The COURT:

This is an appeal from an order, in insolvent proceedings, setting apart a homestead to the insolvent.

1. The declaration of homestead stated the value of the premises to be eight thousand dollars. The objection to the order on this ground is disposed of by the opinion of this Court in *Ham v. Santa Rosa Bank*, 10 P. C. L. J. 411.

2. The premises consist of a lot or parcel of land thirty-five feet wide, fronting on Mission Street, in the City and County of San Francisco, by one hundred and twenty-two and a half feet deep, which, with the improvements, are of the value of eight thousand dollars. Upon the land is a double house, intended for two families; Tiernan never occupied more than the southerly half of the same — the other half has always been and is occupied by his tenants. The double house has two distinct entrances, and there is no connection between the two tenements by which a person can go, within, from one house to the other. Under such circumstances, the Court erred in setting apart that portion of the premises not occupied by Tiernan. "The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated." (C. C., § 1237.) In this case, the claimant did not reside in the structure which was occupied by his tenants. The facts of this case are widely different from the case of a person residing in a building and renting a portion or portions of it to roomers or lodgers.

3. Objection is made to the creditors being heard in this matter, before they shall have proved their debts. It might be said that the petitioner himself, having put their names in his list of creditors, is estopped from making the objection; but it is enough to say that the matter was heard in the Court below without this objection being made, and it is too late to make it here for the first time.

4. The existence of a mortgage on the premises in this case is no element in the ascertainment of the property to be set apart as a homestead or of its value.

Order reversed and cause remanded for proceedings in accordance with this opinion.

[No. 8,693.—Department Two.]

December 6, 1882.

ANNIE R. VALLEAU v. SUPERIOR COURT OF THE
CITY AND COUNTY OF SAN FRANCISCO.

STATEMENT ON APPEAL — SETTLEMENT — MANDAMUS.—Mandamus to a Judge of a Superior Court to compel him to settle a statement on appeal to this Court. The proposed statement was made up of the Reporter's notes, taken at the trial and written out in long hand.

Held: This is not the proper manner in which a bill of exceptions or statement on appeal should be prepared, and the Court will not sanction such a practice. Writ denied.

APPLICATION for writ of mandamus to CHAS. HALSEY, Judge of the Superior Court of the City and County of San Francisco.

Severance, Travers & Hornblower, for Plaintiff.

Geo. D. Shadbourne, for Defendant.

The COURT:

This is an application for a writ of mandamus, to compel the respondent, who is a Judge of the Superior Court of the City and County of San Francisco, to settle a statement on appeal to this Court. Several reasons are assigned for the refusal of the Judge to settle the statement, only one of which will be noticed, as that is sufficient to sustain the respondent's action in the case.

The proposed statement is made up of the reporter's notes, taken at the trial and written out in long hand. This is not the proper manner in which a bill of exceptions, or statement on appeal, should be prepared, and we will not sanction such a practice. It has been justly condemned in several cases (*People v. Getty*, 49 Cal. 584; *Caldwell v. Parks*, 50 id. 502), and this case comes within the rule therein laid down.

Writ denied.

[No. 10,772.—In Bank.]
December 9, 1882.

THE PEOPLE v. JAMES HOPE.

COMMITMENT — SETTING ASIDE INFORMATION.—*People v. Smith*, 59 Cal. 305, affirmed on these points.

BURGLARY — MISCONDUCT OF JURY.—The bare fact of a juror having visited during the trial, the premises where it was alleged that the defendant had committed the crime of burglary, is not sufficient ground for discharging the jury.

BURGLARY — INSTRUMENTS OF CRIME — EVIDENCE.—The defendant was charged with burglary for entering the house, room, shop, warehouse, store, and building of S., with intent then and there to commit larceny, and was convicted of attempting to commit the crime. It appeared that S. owned the building, and that he occupied the first floor as a banking office and rented the second and third floors to tenants; that in consequence of the discovery of supposed indications of a design on the part of some person or persons to force an opening into the vault of the bank located in said building, certain police officers had been stationed where they could readily detect any one entering the building on the night of the arrest of the defendant, and that the defendant entered the building and was arrested on the second floor in a closet; and from an inspection of the premises, it appeared that in a closet over the bank vault a trap-door about two feet wide and two and a half feet long had been sawed out of the floor and then fastened down with screws, so that it might be opened without making much, if any, noise; and under the trap-door and on top of the vault there was found a large quantity of burglar's tools and a hole in the vault of the depth of two feet; and other tools, of a similar character, were found in the defendant's trunk in a room occupied by him in San Francisco.

Held: The tools found in the excavation over the vault and also those found in the appellant's trunk were admissible in evidence.

ID.—ID.—ID.—The Court, over the objection of the defendant, permitted a witness to exhibit in the presence of the jury a cylindrical steel bar about half an inch in diameter and about eight inches long, which he (the witness) said he had made for the purpose of screwing upon it the said coupling or sockets, one of which was found in the hole over the bank vault and the other in the trunk of the defendant; but the bar referred to, had not previously been offered in evidence, and the counsel for the prosecution stated that they did not intend to offer it.

Held: The object of screwing "said coupling or sockets" upon the bar is not stated, nor to us apparent; still, in support of the correctness of the ruling of the Court below, we are bound to presume, unless the contrary appears, that the object was a legitimate one.

ID.—EVIDENCE.—A witness was permitted to testify over the objection of the defendant, that a short time prior to the date of the alleged offense the defendant called himself by an *alias* name. **Held:** The objection to the testimony was properly overruled.

ID.—INSTRUCTIONS.—It is not error for the Court to refuse an instruction which, in effect, it has already given or afterwards gives.

ID.—ID.—ATTEMPT.—The Court instructed the jury: "If the jury find from the evidence beyond a reasonable doubt, that the defendant did at the time charged in the information intend and attempt to enter the house, room, apartment, building, etc., described in the information, of said O. S., then in his occupancy, with the intent to commit larceny therein, and did *some act to carry out said attempt*, but was anticipated in his said attempt, and before the alleged entry was completed or consummated, and before said larcenous attempt was carried out, and was interrupted, prevented, and anticipated in said attempt, while in or about the act of carrying it out, by outside agencies, and against his will and consent, and if you find that he had not alone made preparations for said attempt, but was directly, at the time of said prevention, engaged in making movements towards consummating such an attempt, then, and in such case only, you can find the defendant guilty of an attempt to commit burglary in the first degree, if the attempt was made between sunset and sunrise; of burglary in the second degree if it were made between the hours of sunrise and sunset. * * * * * If you find that he had not alone made preparations for said attempt, but was directly, at the time of said prevention, engaged in making movements toward consummating such an attempt, then, and in such case only, you can find the defendant guilty of an attempt to commit burglary."

Held: It is difficult to uphold such an instruction as this, and if the evidence in regard to the acts of the defendant was of a character to render it doubtful whether he was making preparations for an attempt to commit burglary, the difficulty would be greatly enhanced, if not quite insurmountable. As it is, the jury could not have been misled by the instruction to the prejudice of the defendant.

ID.—ID.—The Court instructed the jury: "If you believe from the evidence, beyond a reasonable doubt, that the stairs, hall-way, privy-room and water-closet, and closet under the stairs, spoken of in the evidence, were at the time of the alleged entry in the occupancy of S. named in the information, and that the defendant entered in and upon such occupancy, as charged in the information, with intent to commit larceny in any part of the house or building of said S., then in his occupancy, then it is your duty to find the defendant guilty." And on appeal it was urged, that the exception to this instruction should have been sustained on the ground that there was no internal communication between the part of the building entered and that in which it was alleged that the defendant intended to commit larceny."

Held: In order to justify the verdict, it is not necessary that the evidence should show that the defendant effected an entrance into any part of the building; proof of an attempt is sufficient; but, were it otherwise, there would be no difficulty in holding that an entrance effected through a trap-door leading from the second floor of the building to the vault located in the banking-office of S. would constitute an entry into the occupation of S.

ID.—ID.—ASSUMPTION OF FACT.—The instruction does not assume that S. was in the occupancy of any part of the building.

Id.—Id.—POSSESSION OF BURGLARS' TOOLS.—There was not error in the Court's refusing to give the instruction which it was asked to give in regard to the weight which the jury might attach to the circumstance of burglar's tools having been found in the defendant's possession at or about the time of the alleged commission of the crime with which he was charged. The instruction refused did not accord to the circumstance, when considered in connection with the other circumstances of the case, all the weight to which it was entitled.

APPEAL from a judgment of conviction and from an order denying a new trial in the Superior Court of the City and County of San Francisco. FREELON, J.

Barham & Coogan, for Appellant.

A. L. Hart, Attorney-General, for Respondent.

SHARPSTEIN, J.:

The question presented by the first point in appellant's brief, as we view it, does not differ materially from that upon which this Court passed in *People v. Smith*, 59 Cal. 365, and we are satisfied with the views therein expressed.

We do not think that the bare fact of a juror having visited, during the trial, the premises where it was alleged that the defendant had committed the crime of burglary, was a sufficient ground for discharging the jury. From the facts before us we are unable to see how the case of the defendant could possibly have been prejudiced thereby.

For the purpose of proving that the defendant had burglariously entered the building described in the information, with the intent to commit larceny therein, witnesses were introduced by the prosecution, who testified in substance, that in consequence of the discovery of supposed indications of a design on the part of some person or persons to force an opening into the vault of the bank located in said building, certain police officers had been stationed where they could readily detect any one who should enter said building, on the night of the arrest of the defendant. One of said officers testified that about nine o'clock P. M., he saw the defendant and another person enter said building; and another officer, who was stationed inside of the building, testified that about the same time he heard parties coming up the stairs in said building.

and soon afterwards he saw the defendant on the second floor of it inside a doorway leading to a closet, where he was arrested. This witness further testified that before he became aware of the entrance of any other persons than himself and two other officers, who had been stationed inside the building with him, he inspected the closets on the second floor and found that the doors of them were locked. But that after the entrance of persons other than himself and said officers, he found the door of one of the closets "sprung open, and behind the door close to the partition * * * a large sledge hammer wrapped in paper and also a handle wrapped in papers," which were not in the hall when the witness first inspected it. A further inspection of the premises revealed the following facts: In a closet over the bank vault a trap-door about two feet wide and two and a half feet long had been sawed out of the floor, and then fastened down with screws so that it might be opened without making much, if any, noise. On opening it the witnesses found beneath it and on the top of the vault a large quantity of tools, and a hole in the vault of the depth of two feet which had been made by the removal of bricks, which had been deposited between the walls of the room and the vault. The tools found on the vault were adapted to the kind of work that was evidently being prosecuted upon it, and other tools of a similar character were found in the defendant's trunk in a room occupied by him in San Francisco. To the introduction of the tools found upon the vault and to those found in the defendant's trunk objections were made by the defendant's counsel. The objections were overruled and exceptions were taken, upon which we are asked to pass.

"The implements found in the excavation over the vault," say the appellant's counsel, "were improperly admitted in evidence because there was no evidence showing or tending to show that any of them belonged to or had been in the possession of the defendant, or were in any way connected with him." If such evidence was a necessary prerequisite to the introduction of the implements to which counsel refer, their exception was doubtless well taken. But these implements were not offered in evidence until the witness, by whom they were discovered, had testified, without objection, to the fact of having found implements of a similar description, "in the

excavation over the vault," and if that testimony was admissible, of which we entertain no doubt, we are unable to conceive upon what ground the production, identification, and introduction of the implements themselves in evidence could be objectionable.

The objection to the admission in evidence of the implements found in the appellant's trunk is based on the ground that "they were not used in the perpetration of, or in the attempt to perpetrate, the offense charged." And that "if they were burglars' tools then they were evidence of another crime." There was evidence, however, which tended to prove that burglars' tools had been "used in the perpetration, or in the attempt to perpetrate, the offense charged," and that, coupled with the fact "that the defendant was in the vicinity at or about the time the burglary was committed" furnished a sufficient ground for the introduction of evidence to show "the possession by the defendant, at or about that time, of corresponding tools." (*People v. Winters*, 29 Cal. 658.)

Among the articles exhibited in the presence of the jury was "a cylindrical steel bar about half an inch in diameter and about eight inches long, which he (the witness exhibiting it) said he had made for the purpose of screwing upon it the said coupling or sockets"—one of which was found in the hole over the bank vault and the other in the trunk of the defendant. The Court, against the objection of the counsel of appellant, permitted the witness "to make experiments in the presence of the jury with the couplings or sockets attached to said cylindrical bar." The ground of the objection was that the cylindrical bar was not in evidence. It had not been formally offered in evidence, and the counsel for the prosecution stated that they did not intend to offer it in evidence. But the witness had exhibited it on the witness stand, and had stated that he had it made for the purpose of screwing "said coupling or sockets" upon it. The object of screwing "said coupling or sockets" upon it is not stated, nor to us apparent. Still, in support of the correctness of the ruling of the Court below we are bound to presume, unless the contrary appears, that the object was a legitimate one. Perhaps the use to which the coupling or sockets might be put, could be made more clear by screwing them upon said cylindrical bar.

It was not objected that the witness was not an expert, and we are unable to determine from anything before us that it was not necessary for him to use said cylindrical bar in order to elucidate and illustrate clearly the character of the "coupling or sockets" which had been admitted in evidence. It was not only proper, but of the first importance, that the prosecution should show that the implements found on the vault, and in the appellant's trunk, were "burglars' tools." And we must presume that it was for that or some other legitimate object that the witness was permitted to experiment with some of them in the presence of the jury, and that he was allowed to use an instrument of his own for the purpose of making the experiment better understood than it otherwise would be. The objection to the question put to the witness Aiken was properly overruled.

The Court refused to give the following instruction, which the defendant requested to have given to the jury: "Before you can find the defendant guilty of the charge in the information you must be entirely satisfied from the evidence that the defendant entered the house, room, shop, warehouse, store, or building of Peder Sather, in the City and County of San Francisco with the intent then and there to commit larceny;" but gave the following: "I instruct you that it is not sufficient for you to find that the defendant entered the house, room, shop, warehouse, store, or building of Peder Sather; but in addition to such entry you must find that he entered with the intent to commit larceny therein, and if you do not so find you should acquit the defendant."

We are unable to discover any satisfactory reason for the Court's refusal to give the instruction which it was requested to give. But since there is no substantial difference between that and the one which it gave, it is not a sufficient ground for reversing the judgment. And this applies as well to the refusal to give the instructions numbered 21 and 23, which the defendant also asked to have given.

But the jury did not find the defendant guilty of burglary, and did find him guilty of an attempt to commit burglary only, so that he could not have been prejudiced by the refusal to give an instruction which contained a correct definition, not of the crime of which he was found guilty, but of a higher

one. Therefore, the material question is, whether the jury was correctly instructed as to what facts it was necessary to prove before the defendant could be found guilty of an attempt to commit burglary. And the instructions given upon that point is attacked by appellant's counsel, who insists that "it is clearly erroneous and was fatally prejudicial." It reads as follows:

"If the jury find from the evidence, beyond a reasonable doubt, that the defendant did, at the time charged in the information, intend and attempt to enter the house, room, apartment, building, etc., described in the information of said Sather, then in his occupancy, with the intent to commit larceny therein, *and did some act to carry out said attempt*, but was anticipated in his *said attempt*, and before the alleged entry was completed or consummated, and before said larcenous attempt was carried out, and was interrupted, prevented, and anticipated *in said attempt* while in or about the act of carrying it out by outside agencies, and against his will and consent; and if you find that he had not alone made preparations *for said attempt*, but was directly at the time of said prevention engaged in making movements towards consummating *such an attempt*, then, and in such case only, you can find the defendant guilty of an attempt to commit burglary in the first degree if the attempt was made between sunset and sunrise; of burglary in the second degree if it were made between the hours of sunrise and sunset."

Of course the attempt, if any was made to commit burglary, consisted in doing some act or acts towards the commission of that crime, and if the defendant was "prevented and anticipated in said attempt," it would logically follow that he never made it. He might have made preparations for the commission of the crime without being guilty of an attempt to commit it. And if this instruction would be liable to lead the jury to confound a preparation to commit the crime with an attempt to commit it, it would be clearly erroneous. But the Court, in the following extract, attempted to point out the distinction between a preparation and an attempt: "And if you find that he had not alone made preparations for said attempt, but was directly, at the time of said prevention, engaged in making movements towards consum-

making such an attempt, then, and in such case *only*, you can find the defendant guilty of an attempt to commit burglary." It is difficult to uphold such an instruction as this, and if the evidence in regard to the acts of the defendant was of a character to render it doubtful whether he was making preparations or an attempt to commit burglary, the difficulty would be greatly enhanced, if not quite insurmountable. As it is, we do not think that the jury could have been misled by that instruction to the prejudice of the appellant, although we would be much better satisfied, if the Court had given the instruction which the defendant's counsel asked to have given upon this point.

It was charged in the information that the defendant feloniously and burglariously entered "the house, room, shop, warehouse, store, and building of Peder Sather, then and there doing business under the firm name and style of Sather & Co., situated on the north-east corner of Montgomery and Commercial streets, in said city and county of San Francisco, and known as No. 526 Montgomery street."

The evidence tended to show that Sather owned that building and that he occupied the first floor as a banking office, and rented the second and third floors to tenants. We are unable to discover any conflict in the testimony of the witnesses upon the questions of ownership and occupancy.

One of the instructions excepted to by the defendant reads as follows: "If you believe from the evidence, beyond a reasonable doubt, that the stairs, hallway, privy-room, and water-closet, and closet under the stairs, spoken of in the evidence, were at the time of the alleged entry in the occupancy of Peder Sather, doing business as Sather & Co., named in the information, and that the defendant entered in and upon such occupancy as charged in the information, with intent to commit larceny in any part of the house or building of said Sather, then in his occupancy, then it is your duty to find the defendant guilty."

We are urged to sustain the exception to this instruction on the ground that there was no internal communication between the part of the building entered and that in which it was alleged that the defendant intended to commit larceny. But in order to justify the verdict rendered in this case it is not necessary that the evidence should show that the defend-

ant effected an entrance into any part of the building. Proof of an attempt to enter with the intent to commit larceny is sufficient. But were it otherwise, we should find no difficulty in holding that an entrance effected through a trap-door leading from the second floor of the building, to the vault located in that part of the building occupied by Peder Sather as a banking office, would constitute "an entry in the occupancy of Peder Sather." The trap-door would constitute "some internal communication" between the closet on the second floor and the banking office on the first. We do not think that this instruction assumes that Sather was in the occupancy of any part of the building. Nor do we think that is assumed in another instruction which is excepted to on that ground alone.

Upon the question of what was or was not sufficient evidence to sustain the allegation in the information as to the occupancy of Peder Sather, we think that the instructions are as full, explicit, and accurate as the case required that they should be, and we think that there was no error in the Court's refusing to give the instructions which it was asked to give in regard to the weight which the jury might attach to the circumstance of burglars' tools having been found in the defendant's possession at or about the time of the alleged commission of the crime with which he was charged. The instructions asked and refused on that point did not accord to that circumstance, when considered in connection with other circumstances in the case, all the weight to which it was entitled.

Judgment and order affirmed.

ROSS, MCKINSTRY, MYRICK, and MCKEE, JJ., and MORRISON, O. J., concurred.

[No. 8,808.—In Bank.]
December 11, 1882.

EUGENE McCARTHY v. L. LOUPE.

BROKER'S EMPLOYMENT TO SELL REAL ESTATE.—To entitle a broker to recover commissions for effecting a sale of real estate, he must show that he was employed by or on behalf of the owner to make the sale.

Id.—USAGE.—It may be that, independent of the provisions of Section 1624 of the Civil Code, requiring such a contract to be in writing, the absence of an express contract might be supplied by proof of usage regulating transactions of that kind, but even before the Code proof of an express contract or of such usage was required.

UNDER CODE, SUCH EMPLOYMENT MUST BE IN WRITING — STATUTE OF FRAUDS — EVIDENCE — CONTRACT.—Since the Code, under the provisions of Section 1624, an agreement authorizing or employing an agent or broker to purchase or sell real estate for a compensation or commission, can only be proved by the introduction of an instrument in writing. The plaintiff in this action failed to show any express contract, but claimed the right to recover what his services were reasonably worth, upon a promise implied by law.

Held: He could only recover upon an express contract, and therefore could not maintain this action.

NEW TRIAL, REASONS OF TRIAL COURT FOR GRANTING, NOT MATERIAL.—The Court below, on motion of defendant, granted a new trial, and assigned, as the ground upon which the motion was granted, error in the Court in its instruction to the jury.

Held: The order granting the new trial will be sustained, if it was properly granted on any other ground.

APPEAL by plaintiff from an order of the Superior Court of the City and County of San Francisco granting a new trial.
HUNT, J.

Action on contract. The complaint in this action, filed June 2, 1881, contains two counts. In the first count it is alleged: that on the first day of March, 1881, the defendant entered into an agreement with the plaintiff that in consideration that he, the plaintiff, would devote his time, labor, and skill in finding and securing a purchaser for a lot of land then belonging to the said defendant, situated at the south-east corner of Market and Fremont streets, in said City and County, and being ninety-one feet eight inches on Market street, by a uniform depth of one hundred and thirty-seven feet six inches, at a price satisfactory to said defendant, the defendant would pay to the plaintiff therefor, the sum of three thousand five hundred dollars as a commission: that the plaintiff, thereupon, did, between said first day of March, 1881, and the twenty-sixth day of May, 1881, devote his time, labor, and skill, in and about the said business, and on, to wit, the twenty-sixth day of May, A. D. 1881, did find and secure a purchaser for said lot of land, to wit, one Claus Spreckels, at the price of one hundred and seventy-five thousand dollars, and duly performed

all the conditions of said agreement on his part to be performed; that said price was satisfactory to said defendant and said defendant thereupon sold the said lot of land to said Claus Spreckels, at said price; that plaintiff thereupon demanded of said defendant, said sum of thirty-five hundred dollars, but the said defendant refused to pay the same, or any part thereof, and the whole thereof is now due and payable from said defendant to the plaintiff.

In the second count it is alleged: That on, to wit, the twenty-sixth day of May, A. D. 1881, the said defendant was, and still is, justly indebted to the said plaintiff, in the sum of three thousand five hundred dollars, for the work, labor, and services of the said plaintiff theretofore, and between the first day of March, 1881, and said twenty-sixth day of May, 1881, rendered by said plaintiff, to and for said defendant at his special instance and request, in and about the finding and securing for said defendant, a purchaser, at a price satisfactory to said defendant, of the lot of land, situated in the city and county of San Francisco, State of California, on the southeast corner of Market and Fremont streets, and being ninety-one feet eight inches front on Market street, by a uniform depth of one hundred and thirty-seven and one half feet then owned by said defendant, and in consideration thereof, the said defendant then and there agreed to pay to the plaintiff, whatever the said services were reasonably worth, whenever he should be thereunto afterwards requested; that said services were reasonably worth the said sum of three thousand five hundred dollars, but though often requested to pay the same, the said defendant has refused and neglected to pay the same or any part thereof, and the whole thereof is now due and payable from said defendant to the plaintiff.

The answer of the defendant denied the making of any contract between the plaintiff and defendant, except that on the first day of March, 1881, the defendant authorized the plaintiff to sell the lot of land for one hundred and seventy-five thousand dollars, to the firm of Low & Montague; admits the sale by defendant himself to Spreckels of the land for the sum of forty thousand dollars; the conveyance by S. to defendant of another lot of land valued at fifty-five thousand dollars, and Spreckels' taking the defendant's lot subject to a

mortgage then existing thereon, and denies that the plaintiff was in any way instrumental in making the trade with Spreckels, or that the defendant is in any way indebted to the plaintiff for any services whatever. The case was tried before a jury, who returned a verdict for the plaintiff, in the sum of two thousand dollars, and judgment was given accordingly. The defendant moved for a new trial, on, among others, the following grounds: *·*·* Insufficiency of the evidence to justify the verdict; that the verdict is against law; errors in law occurring at the trial and excepted to by defendant.

The Court below granted the new trial, for the reason that the Court erred in giving one of its instructions to the jury. The plaintiff appealed.

William M. Pierson, for Appellant.

Stanly, Stoney & Hayes, for Respondents.

SHARPSTEIN, J.:

The Code provides that "An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is "invalid unless the same or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent." (C. C., § 1624.) It is not claimed that the agreement in this case or any note or memorandum thereof was in writing. But it is claimed that the plaintiff may, nevertheless, recover what his services were reasonably worth, upon a promise *implied by law*, by reason of the loss which he has sustained in rendering the service, and the benefit received by the defendant in accepting the same.

That there are cases in which the law will imply a promise to pay for services rendered by one person for another in the absence of any actual promise to pay therefor, can not be doubted. But no case has been brought to our attention in which it has been held where proof of employment is indispensable to a right to recover for services, that in the absence of such proof a recovery can be had. And to entitle a broker to recover commissions for effecting a sale of real estate, it is

indispensable that he should show that he was employed by the owner (or on his behalf) to make the sale. (*Pierce v. Thomas*, 4 E. D. Smith, 354; *Hinds v. Henry*, 36 N. J. Law, 328; *Edwards on Factors*, 144.)

But for the provision of the Code above cited it may be that the absence of an express contract might be supplied by proof of usage regulating transactions of this kind. (*Wilkinson v. Martin*, 8 Car. & P. 1; *Burnett v. Bouch*, 9 id. 620; *Read v. Rann*, 10 B. & C. 438; *Wisner v. Dillaway*, 4 Metc. 221; *Cook v. Welsh*, 9 Allen, 350.) But it was held in *Hinds v. Henry*, *supra*, that a plaintiff in such a case could not recover under the common counts.

It would seem, therefore, that no recovery could have been had before the Code, without proof of an express contract or of a usage regulating such transactions. The law in such a case would never imply a contract. Since the Code, no express contract in a case like this can be of any avail unless in writing. This particular kind of contract can only be proved by the introduction of an instrument in writing. Therefore the plaintiff failed to prove an express contract, and it was upon an express contract alone that he was entitled to recover.

This is not the ground upon which the Court granted the motion for a new trial, but it is a ground upon which the respondent was entitled to have a new trial. Therefore we can not disturb the order granting it.

Order affirmed.

MORRISON, C. J., and MCKINSTY, MYRIOK, ROSS, and MCKEE, JJ., concurred.

[No. 10,712.— In Bank.]

December 12, 1882.

THE PEOPLE v. THOMAS L. WESTLAKE.

HOMICIDE — JUSTIFICATION — THREATS.— On the trial of the defendant for murder, the Court instructed the jury: "Past threats or conduct of the deceased, how violent soever, will not excuse a homicide without sufficient present demonstration to authorize the belief that the deadly purpose then exists and the fear that it will then be executed." "The danger must be present, apparent, and imminent, and the killing must be done under a well-founded belief that it was absolutely necessary for the de-

fendant to kill the deceased at that time to save himself from great bodily harm." *Held*: The instructions were correct.

ID.— ID.— CASE DISTINGUISHED.— *The People v. Flahove*, 58 Cal. 249, distinguished.

ID.— ID.— CASE CRITICISED.— The Court instructed the jury: "If you believe beyond a reasonable doubt, from the evidence, that the defendant killed the deceased, then to render said killing justifiable, it must appear that the defendant was wholly without fault imputable to him by ~~any~~ in bringing about or commencing the difficulty in which the mortal wound was given."

Held: The instruction is taken literally from the decision of the late Supreme Court in *People v. Lamb*, 17 Cal. 323, which has since been followed and approved by this Court in *People v. Travis*, 58 id. 254. It is true that in *People v. Simons*, 60 Cal. 72, the doctrine enunciated in those cases seems to have been questioned, but it was not questioned by a majority of the Judges who concurred in that decision, and the case is not entitled to be considered as an authoritative overruling of the former cases. It is not to be doubted that a person accused of crime may show in justification that although he brought upon himself an imminent danger, he, in the presence of that necessity, changed his mind and conduct and honestly endeavored to escape from it, but could not without striking the mortal blow. But that is not the present case. (SHARPSHIN, J., dissenting.)

ID.— ID.— HYPOTHETICAL INSTRUCTION.— The Court, in effect, instructed the jury that if they were satisfied beyond a reasonable doubt, from all the facts and circumstances in the case, of the existence of the facts which he stated to them and which the evidence tended to prove, then the defendant would be guilty of murder or manslaughter, as they might determine.

Held: It is allowable for a Court to give a hypothetical instruction to the jury, provided the province of the jury be not invaded. No invasion took place in this instance. The jury were left entirely free in the exercise of their functions to find the facts stated to them, and were cautioned that the facts must be found by them from the evidence beyond a reasonable doubt.

ID.— RESERVED RULING AS TO THE ADMISSIBILITY OF EVIDENCE.— Where the ruling upon an objection to a question is reserved by the Court, and the defendant does not afterwards ask for or make any effort to obtain a ruling upon the objection, or move to strike out the answer to the question, the ruling upon which has been reserved, the legal presumption is that a ruling has been waived.

ID.— MEDICAL EXPERT — EVIDENCE.— An objection was sustained to the following question, asked of a medical witness who had made a *post-mortem* examination of the body of the deceased: "State, from the examination you gave the wound, the course of the ball and the condition of the deceased, whether, if he were moving in a north-westerly direction, or standing facing a north-west direction, he could have received that wound from the pistol-shot fired by a person standing north of him and facing south."

Held: Whether the wound of which the witness died could have been in-

fired by a pistol-shot fired by the defendant from a certain direction, was a fact to be found by the jury from the evidence of the circumstances under which the homicide was committed, or by inference, from the relative position of the parties at the time the shot was fired. It was not such a matter of science or skill as required the opinion of an expert.

12.—DECLARATION OF DECEASED AFTER THE KILLING—*RES GESTA*.—Declarations of a person who has been shot, made a half an hour after the shooting, as to what he intends to do to the man who shot him, are not part of the *res gestæ* of the shooting.

13.—EXCLUSION OF EVIDENCE—UNCONTRADICTED TESTIMONY—IMMATERIAL ERROR.—The exclusion of the testimony of one witness as to a fact which has been proved by the uncontradicted testimony of another witness, is not a prejudicial error; for the direct evidence of one witness who is entitled to full credit, is sufficient for proof of any fact except perjury and treason.

APPEAL from a judgment of conviction, and from an order denying a new trial, in the Superior Court of the County of Shasta. BELL, J.

Chipman & Garter and S. Sweeney, for Appellant.

A. L. Hart, Attorney General, for Respondent.

McKEE, J.:

In the Superior Court of Shasta County Thomas L. Westlake was charged, by criminal information, with having committed the crime of murder, by maliciously and unlawfully killing one John McCool, in that county. Upon trial a verdict was rendered against him of murder in the second degree, and on this appeal, which is from the judgment of conviction, and from an order denying his motion for a new trial, it is insisted that the Court erred: *first*, in giving to the jury the following instruction upon the subject of justifiable homicide:

“Past threats or conduct of the deceased, how violent soever, will not excuse a homicide, without *sufficient present demonstration to authorize the belief* that the *deadly* purpose then exists, and the fear that it will then be executed.

“The danger must be *present*, apparent, and *imminent*, and the killing must be done under a *well-founded* belief that it was *absolutely necessary* for the defendant to kill the deceased at that time to save himself from great bodily harm.”

The first part of this instruction is challenged as erroneous;

but as a proposition in criminal law, it is true that previous insults or conduct, however violent and abusive, are not, in and of themselves, sufficient to justify or excuse any one for the commission of a crime. (*People v. Iams*, 57 Cal. 127.) They are, however, evidential circumstances, which, in connection with the facts and circumstances in which a crime has been committed, are entitled to due consideration in determining whether the person charged with the commission of the crime was justifiable or not. Substantially, that was the import of the first part of the instruction, and it was expressed in such language that the jury could not have misunderstood it.

But it is claimed that the instruction as an entirety is objectionable under the decision by this Court in *Flahave's Case*, 58 Cal. 249.

The instructions in the two cases are not identical. In the *Flahave Case* the disapproved instruction was substantially this: To justify a person for killing another upon the ground of self-defense, the killing must be done under an appearance of danger so urgent and pressing that it was absolutely necessary to save his own life or to prevent great bodily injury. In this case the instruction was qualified by the expression that the killing must be done *under a well-founded belief that it was absolutely necessary*, etc. That qualification saves the instruction from the rule of the *Flahave Case*, and, as qualified, the instruction in this case, as an entirety, was right. It is substantially the instruction which was given in the case of *The State v. Rippey*, 2 Head, 217, which the Supreme Court of Tennessee approved as sound law.

Justification for a homicide, according to the Penal Code, must rest upon two things: 1. A reasonable cause; 2. An actual apprehension of a design to commit a felony or to do some great bodily injury. Both must exist or neither will avail. To constitute the defense the apprehension of danger must be founded on sufficient circumstances, real or apparent, to authorize the opinion that the felonious design then exists; previous threats or menacing conduct constitute part of such circumstances. And the circumstances must not only be such as authorize the fear of death or great bodily harm, but the fear caused by them must be actual — really entertained, and

the homicidal act must have been done under the controlling influence of that fear, or, in other words, under the honest and well-founded belief that it was absolutely necessary to kill at that moment, to save from the imminent danger that menaced life or limb. Can such a belief arise out of circumstances of necessity or danger which a party has, intentionally or by his own fault, brought upon himself? We think not. Hence we see no error in the following instruction upon the same subject of justification, to which the defendant took exceptions:

“If you believe beyond a reasonable doubt from the evidence that the defendant killed the deceased, then to render said killing justifiable it must appear that the defendant was wholly without fault imputable to him by law, in bringing about or commencing the difficulty in which the mortal wound was given.”

The instruction is taken literally from the decision of the late Supreme Court in *People v. Lamb*, 17 Cal. 323, which has been since followed and approved by this Court in *People v. Travis*, 56 Id. 254. It is true that in *People v. Simons*, 60 Cal. 72, the doctrine enunciated in those cases seems to have been questioned; but it was not questioned by a majority of the Judges who concurred in that decision; and the case is not entitled to be considered as an authoritative overruling of the former cases. And those cases, we think, should not be overruled, for, as a proposition in criminal law, the doctrine enunciated by them rests upon reason and authority. As has been already said, the apprehension of danger to life or limb which justifies a man for taking the life of another must be an honest one — one that is well grounded, and must arise out of a reasonable cause; but a cause which originates in the fault of the person himself — in a quarrel which he has provoked, or in a danger which he has voluntarily brought upon himself, by his own misconduct, can not be considered reasonable or sufficient in law to support a well-grounded apprehension of imminent danger to his person. Error of apprehension the law overlooks, when a man is called upon to act on appearances; but it does not overlook dishonesty of apprehension. Hence a real or apparent necessity brought about by the design, contrivance, or fault of the defendant, can not be availed of as a defense for the commission of a

crime. (*State v. Rippy, supra; Stewart v. State*, 15 Ohio St. 155; *State v. Neeley*, 20 Iowa, 109; *State v. Roach*, 34 Geo. 78; *State v. Eiland*, 52 Ala. 322; *State v. Evans*, 44 Miss. 762; *People v. Gainey*, 97 Ill. 271.)

Yet it is not to be doubted that a person accused of crime may show, in justification, that although he brought upon himself an imminent danger, he, in the presence of that necessity, changed his mind and conduct, and honestly endeavored to escape from it, but could not without striking the mortal blow. But that is not the present case. And, in the absence of such circumstances, it must be true, as a legal proposition that where a defendant seeks and brings upon himself a difficulty with the deceased, in which he willingly continues until he involves himself in the necessity to kill, the law will not hold him guiltless. The right of self-defense, which justifies a homicide, does not include the right of attack.

2. The instruction numbered twenty-two was correct. In effect, the Court told the jury that if they were satisfied "beyond a reasonable doubt, from all the facts and circumstances in the case," of the existence of the facts which he stated to them, and which the evidence tended to prove, then the defendant would be guilty of murder or manslaughter, as they might determine.

It is allowable for a Court to give a hypothetical instruction to the jury, provided the province of the jury be not invaded. No invasion took place in this instance; the jury were left entirely free, in the exercise of their functions, to find the facts stated to them, and were cautioned that the facts must be found by them, from the evidence, beyond a reasonable doubt.

3. A witness for the prosecution, on his direct examination, testified that McCool (the deceased) and a younger brother of the defendant, on the morning of the homicide, came along and halted right in front of the door of the saloon, near which the witness was seated. When they halted, McCool said to young Westlake, "I was not alluding to you or your family." At the time of the remark the witness did not observe that the defendant was present, but he came forward and joined them immediately afterwards and commenced the difficulty with McCool, in which the latter was killed. To the remark,

counsel for defendant "objected as evidence and moved that it be stricken out." No ruling was *then* made by the Court upon the objection or motion. Impliedly, the Court reserved its ruling, and no exception was taken by defendant. But the Court did not, at any time during the trial of the cause, pass upon either, and this omission of the Court is assigned as error. But the defendant did not at any time ask for a ruling; and where a defendant makes no effort to obtain a definite ruling upon an objection to a question asked of a witness, or a motion to strike out the answer to the question, the ruling upon which has been reserved, the legal presumption is that a ruling was waived. (*People v. Sanford*, 43 Cal. 32.) This presumption also arises from the fact disclosed by the record in this case, that the defendant did not make the omission of the Court to rule upon his objection, or motion to strike out part of the grounds of his motion for a new trial.

4. A medical witness, called by the defendant, after testifying that he had made a *post-mortem* examination of the body of the deceased, was asked this question: "State from the examination you gave of the wound, the course of the ball, and the condition of the deceased, whether, if he were moving in a north-westerly direction, or standing facing a north-west direction, he could have received that wound from the pistol shot fired by a person standing north of him and facing south?" Objection was taken to the question, which was sustained, and the ruling is assigned as error.

Whether the wound of which the deceased died could have been inflicted by a pistol shot fired by the defendant from a certain direction, was a fact to be found by the jury from the evidence of the circumstances in which the homicide was committed, or to be inferred from the relative position of the parties at the time the shot was fired; it was not such a matter of science or skill as required the opinion of an expert. (*People v. Smith*, 4 Pac. C. L. J. 213.) There was, therefore, no error in excluding the opinion of the witness. Nor did the Court err in excluding the testimony of the same witness as to a declaration made by McCool, half an hour after he had been shot, to the witness, who was his attending physician. The declaration related to what he then meant to do to the defendant for shooting him. Declarations of a person who

has been shot, made half an hour after the shooting, as to what he intends to do to the man who shot him, are not part of the *res gestæ* of the shooting. (C. C. P., § 1850.)

Lastly.—It is contended that in excluding the testimony of John Stewart, a witness for the defendant, as to the communication to defendant of a threat which had been made by McCool against the defendant, there was error. But the threat, and the communication of it to the defendant, had been proved by the testimony of another witness, who was unimpeached and uncontradicted, and the defendant himself testified on the same subject. The exclusion of the testimony of one witness as to a fact which has been proved by the uncontradicted evidence of another witness, is not a prejudicial error (*People v. Reed*, 48 Cal. 558); for the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason. (Sec. 1844, C. C. P.)

There is no error in the record, and the judgment and order appealed from are affirmed.

MORRISON, C. J., and MYRICK, J., concurred.

ROSS, J., concurred in the judgment.

SHARPSTEIN, J., dissenting:

The following instruction, in which the Court said, "If you believe beyond a reasonable doubt, from the evidence, that the defendant commenced the affray with the deceased, in which the mortal wound was given, then his fear of danger, if really entertained, would not justify him in taking the life of the deceased," can not, in my judgment, be reconciled with that provision of the Penal Code which makes homicide justifiable, when committed by a person in the lawful defense of such person, even if he was the assailant, if he had really and in good faith endeavored to decline any further struggle before the homicide was committed. (Pen. C., § 177.) This error, if error it be, is repeated in several other instructions.

[No. 7,140. — In Bank.]

December 12, 1882.

**THE REMINGTON SEWING MACHINE COMPANY
v. JOSEPH H. COLE ET AL.**

CHANGE OF PLACE OF TRIAL—ACTION—PRACTICE.—Action commenced in the City and County of San Francisco. Joseph H. Cole and George N. Cole were united as defendants with Jewell and Showers. The complaint alleged that Showers, Jewell, and George N. Cole formed a copartnership; that plaintiff entered into an agreement with said partnership, etc.; that as a condition precedent to said agreement plaintiff exacted from each and every member of the firm a bond in the sum of ten thousand dollars, conditioned that if said Showers, Jewell, and Cole should from time to time, as the same should become due, pay all dues, etc., which under their agreement might become due to plaintiff, or in default thereof, that said member would pay to plaintiff his one-third part of any such indebtedness, then the obligation to be void; otherwise, etc. George N. Cole, as one of the firm, executed such a bond to the plaintiff, with Joseph H. Cole as surety. After the dissolution of the copartnership, and settlement of the affairs, the firm was indebted to the plaintiff in the sum of nine thousand seven hundred and one dollars and fifty-five cents, of which the complaint alleged, Joseph H. Cole became liable to pay three thousand two hundred and thirty-three dollars and eighty-five cents; that since said settlement Showers and Jewell paid to plaintiff six thousand two hundred and eight dollars and thirty-four cents, leaving unpaid three thousand one hundred and ninety-three dollars and twenty-one cents. Prayer therefor against the four defendants. Showers and Jewell demurred. The other defendants, Joseph H. Cole and George N. Cole, also demurred, and moved a change of the place of trial, which was denied August 30, 1878. Afterwards the demurrer of the defendants Joseph H. Cole and George N. Cole was overruled, and the action was dismissed as to Showers and Jewell. Subsequently the defendants Joseph H. Cole and George N. Cole made a second motion for change of the place of trial, which was also denied, and this appeal was taken by them from the order denying their second motion. Both motions by them were made upon the ground that they were residents of the County of San Joaquin.

Held: 1. If the complaint counted alone on the bond executed by Joseph H. and George N. Cole, there was no cause of action stated against Jewell or Showers, and they were improperly made parties. In that view, the Coles were entitled to a change of the place of trial, and their motion in that behalf, made in 1877, and denied August 30, 1878, ought to have been granted, notwithstanding Jewell and Showers then remained parties of record. From the order made refusing a change of venue, the parties aggrieved were entitled to appeal, and that was their remedy.

2. If, on the other hand, the complaint contained a cause of action against Jewell and Showers, the order made August 30, 1878, was rightly made, for they did not join in the motion for a change of the place of trial, but on the contrary filed a demurrer, without objection, on that

ground. If there was a cause of action stated against them, they had as much right to have it tried in the city and county of San Francisco, where the action was commenced, as their co-defendants had to have it tried in the county of their residence.

3. In either event, the subsequent dismissal of the action as to Showers and Jewell could not operate to confer on the other defendants the right to demand a change of the place of trial, for that right is to be determined by the condition of things existing at the time the parties claiming it first appeared in the action.

APPEAL by the defendants, Joseph H. Cole and George N. Cole, from an order of the Superior Court of the City and County of San Francisco, denying their motion for a change of the place of trial. **EDMONDS, J.**

Action on a bond. The action was commenced September 29, 1877, in the Fifteenth District Court. The complaint is as follows:

The Remington Sewing Machine Company, hereinafter styled plaintiff, complains of Joseph H. Cole, George N. Cole, O. H. Jewell, and A. Showers, defendants herein, and for cause of action alleges:

1. That plaintiff is, and at all the times hereinafter mentioned was, a corporation organized under the laws of the State of New York, and is and was engaged in the manufacture and sale of the Remington sewing machines, so called.

2. That on or about the first day of January, A. D. 1875, the defendants, A. Showers, O. H. Jewell, and George N. Cole, entered into and formed a copartnership under the style of Showers, Jewell & Cole, for the purpose of buying and selling the aforesaid Remington sewing machines in the State of California and elsewhere.

3. That after the formation of such copartnership the plaintiff entered into an agreement with the said Showers, Jewell & Cole, as partners as aforesaid, whereby the plaintiff agreed among other things to sell to said firm only in the States of California and Oregon its said Remington sewing machines, at certain agreed rates, and upon certain conditions, and the said firm of Showers, Jewell & Cole did agree with the plaintiff among other things to maintain and keep open a store in San Francisco, California, for the sale of said machines, and

to pay the plaintiff certain agreed rates for all such machines sold and delivered to them by the plaintiff.

4. That as a condition precedent to the aforesaid agreement between plaintiff and the said firm of Showers, Jewell & Cole, the plaintiff did acquire and exact from each and every member of said firm a bond in the sum of ten thousand dollars, with good and sufficient surety, and conditioned that if said Showers, Jewell & Cole should from time to time, and at all times, as the same should become due and payable, pay and satisfy all dues, demands, or any balances, which, under their aforesaid agreement, might become due to the plaintiff, or in default thereof, that said member would pay to the plaintiff his one third part or proportion of any such indebtedness, then the obligation to be void, otherwise in full force and effect.

5. That pursuant to such condition the said defendant, George N. Cole, as one of the said firm of Showers, Jewell & Cole, did, on the tenth day of February, A. D. 1875, make, execute, and deliver to plaintiff his certain bond in the sum of ten thousand dollars, with the defendant, Joseph H. Cole, as surety thereon, and of which the following is a copy, to wit: "Know all men by these presents, that I, George N. Cole, of Stockton, in California, as principal, and Joseph H. Cole, of O'Neal Township, California, as surety, are firmly bound and obliged unto E. Remington & Sons, of Ilion, New York, a firm duly established and doing business under said name, in the full and just sum of ten thousand dollars, the which sum, well and truly to be paid to them, said E. Remington & Sons, or the survivor or survivors of them or their assigns, or representatives of them, we jointly and severally bind and oblige ourselves, and our several heirs, representatives, and assigns, firmly by these presents. Sealed with our seals, and dated this tenth day of February, A. D. 1875. The condition of this obligation is such that, whereas, on the first day of January, 1875, the said George N. Cole became an equal copartner with A. Showers and O. H. Jewell in the business of selling and dealing in the sale and disposition of the Remington sewing machines, a machine, the patent of which is owned by E. Remington & Sons, and transacting said business under the firm name of Showers, Jewell &

Cole, which said firm have entered into an arrangement or agreement to and with said E. Remington & Sons for the supplying of said sewing machines to said firm, for the purpose of sale and the carrying on of their said business. Now, therefore, if the said Showers, Jewell & Cole shall from time to time, and at all times, as the same shall become due and payable, pay and satisfy all dues, demands, or any balances, which, under their said arrangement, agreement, or understanding, as to the terms of dealing, may be or become due, owing and payable to said E. Remington & Sons for supplies and machines as aforesaid, or in default thereof, the said George N. Cole shall well and truly pay or cause to be paid or settled to the satisfaction of said E. Remington & Sons his one third part or proportion of any such due, indebtedness, or balance, then this obligation shall be void and of no effect, otherwise be and remain in full force and virtue. Sealed with our seals, and delivered in presence of William Graham. GEORGE N. COLE, J. H. COLE."

6. That by mistake and inadvertence, the name of E. Remington & Sons was inserted in said bond instead of that of the Remington Sewing Machine Company, though the said bond was given, and intended to be given by said defendants, George N. Cole and J. H. Cole, to said Remington Sewing Machine Company, the plaintiff herein, and was by them to this plaintiff delivered, and the plaintiff accepted the same without noticing said mistake; and the said defendants, George N. Cole and Joseph H. Cole, thereby covenanted with the plaintiff, under their hands and seals, to pay to the plaintiff the sum of ten thousand dollars upon the conditions therein mentioned; that in order to make said bond conform to the actual intentions of the parties thereto, it is necessary that the name of "E. Remington & Sons," wherever occurring therein, should be changed to the words "The Remington Sewing Machine Company," and also the words "of Ilion, New York, a firm duly established and doing business under said name," after the words "E. Remington & Sons," first occurring in said bond, be changed to "of Ilion, New York, a corporation duly established and doing business under said name."

7. That on or about the —— day of May, A. D. 1876, the said firm of Showers, Jewell & Cole was dissolved by mutual

consent; and upon a settlement thereafter had by said firm and the members thereof with the plaintiff, it was found that the said firm was indebted to plaintiff in the sum total of nine thousand seven hundred and one dollars and fifty-five cents, of which amount, by the terms and conditions of said bond, the defendant, Joseph H. Cole, became and was liable to pay to plaintiff the full sum of three thousand two hundred and thirty-three dollars and eighty-five cents; that since said settlement the defendants, Showers and Jewell, have paid to plaintiff on account of said indebtedness the sum of six thousand five hundred and eight dollars and thirty-four cents, and there is now owing and unpaid to plaintiff thereon the sum of three thousand one hundred and ninety-three dollars and twenty-one cents. That the defendants, George N. Cole and Joseph H. Cole, have paid no part of said sum of nine thousand seven hundred and one dollars and fifty-five cents, nor has either of them; and there is now owing to plaintiff from said George N. Cole and Joseph H. Cole, on account of said indebtedness and said bond, the sum of three thousand one hundred and ninety-three dollars and twenty-one cents, which became due and payable on August 1, 1877. That the plaintiff has demanded payment of said sum of three thousand one hundred and ninety-three dollars and twenty-one cents from each and all of said defendants, but they have each and all neglected and refused to pay the same.

Wherefore plaintiff prays the judgment of this Court: 1. That the bond set forth in count fifth of this complaint herein may be reformed in the particulars set forth in said complaint, and so it may be taken and construed to run to the Remington Sewing Machine Company, the plaintiff herein. 2. That plaintiff have and recover from the defendants herein the sum of three thousand one hundred and ninety-three dollars and twenty-one cents, with interest thereon from August 1, 1877, at the rate of ten per cent. per annum, and costs of suits, and for such other and further relief herein as the plaintiff may be entitled to.

The defendants Showers and Jewell demurred to the complaint.

The defendants Joseph H. Cole and George N. Cole also demurred, and moved a change of the place of trial, which was

denied, August 30, 1878, by the District Court. Afterwards the demurrer of the defendants Joseph H. Cole and George N. Cole was overruled, and the action was dismissed by the plaintiff as to the defendants Showers and Jewell. The defendants Joseph H. and George N. Cole thereafter answered the complaint. On the fourteenth day of January, A. D. 1880, the defendants Joseph H. Cole and George N. Cole, without previously asking leave of the Court so to do, made a second motion for change of the place of trial, which was heard and denied by the Superior Court. Both motions were made upon the ground that the defendants Joseph H. Cole and George N. Cole were residents of the County of San Joaquin. A bill of exceptions was filed, and this appeal taken.

J. H. Budd, for Appellants.

The complaint shows a cause of action which must be tried in the county where the defendants resided at the commencement of the action, if duly demanded in writing by the defendants. (Code Civil Procedure, §§ 395, 396.) The language of Section 395 of the Code is imperative on this point. The following are its provisions, viz.: In all other cases the action must be tried in the county in which the defendants, or some of them, resided at the commencement of the action.

The appellants resided at the commencement of the action in the County of San Joaquin, and filed their affidavits showing that fact, and an affidavit of merits, and demanded in writing that the trial be had in the proper county. This was at the time they appeared in the action. The right of appellants to have the action tried in the county of their residence is given by the Code, and can only be waived as provided by Section 396 of the Code; and if not so waived, the Court in which the action is brought has no jurisdiction to try the action.

When, therefore, the plaintiff voluntarily dismissed the action as to Jewell and Shower, two persons named as defendants in the complaint, the right of the appellants arose, under the Code, to have the action tried in the county of their residence, unless they had waived that right by failure to file an affidavit of merits, and demand in writing a trial of the action in the county of their residence at the commencement of the

action. There was no such waiver, and the Court in which the action was brought, had, after such dismissal, no jurisdiction to try the action unless with appellant's consent. And the subsequent affidavit of merits and of residence, and demand in writing by defendants, showed they did not consent to the trial of the action in the Court in San Francisco, but insisted on their statutory right to have the action tried in the County of San Joaquin, the county of their residence. To state the matter syllogistically: in all cases of actions on contracts, the defendants have the right to have the action tried in the county of their residence at the commencement of the action, unless they waive that right by failure to file an affidavit of merits, and to demand in writing, at the time they appeared in the action, that the trial of the action be had in that county.

This is an action on contract, and the appellants, when they appeared in the action, filed the proper affidavit of merits and of their residence in San Joaquin County, at the commencement of the action, and demanded in writing that the action be tried in that county. Therefore the appellants have the right to have this action tried in that county. It is urged by the counsel for defendant, that appellants should have appealed from the order of the District Court, denying their first application to change the place of trial. Such appeal would have been frivolous. The order of the District Court was properly made on the facts then existing. The statutory right of appellants to have the action tried in the county of their residence had not then arisen. Appellants took the prescribed statutory steps to prevent a waiver of such right when it should arise, and when it did arise under the provisions of the Code, insisted on that right.

E. S. Pillsbury, for Respondent.

The first motion for change of place of trial was properly denied, because all the defendants did not join in the motion, and no reason was assigned by the moving parties for such failure. (*Pieper v. Centinela Land Co.*, 56 Cal. 173, and cases therein cited.) The motion having been made upon the same ground as the first, viz., residence in San Joaquin County, the decision of the first motion became the law on all

points involved therein, and obligatory upon the Court and parties. The remedy was by appeal. (*Lang v. Specht*, 7 P. C. L. J. 236.) If the remedy was not by appeal, the second application for change of venue was properly denied, because not made at the time the defendants appeared and demurred. They could not move after filing their demurrer. It was a right which could be waived. (*Pearkes v. Freer*, 9 Cal. 642; *Jones v. Frost*, 28 Cal. 245.) "A defendant who demurs to a complaint without answering must demand a transfer, if he claim it on the ground that the proper county is not designated before or when he demurs." (*Cook v. Pendergast*, 8 P. C. L. J. 1006.)

Ross, J.:

If the complaint counted alone on the bond executed by Joseph H. and George N. Cole, there was no cause of action stated against Jewell or Showers, and they were improperly made parties. In that view, the Coles were entitled to a change of the place of trial, and their motion in that behalf made in 1877, and denied August 30, 1878, ought to have been granted, notwithstanding Jewell and Showers then remained parties of record. From the order made refusing a change of venue the parties aggrieved were entitled to appeal, and that was their remedy. If, on the other hand, the complaint contained a cause of action against Jewell and Showers, the order made August 30, 1878, was rightly made, for they did not join in the motion for a change of the place of trial, but on the contrary, filed a demurrer, without objection, on that ground. If there was a cause of action stated against them, they had as much right to have it tried in the City and County of San Francisco, where the action was commenced, as their co-defendants had to have it tried in the county of their residence. In either event, we do not perceive how the subsequent dismissal of the action as against Jewell and Showers could operate to confer on the other defendants the right contended for by them. That right is to be determined by the condition of things existing at the time the parties claiming it first appeared in the action.

Order affirmed.

McKINSTRY and McKEE, JJ., and MORRISON, C. J., concurred.

SHARPSTEIN, J., dissenting:

I dissent. This is one of the actions which the Code declares "must be tried in the county in which the defendants or some of them reside at the commencement of the action." (C. C. P. 395.) Before the action was dismissed as to any of the defendants, some of them resided in San Francisco and some of them in San Joaquin County. After the dismissal of the action as to some of them, the remaining ones resided in San Joaquin. They had a right to have the action tried in that county, and if they did not waive that right, the Court erred in denying their application to have the place of trial changed from San Francisco to San Joaquin. The right might have been waived by appearing and answering or demurring without filing an affidavit of merits and demanding "in writing that the trial be had in the proper county." (Id. 396.)

The appellants, on their first appearance, as the *sole* defendants in the action, and at the time of filing their answer, did file an affidavit of merits and a demand "in writing that the trial be had in the proper county." Before that, either San Francisco or San Joaquin was the *proper* county. Now it could never have been the intention of the Legislature that a plaintiff, by improperly joining persons who resided in the same county with himself, against whom his complaint showed that he had no cause of action, with persons residing in another county against whom he did allege a cause of action as defendants, could defeat the right of the *real* defendants to have the action tried in the proper county, particularly when, as in this case, the action is dismissed as to the defendants residing in the same county with himself before the filing of the answer. Whenever the attention of the Legislature is manifest it must prevail in the construction of statutes. The object of the Legislature was to prevent the trial of actions in counties other than those in which the defendants resided, unless they waived that right. I do not think that the Courts should sanction a palpable evasion of such a statute.

MYRIOK, J., concurred with Mr. Justice SHARPSTEIN.

[No. 8,482. — In Bank.]

December 12, 1882.

H. F. NEHRBAS v. THE CENTRAL PACIFIC RAILROAD COMPANY.

WHEN QUESTIONS OF NEGLIGENCE TO BE LEFT TO JURY.—Action by the father to recover damages for loss of five children, ranging from five to sixteen years of age, killed in a collision with a train belonging to defendant. The children killed were returning home from a May-day picnic, in a light wagon drawn by one gentle horse. The oldest—a girl of sixteen—was driving. She was acquainted with the highway over which she was passing and with the point at which it was crossed by the railroad track. Several persons in vehicles preceded her on the highway, and had crossed the railroad, the nearest one being some four hundred feet in advance; and she was followed by a boy thirteen years old, at a considerable distance in the rear. On the railroad, about three hundred and thirty-five feet from the point of crossing, was a covered bridge. On either side of the railroad, between the bridge and its intersection with the highway, were a number of eucalyptus trees planted by the defendant, and which had attained such size, as, according to some of the testimony in the case, prevented—in connection with some of the neighboring orchards—an approaching train from being seen by those traveling the highway, until the traveler should reach a point very close to the railroad track. There was also evidence going to show that at the time of the accident the train was slightly behind time, and was running at the rate of from thirty-three to thirty-five miles per hour, whereas the rate at which the trains usually ran at that point was from twenty-five to thirty miles an hour. Further, there was some evidence tending to show that the bell was not rung nor the whistle blown.

Held: 1. This evidence, especially that relating to the increased speed, under the circumstances appearing, tended to show negligence on the part of the defendant, and it was for the jury to pass upon the effect of this testimony: 2. The evidence was sufficient to justify the verdict of the jury against the defendant on the question of the defendant's negligence.

Id.—**CONTRIBUTORY NEGLIGENCE.**—If it clearly appears from the undisputed facts, judged of in the light of that common knowledge and experience of which Courts are bound to take notice, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, the question of negligence is one of law, to be decided by the Court. In all other cases the question must be submitted to the jury under proper instructions.

Held: In the present case the question of contributory negligence on the part of the deceased children was properly submitted to the jury, and there exists no valid reason for disturbing the finding of the jury on this point against the defendant.

RULE OF DAMAGES.—In this action under the law of this State the jury was not limited in assessing the plaintiff's damages to his actual pecuniary injury sustained by him by reason of the loss of services of his children.

APPEAL by defendant from the judgment of the Superior Court of the County of Alameda. GREENE, J.

Action for damages caused through the negligence of the defendant. Upon the conclusion of the plaintiff's testimony in the Court below the defendant moved for a nonsuit, which was denied. The defendant offered no testimony. The jury returned a verdict for the plaintiff in the sum of ten thousand eight hundred dollars. The defendant, without moving for a new trial in the Court below, prepared a bill of exceptions to be used on appeal. The facts are stated in the opinion of the Court. After the decision in bank a petition for rehearing was presented and denied.

Henry Vrooman and W. H. L. Barnes, for Appellant.

The damages were excessive and contrary to law. (Sedgwick on Measure of Damages, vol. ii., p. 537.) The author says: "Where there is a prospective pecuniary loss, resulting from the death, damages may be recovered in compensation for such loss. It may be difficult, from the nature of the case, to lay down more than a general rule to govern the jury in their award of prospective damages. There should be, at least, a reasonable expectation of pecuniary benefit from the life of the deceased to entitle the plaintiff to recover.

"Definite instructions should be given to the jury as to the true measure of damages under the statute, although much must be left, it is said, to their sound discretion. The rule on the proper measure of damages in this class of cases is nowhere better stated than by Sharswood, J., in *Penn. R. R. Co. v. Butler*, 57 Pa. St. 335, where the learned Judge says: 'After an attentive examination and review of all the cases which have heretofore been decided, we are of opinion that the proper measure of damages is the pecuniary loss suffered by the parties entitled to the sum to be recovered (in this instance the children of the deceased), without any *solatium* for distress of mind, and that loss is what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his children,

taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditure.'

"As to the future services of minors, damages under this statute may also be recovered for the pecuniary loss, present or prospective, resulting from the death of minors. But it should be made to appear to the jury that there is, at least, a reasonable expectation that the services of the child will be of pecuniary value to the plaintiff."

In *Oldfield v. The N. Y. & H. R. R. Co.*, 14 N. Y. 310, this language was used by Judge Wright: "Since the jury must be satisfied by proof of the probability of actual loss resulting to the plaintiff from the death of the minor, the condition of the parents, the occupation of the father, etc., are admissible in evidence in this class of cases, when not in others, under the statute, to enable the jury to determine the actual loss which will, in all probability, result from the death of a child." (Citing *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613; *Barley v. Chicago & Alton R. R.*, 4 Biss. 430; *Chicago v. Powers*, 42 Ill. 169.)

"But the damages must be limited to the minority of the child. It is the pecuniary value of the services of the boy during his minority that can be recovered." (Citing *Caldwell v. Brown*, 53 Pa. St. 453; *State of Maryland v. B. & O. R. R. Co.*, 24 Md. 84; *Penn. R. R. Co. v. Kelly*, 31 Pa. St. 372; *Penn. R. R. Co. v. Zebe*, 33 Pa. St. 318; *Felfer, Adm'r, v. N. R. R. Co.*, 30 N. J. L. 188.)

"The expense of providing for the child, had he lived, should be estimated and deducted from the estimated earnings of the child. Says Van Dyke, J., in the case last above cited: "The action is the creation of the statute." In the same action the Court says the common law gives no action to a father sustaining such an injury. It is given by the statute. The language of the Act upon the subject of the damages is: "The jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting to the wife and next of kin of such deceased person." "It is liable to great abuse, and the Court should see that every verdict which is rendered contrary to it should be set aside. It is simply an action to recover, in dollars and cents, a compensation for the loss and damages which have

actually been sustained." In this case there were two boys, one thirteen and one seventeen years of age, who were driving in a wagon; got on a crossing, were struck by a passing locomotive, and instantly killed.

"As the father of his children, the plaintiff was entitled to their services until they should arrive at the age of twenty-one years; and what those services might reasonably have been expected to be worth, he was entitled to recover, and nothing more, unless it be expenses growing out of the injuries, subject to the burdens and incumbrances which that relationship imposed upon him. Where, however, as in Iowa; the statute provides that the action shall be in favor of the 'estate of the deceased,' it is held that the damages are not limited by the minority of the child."

In *Potter, Adm. etc., v. The Chicago & N. W. R. R. Co.*, 21 Wis. 377, it is said: "The weight of authority is that the jury may take into account the reasonable expectation of pecuniary benefit from the continuance of the life beyond the minority. But this does not seem to be correct. As was said in *Bannon v. B. & O. R. R. Co.*, 24 Md. 117: 'the chances of survivorship, his ability and willingness to support others, are matters too vague to enter into an estimate of damages merely compensatory.'"

In *Telfer v. The Northern R. R. Co.*, the Court further says: "It is insisted also that the damages in these cases are excessive." [I will remark here that these actions were brought, as probably they strictly should have been brought, separately for each one, and were, by stipulation, consolidated and tried together. In this case, by agreement, the cases of all the children were tried in one action, and we make no point, exception, or objection to what would otherwise be an improper joinder of several causes of action.] "In the case of David, they are assessed at nine hundred and thirty-six dollars; and in the case of William at one thousand and fifty-six dollars. In the view which I have taken of the cases, it is not necessary to examine this part of them; but the question presented is one of importance, and deserves the consideration of the Court, either now or at some other time. The jury seem to have been left pretty much to their own conclusions in the matter, as there was but little if any evidence to throw light on the subject beyond

the fact of the relationship between the father and his children; and it may be doubted if they could have reached the conclusions which they did, if they had been governed by correct legal principles.

“The action is the creation of the statute; and it is needless to say that it must conform strictly to it. It is liable to great abuse; and the Court should see that every verdict which is rendered contrary to it, should be set aside. It is simply an action to recover in dollars and cents, a compensation for the loss and damages which have actually been sustained. As the father of his children, the plaintiff was entitled to their services until they should arrive at the age of twenty-one years; and what those services might reasonably have been expected to be worth, he was entitled to recover, and nothing more, unless it be expenses growing out of the injuries, subject to the burdens and incumbrances which that relationship imposed upon him. Nothing can be allowed for the mental anguish which, as a parent, he is supposed to have suffered. Nothing for the satisfaction and comfort of having his sons—nothing for the loss of their society and associations.

“The damages in the case of William are fixed at one thousand and fifty-six dollars. He was over thirteen years of age, and had something over seven years to serve his father. There is an allowance, then, of about one hundred and fifty dollars per year on an average. This is about what the services of a full-grown man would be worth in the business in which the plaintiff was engaged, when boarded, provided he should work faithfully the whole of that time. If this is the principle upon which the jury proceeded, they were unquestionably wrong; for as the plaintiff was bound not only to feed but to properly clothe and educate his son, and to take care of him if sick, pay his physician's bills, etc., it may well be doubted whether his services would have been worth any more than his board, clothing, education, and other incidentals, previous to his arriving at the age of eighteen years.

“At all events, these things should have been taken into consideration by the jury, and proper deductions made on account of them, as well as for the days of idleness, of absence, and of pleasure incident to such relationship and likely to inter-

vene. The jury seem, too, to have gone on the supposition that William would remain in sound health, and serve faithfully during every day of the time; whereas, they were bound to consider the probability, that through accidents, sickness, and the like, he might be unable, possibly for a considerable portion of the time, to perform service at all, when he would be an expense rather than an advantage. Then, too, they seem to have taken it for granted that he was certainly going to live through the whole period, and his life, during the whole of that time, the defendants are made to insure; whereas, it was possible he might die the next day, when his services, of course, would have ceased. We may be quite willing to bind ourselves to pay a man one thousand and fifty dollars for seven years' service, if we can certainly have that service secured to us, when we would not be willing to pay half that sum if we are to take all the risk of his sickness, accident, and death in the mean time. These things, too, should have been taken into consideration and allowed for; and if they had been, all of them, it seems difficult to see how the jury could properly have calculated the damages at one thousand and fifty-six dollars. The same principles and rules apply, of course, to the case of David; and if this were the only reason on which we are asked to set the verdict aside, I should feel constrained to yield to it, believing, as I do, that the jury must have proceeded upon erroneous principles in this respect in reaching their conclusions."

Judge Elmer, concurring, says: "I am also of opinion that the damages were excessive. The jury had no legal right to give more than the actual pecuniary injury to the plaintiff, the father and next of kin of the persons killed, resulting from their death. In this case there was little or no difficulty in arriving at a correct result. The boys were of the ages of thirteen and fifteen years, so that the father was entitled to fourteen years' service from them before they became of full age. The true rule for measuring his injury was the cost of procuring equivalent help from others, whose clothing and other necessities should be furnished by him; to which might perhaps be added reasonable funeral charges, beyond what was expressly contributed for that purpose. Upon the most liberal computation, these expenses could not have amounted

to anything like the sum awarded by the jury. Verdict set aside." (See *Karr v. Parks*, 44 Cal. 46; *Sykes v. Lawlor*, 49 id. 236; *Durkee v. C. P. R. R. Co.*, 56 id. 388; *Beeson v. G. M. G. M. Co.*, 57 id. 20.)

In the *Durkee Case*, Chief Justice Morrison, in passing upon the question involved, cites *O. & M. R. R. Co. v. Tindall*, which was an action to recover damages for the loss of Daniel Tindall, a minor, killed by a locomotive engine of the company, as follows: "The third question relates to damages. The Court instructed the jury that, in estimating damages, they might take into consideration the actual pecuniary loss to the plaintiff, occasioned by the death of the son, and the services; and also, such other circumstances as have injuriously afflicted the plaintiff in person, in peace of mind, and in happiness." The Court says this instruction was erroneous, citing *Quin v. Moore*, 15 N. Y. 432, where the statute is similar to that of California. Indeed, all these statutes are founded upon the Act of Lord Campbell. "The statute of New York," says the Court, "under which the foregoing decision was made, authorized the jury to give such damages as they deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin to the deceased person."

The children of the plaintiff were aged as follows: Christine, a girl, aged sixteen years; Katie, a girl, aged fourteen years; John, a boy, aged ten years; Frank, a boy, aged eight years; Lillian, a girl, aged five years. It is impossible to say what, if any, basis was assumed by the jury in arriving at a verdict of ten thousand eight hundred dollars as the total damages of the plaintiff.

If they equally apportioned the damages among the children, they allowed two thousand dollars for each child, as the value of the prospective services of each, without reference to disparity of age or difference in sex. If they found the years of service to which each was bound to the parent, the result would be as follows: Christine, two years, two thousand dollars; Katie, four years, two thousand dollars; John, eleven years, two thousand dollars; Frank, thirteen years, two thousand dollars; Lillian, thirteen years, two thousand dollars; total, forty-three years, ten thousand dollars. Dividing ten

thousand dollars by forty-three years, we have again the yearly value of all their services, equal to, say, two hundred and thirty-two dollars and fifty cents per annum, without any deductions whatever for board, clothing, education, illness, or any incidental expense whatever, or any regard to the near emancipation of some of the children and the infancy of others.

If the cases cited state the law, the verdict of the jury was excessive and contrary to law. It is evident there was no calculation about the matter. The jury made the damages as large as they dared. But in view of the intimation of the Court that a verdict based upon sympathy, and not reasonable calculation of values, would be set aside, they may have been somewhat restrained. However this may have been, the verdict was evidently not in accordance with the law.

W. W. Foote and A. A. Moore, for Respondent.

The rule in cases of this character, as we understand it, is perfectly plain, and is supported by an unbroken current of authority. "There being some proof of negligence, the Supreme Court will not review the verdict." (*Algier v. Steamer Maria*, 14 Cal. 168.) "In an action for damages for injury caused by negligence, a nonsuit on the ground of contributory negligence should only be granted when, giving the plaintiff the benefit of all controverted questions, it is apparent to the Court that a verdict in his favor must necessarily be set aside." (*Schierhold v. N. B. & M. R. R. Co.*, 40 id. 447.) And in the case of *Siegel v. Eisen*, 41 id. 109, the same doctrine is affirmed. "The question whether the collision by which the injury was caused could have been avoided by proper care, is a question of fact for the jury." This was the precise question at issue in the case at bar, and the verdict of the jury decided it adversely to the defendant.

In the case of *Fernandes v. The Sacramento City Railway Co.*, 52 Cal. 52, our Court uses the language of another Court with approval. "Ordinarily, however, it is to be settled as a question of fact in each case as it arises, upon a consideration of all the circumstances in connection with the ordinary conduct and motives of men, applying as the measure of ordinary care the rule that it must be such care as men of common

prudence usually exercise in positions of like exposure and danger. When the circumstances under which the plaintiff acts are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, it is plainly to be submitted to the jury. What is ordinary care in such cases, even though the facts are undisputed, is peculiarly a question of fact to be determined by the jury under proper instructions. It is the judgment and experience of the jury, and not of the Judge, which is to be appealed to." In the same case our Supreme Court continues thus: "We think these cases, and many others of like import which might be cited, state the rule correctly; and the conclusion to be drawn from them is, that if it clearly appears from the undisputed facts, judged of in the light of that common knowledge and experience of which Courts are bound to take notice, that a party has not exercised 'such care as men of common prudence usually exercise in positions of like exposure and danger,' negligence in such a case is a question of law to be decided by the Court. In all other cases the question must be submitted to the jury under proper instructions."

In support of these views we refer also to the late work of Mr. Field on the law of damages, who, at page 519, states the rule to be that "to justify a nonsuit on the ground of contributory negligence, the evidence against the plaintiff should be so clear as to leave no room to doubt; and all material facts must be conceded or established beyond controversy." The rule we have announced is also supported by the following recent adjudications: *Johnson v. Bruner*, 61 Pa. St. 58; *Quirk v. Holt*, 99 Mass. 164; *B. C. P. R. Co. v. Wilkinson*, 30 Md. 226; *Barton v. St. L. & I. M. R. R. Co.*, 52 Mo. 253.

Later cases of our own Court announce the same doctrine. (*Durkee v. C. P. R. R. Co.*, 56 Cal. 388; *Jamison v. S. J. & S. C. R. R. Co.*, 55 id. 593.) And in all the other States the doctrine is the same — each case is to be governed by its own particular facts. As has been well said by our own jurists: "Negligence is never absolute or intrinsic, but is always relative to some circumstances of time, place, or person." This being the law, it is only necessary to examine into the facts

of this case, to see that the motion for a nonsuit was properly denied.

The first witness called for the plaintiff, H. F. Nehrbas, the father of the children, testified in a clear and distinct manner as to the facts preceding the accident. His children, the eldest sixteen years old, left home in the morning, driving a gentle horse, for the laudable purpose of attending a May-day picnic. They were acquainted with the road, and counsel for the defendant claims that this circumstance imposed upon them an additional degree of care. This is not the law. The mere fact that a traveler is familiar with the road, and knows of the existence of defects therein, will not impose upon him the obligation to use more than ordinary care in driving it. Such knowledge is merely a circumstance. * * * * (Shear. and Red. on Neg. 492, and cases cited in note.) Besides, these children were infants, and not legally held to as high a degree of care as grown people. (*Schierhold Case.*)

Counsel for appellant also claims, in his specifications of errors, that there were other acts done or omitted by these children, which in law amounted to contributory negligence. An examination of the transcript will disclose no single act of the kind, and, as we understand the law, the fact of contributory negligence is a defense to be proved by the defendant, and its absence need neither be pleaded nor proved in the first instance by the plaintiff. (*Robinson v. Western P. R. R. Co.*, 48 Cal. 409; *McQuilken v. C. P. R. R.*, 50 id. 7.)

On the other hand, negligence is not to be presumed against the railroad company, but must be proven. We think the admitted and proved facts in this case show negligence of the grossest kind. In the first place, the railroad company, in constructing its road over and across the ancient and public highway, under authority of the license conferred by Section 5 of the Act of the Legislature conferring such rights, did not comply with the provisions of said Act, and it did not comply with the provisions of Section 19 of said Act. (Statutes 1861, p. 615, §§ 5, 19.) They did not restore the highway to as safe a condition as it was before, and this was a fact from which the jury were at liberty to infer negligence. "Where the track of a railroad crosses a turnpike, care and caution which the company and parties passing upon the highway should use are mutual. Where the view is obstructed, so that parties crossing

the railroad can not see an approaching train, the exercise of greater care and caution is required by both sides. Those in charge of the train should approach the crossing at a less rate of speed, and use increased diligence to give warning of its approach; and neglect in these particulars, is sufficient to fix a liability for an attending injury upon the company." (*Louisville C. & L. R. R. Co. v. Goetz's Adm'x*, C. of Appeals, Ky., 12 Rep. 616.)

The evidence showed conclusively, and it was not contradicted, that it was an act of gross negligence for the railroad company to have planted double rows of trees on both sides of its right of way, so that the view of both employees of the road and of travelers approaching the crossing should be obstructed. "Both parties are, however, equally bound to use ordinary care. For this purpose, it is the duty of the engineer to keep watch for travelers, to give signals, etc., and also to approach a crossing which he knows to be continually thronged with travelers, and unprotected by the company, at such a rate of speed as will enable him to check the train if necessary." (See also, *Indianapolis & S. L. R. R. Co. v. Smith*, 78 Ill. 112; *Mackay v. N. Y. Cent. R. R. Co.*, 35 N. Y. 75.)

Mr. Justice McKinstry, speaking for the Court, in the *Robinson Case*, before cited, uses this significant language, with reference to the conduct of persons in the immediate presence of dangers: "We attach little consequence to her conduct after the train began to move. Startled and alarmed, as she doubtless was, by the immediate peril of her position, it would be asking more than should be required of an ordinarily prudent and reasonable person to demand that she should exercise the soundest discretion in her efforts to escape." So was it with these little children. First seeing or hearing the train at the moment when they were within a few feet of the track, their view obstructed by the bridge and trees, and the sound of the approaching train deadened by the same causes, it is idle to claim that they did not attempt to save themselves from a peril to prevent which would have been impossible. To hold such a doctrine, would be in effect to say that a traveler who was injured crossing a railway upon a public highway could never recover damages. The case of *Richardson v. N. Y. Central R. R.*, 45 N. Y.

846, and the case of *Ernst v. Hudson River R. R. Co.*, 35 id. 9, are cases to which we invite the particular attention of the Court and opposing counsel.

Appellant claims that the verdict is excessive and contrary to the law as given to the jury by the Court. In this State, under Sections 376 and 377, it is provided that "in every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just." A verdict should not be set aside unless outrageously excessive.

Field, in his work on damages, thus clearly states the rule: "The power of the Court to set aside verdicts, and grant new trials, should be exercised only where it is apparent from the amount of the verdict or otherwise, that the jury were influenced by passion, prejudice, corruption, or an evident mistake of the law or the facts, or that there was a palpable error in computation." This doctrine is well expressed by Justice Wilde, who remarks: "In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend upon computation, the judgment of the jury, and not the opinion of the Court, is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken views of the merits of the case." Under the instructions in this case, much was left to the unbiased discretion of the jury, and certainly no Court can say, upon the principle of compensatory damages merely, that the verdict was outrageous or at all excessive. The case of *Myers v. San Francisco*, 42 Cal. 215, decided under the statutes of this State, as they stood in 1862, is an instructive case upon this point.

Rosa, J.:

Except in one aspect of the case we need not allude to the pathetic side of the accident which in an instant brought death to five children, the oldest of whom was but sixteen and the youngest but five years of age. The action is by the father against the Railroad Company for damages for the loss of his children. If there was no negligence on the part of

the defendant, of course the plaintiff can not recover. And even if there was great negligence on its part, yet if the accident was brought about in part by a want of ordinary care on the part of the deceased, a like result must follow.

The first inquiry, therefore, is: Is there any evidence going to show negligence on the part of the defendant?

The accident occurred in the afternoon of a lovely day in May. The children killed were returning home from a May-day picnic, in a light wagon drawn by one gentle horse. The oldest — a girl of sixteen — was driving. She was acquainted with the highway over which she was passing and with the point at which it was crossed by the railroad track. Several persons in vehicles preceded her on the highway, and had crossed the railroad, the nearest one — Meeks — being some 400 feet in advance; and she was followed by a boy thirteen years old, at a considerable distance in the rear. On the railroad, about 335 feet from the point of crossing, was a covered bridge. On either side of the railroad, between the bridge and its intersection with the highway, were a number of eucalyptus trees planted by the defendant, and which had attained such size as, according to some of the testimony in the case, prevented — in connection with some neighboring orchards — an approaching train from being seen by those traveling the highway, until the driver should reach a point very close to the railroad track. There is also evidence going to show that at the time of the accident the train was slightly behind time and was running at the rate of from 33 to 35 miles per hour, whereas the rate at which the trains usually ran at that point was from 25 to 30 miles an hour. Further, there was some evidence tending to show that the bell was not rung nor the whistle blown. In the recent case of *Kellogg v. N. Y. C. & Hudson R. R. Co.*, reported in 79 N. Y. 72, the only negligence on the part of the defendant submitted to the jury, was its omission to ring the bell at the crossing, and the Court of Appeals held in that case, that while there was a great preponderance of evidence that the bell was rung, the Court could not say that there was not some conflict in the evidence upon that question proper for submission to the jury. "There was some evidence," said the Court, "tending to show the bell

was not rung, and we can not say as matter of law that the jury was bound to disregard it."

In the case before us, the engineer and fireman of the locomotive were on the stand as witnesses, and neither of them was asked as to whether the bell was rung or the whistle blown. The engineer testified that when he first saw the children they were within about ten feet of the railroad track and the train was between the bridge and the crossing; that he at once put on the air-brake, but to stop the train was out of the question. The boy spoken of, who appears, from his testimony as reported in the record, to be a bright lad, testified that from the position he occupied on the highway he heard the rumble of the train as it passed through the covered bridge, but that he did not hear the bell nor the whistle; that he was in a position where he could have heard them, and that he was in the habit of hearing them at that point, having occasion frequently to pass there; while, on the other hand, the witness Meeks testified that from his position he heard both the bell and the whistle.

It was for the jury to pass upon the effect of this testimony. Besides the increased speed under the circumstances appearing, certainly tended to show negligence on the part of the defendant.

It was held, in the case of the *Continental Improvement Company v. Stead*, 95 U. S. 163, that "where the view is obstructed so that parties crossing the railroad could not see an approaching train, the exercise of greater care and caution was required on both sides. Those in charge of the train should approach the crossing at a less rate of speed, and use increased diligence to give warning of its approach." And in the case of the *Louisville C. and L. Railroad Company v. Goetz's Administratrix*, decided by the Court of Appeals of Kentucky, September 13, 1881, the crossing of a turnpike by the railroad "on a descending grade, running thirty miles or more an hour, with no other signal or warning than a whistle within seventy yards of the crossing, to warn those traveling on the turnpike of its approach," was of itself held culpable negligence. (12 Reporter, 618.)

Clearly, we would not be justified in holding that the testimony in the case now here was not such as entitled the

plaintiff to have it submitted to the jury, or that, being so submitted, it is not sufficient to support the verdict of the jury finding negligence on the part of the defendant.

Next, was there such contributory negligence on the part of the deceased as precludes a recovery by the plaintiff?

On this branch of the case the law is: "If it clearly appears from the undisputed facts, judged of in the light of that common knowledge and experience of which Courts are bound to take notice, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, the question of negligence is one of law, to be decided by the Court. In all other cases the question must be submitted to the jury under proper instructions." (*Fernandes v. Sacramento City Railway Co.*, 52 Cal. 52, and the numerous authorities there cited.)

This being the law, we are of opinion that the present case was properly submitted to the jury, and that there is no valid reason for disturbing their finding that there was no contributory negligence on the part of the deceased.

It has already been decided here that contributory negligence on the part of the injured party, is a matter of defense, to be proved affirmatively by the defendant, unless it can be inferred from circumstances proved by the plaintiff. (*Robinson v. W. P. R. R. Co.*, 48 Cal. 426, and authorities there cited.)

A part of the circumstances in the present case have already been detailed. It has been seen that the children were preceded a considerable distance on the highway by the witness Meeks. Some distance ahead of him was "Smalley's stage," in which were a number of people. As Meeks approached the railroad track he noticed that the passengers in the stage were waving their hats and handkerchiefs at him, but he did not understand why. As he crossed the track he looked down it and saw the train at a distance, as he supposes, of from 1,500 to 2,000 feet beyond the bridge. Meeks, who was driving a good team, at a good road gait, passed the railroad track, and, observing that the passengers in the stage continued to wave their hats and handkerchiefs, stopped and looked back to see if there was not some one behind him to whom they were waving, and saw the wagon, in which were the children, coming up the grade that leads up to the track

at the crossing. Meeks further testified that when the children got close to the track they seemed to have discovered the train and to urge the horse on, and that the horse, as the train approached, swerved to the left, and a moment after he saw the horse in the air.

It will be borne in mind that the testimony went to show that because of intervening trees, those traveling along the highway in the direction the children were going, could not see an approaching train until they had reached a point very near the railroad track. A part of the trees that thus obscured the view, were planted and permitted to grow by the defendant along its track, and within its right of way. At the time of the accident, according to the testimony of Meeks, a wind was blowing, which caused the trees to rustle; and this, it may be, prevented the children — who were much nearer the railroad track and consequently much nearer the trees, than were Meeks or the boy — from hearing the rumbling of the train, while both Meeks and the boy did hear it, according to their testimony. It is not to be presumed that the girl who was driving, recklessly or carelessly, imperiled her own life and the lives of her younger brothers and sisters.

And from the testimony of the engineer of the locomotive, as well as from that of Meeks and the boy, it is quite certain that the children must have been dangerously near the track before they were made aware of the approach of the train. The engineer, according to his testimony, was in the cab and on the lookout. When he first saw them they were within about ten feet of the track; and as he saw the horse before he saw the children, it is not probable if possible that they could have seen the train until they reached a point dangerous in the extreme. The engineer further testified that the horse was on a trot when he first saw him, stopped when within about five feet of the track, turned his head to the driver's left, and then started on again, when the crash came. As the train was running at a rapid rate and was between the bridge and the crossing when the horse was first discovered, of course all of this could have taken at most but a few seconds of time. It is by no means clear that the children could have escaped by the exercise of the utmost coolness and discretion. But in such cases, such a degree of care is never required of those

traveling a highway. Certainly these children were not bound to exercise more care than a prudent man approaching such a place would ordinarily exercise for his protection. (Authorities *supra*, and *Schierhold v. N. B. & M. R. R. Co.*, 40 Cal. 447; *Richardson v. N. Y. Central R. R.*, 45 N. Y. 846; *Ernst v. Hudson R. R. Co.*, 35 N. Y. 9.) There is no proof that they were heedless, and under all the circumstances surrounding the accident, we think it was for the jury to determine whether they exercised that care which the law required of them.

There only remains to be considered whether the damages awarded the plaintiff by the jury — ten thousand eight hundred dollars — are excessive.

It is not claimed by the learned counsel for the appellant that this is so, unless the law be, as claimed by him, that the jury was limited to the actual pecuniary injury sustained by the plaintiff by reason of the loss of the services of his children. Such is not the law in this State. (Code of Civil Procedure, §§ 376 and 377; *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20; *Cook v. Clay-street Hill Co.*, 9 Pac. C. L. J. 605.)

In view of the rule of damages prevailing here, we can not be reasonably expected to hold that for such a loss as the plaintiff in this case sustained, the amount awarded him by the jury was excessive.

Judgment affirmed.

McKINSTRY and SHARPSTEIN, JJ., and MORRISON, C. J., concurred.

[No. 6,829. — In Bank.]

December 12, 1882.

JACOB A. MORENHAUT ET AL. v. THOMAS BELL
ET AL.

LAW OF THE CASE — FORMER APPEAL — FINDING SUPPORTED BY THE EVIDENCE. —

On a former appeal in this case, reported in 42 Cal. 591, it was held that upon the execution of the deed from Montenegro to Forbes, August 7, 1843, all the title that M. then held to the premises described in it passed to and vested absolutely in F.

Held: Conceding that under the Mexican law the sale might have been rescinded after the execution of said deed, the finding of the Court below that it was not rescinded is sustained by the evidence.

APPEAL by plaintiffs from an order of the District Court of the Fourth Judicial District of the State of California, in and for the City and County of San Francisco, denying a motion for a new trial. MORRISON, J.

Action to declare a trust in real estate to compel conveyances, etc. The action was originally brought August 21, 1866, and upon the trial had, judgment was rendered for the plaintiffs. The defendants appealed to the former Supreme Court of this State, and at the January term, 1872, thereof, the judgment was reversed, and cause remanded for a new trial. (See *Morenhaut et al. v. Barron*, 42 Cal. 591.) The pleadings having been amended, the case was again tried in the Court below, and judgment entered April 19, 1878, in favor of the defendants. The plaintiffs moved for a new trial, and this motion having been denied, they took this appeal on the twenty-sixth day of June, 1879. After the decision in bank, a petition for rehearing was presented by the appellants and denied by the Court.

B. S. Brooks, James A. Waymire, and Frederic Hall, for Appellants.

Cope & Boyd, Wilson & Wilson, and James Wheeler, for Respondents.

J. P. Hoge, B. S. Brooks, James A. Waymire, and Frederic Hall, for Appellants, on petition for rehearing.

Appellants respectfully ask for a rehearing. The decision of the Supreme Court is placed solely upon the ground that the Court below found as a fact that the sale was not rescinded. The question was not one of fact. It is not a case of conflict of testimony. The eminent counsel who have at different periods of the history of this case discussed it, have unanimously treated the question as one of law and not of fact. There is no conflict in the testimony. The solution of the question depends upon the written documents presented, and they are

to be interpreted by the Court. (*Carpentier v. Thirston*, 24 Cal. 268; *Payne v. Treadwell*, 16 id. 220; *Chenery v. Palmer*, 5 id. 119; *Bruck v. Tucker*, 32 id. 427, 430.)

The opinion of the Court assumes that upon the former appeal (*Morenhaut v. Barron*, 42 Cal. 591), it was decided that the instrument of August 7, 1848, was an absolute conveyance to Forbes of all the title vested in Montenegro. The Judge who delivered the opinion upon that appeal refers to the instrument as a "deed," and a portion of the language he uses would indicate that he regarded it as an ordinary common law deed. But it is clear, from the whole opinion, that the construction of the document was not a question before the Court. The Court there decides nothing as to the merits of the case. It was simply held that the District Court erred in finding certain facts that were not pleaded, and therefore not in issue, viz., the facts "that there was an agreement contemporaneous with the execution of the deed, by which Forbes had the right to rescind the sale; and that he exercised that right and rescinded the sale."

The Court said that these facts were not put in issue by the pleadings. A finding in regard to them was "useless and idle." For the same reason—because there was no issue on the subject—the instrument of August 7, 1848, was erroneously admitted in evidence. It was not properly before the District Court, nor before the Supreme Court. Therefore it could not be construed by either so as to make the construction a part of the law of the case. *Hence, we contend that its construction is still an open question*, and we insist that it can not be construed as an absolute conveyance, because it is admitted by the pleadings, and appears from the evidence, without contradiction, that Forbes failed and *refused* to pay a part of the purchase money.

THE COURT:

Upon the execution of the deed of Montenegro to Forbes, August 7, 1848, "all the title that Montenegro then held" to the premises described in it, "passed to and vested absolutely in Forbes." (*Morenhaut v. Barron*, 42 Cal. 591.)

The only question that is open for our consideration and determination on this appeal is whether the sale from Monte-

negro to Forbes was subsequently rescinded. Conceding that under the Mexican law such sale might have been rescinded, after the execution of said deed, the Court below found as a fact that it was not, and we think that the findings of the Court upon that and all the other issues were justified by the evidence.

Judgment and order denying the motion for a new trial affirmed.

MYRICK, J., expressed no opinion.

[No. 7,884.— In Bank.]

December 12, 1882.

ISIDOR DANIELWITZ v. ANN SHEPPARD ET AL.

CONTRACT AGAINST PUBLIC POLICY — CONTRACT BY ADMINISTRATRIX OR BY HEIR OF DECEASED PERSON AS TO COMMISSIONS OF BROKER — ADMINISTRATION — ESTATES OF DECEASED PERSONS. — The defendant Ann Sheppard, as administratrix of the estate of her deceased husband, under an order of the Court, sold real property belonging to the estate for the sum of \$28,500, and reported the sale to the Court for confirmation. Pending the proceedings for confirmation the administratrix and her co-defendant, Jennie Sheppard, an heir of deceased, made the following agreement in writing: "San Francisco, April 28, 1877. We hereby agree and promise to pay Isidor Danielwitz all the money in excess or over and above the sum of twenty-nine thousand and five hundred dollars (\$29,500), United States gold coin, for his services in the way of a commission for obtaining a purchaser for property sold on the sixteenth day of April, 1877, by order of the Probate Court of the City and County of San Francisco, belonging to the estate of John R. T. M. Sheppard, deceased. Said purchaser shall pay the sum of \$31,350 gold coin or more; said sum being an advance of ten per cent. or more, as provided by law for said property so sold; the essence of this agreement being the payment to said Isidor Danielwitz of all sum or sums of money obtained or bid for such property sold as hereinafter described in excess of the sum of \$29,500, gold coin, irrespective of what said excess may be as the payment to him, said Danielwitz, in the procuring of said purchaser. Said property is described as follows: [Here follows the description of the property described in the complaint.] This agreement being made with said Danielwitz in good faith, and which we promise faithfully to carry out as hereinbefore stated. Ann Sheppard, Administratrix of the estate of J. R. T. M. Sheppard, deceased. Jennie Sheppard, Heir. Witnessed by R. B. Turner." Afterwards, to wit, on the thirtieth of April, 1877, the plaintiff procured one Corcoran to bid, in writing, for the property,

the sum of \$31,500. On the same day one McLaren put in an advance bid of \$34,500, and on the first of May following, Corcoran bid the sum of \$37,000, for which last named sum the property was sold and confirmed to him; and he thereupon paid to the estate that sum and received the administratrix's deed. The action was brought against the defendants, "as heirs of the estate," to recover the difference between \$29,500 and \$37,500. *Held*: Even if the agreement be treated as the individual contract of Ann and Jennie Sheppard, it is contrary to the provisions of statute, against the policy of the law, and is invalid.

APPEAL by defendants from the judgment of the Superior Court of the City and County of San Francisco, and from an order denying a motion for a new trial. WILSON, J.

Action on contract. The Court below found that the contract was executed by the defendants, as heirs of the estate, and not in any representative capacity, and that it was so understood and agreed at the time of its execution. Judgment was given in favor of the plaintiff for the sum of two thousand three hundred and twenty-nine dollars and forty-seven cents, being the difference between the sum of twenty-nine thousand five hundred dollars, and the original bid of McLaren and interest thereon. Both the plaintiff and the defendants appealed. For the report of the case on the plaintiff's appeal see *Danielwitz v. Sheppard*, No. 7,984, opinion filed December 12, 1882, *post*, 342. The other facts are stated in the opinion of the Court.

Tully R. Wise, for appellant.

Eugene N. Deuprey and *W. M. Pierson*, for Respondent.

THE COURT:

J. R. T. M. Sheppard died in the City and County of San Francisco, leaving certain real estate therein. His widow, Ann Sheppard, was appointed administratrix of his estate, and afterwards obtained an order directing certain of the real estate to be sold. One Regan bid therefor the sum of twenty-eight thousand five hundred dollars, which bid was accepted by the administratrix, who made return of the sale with an application on her part to the Court for confirmation thereof.

An existing statute declared: "Upon the hearing, the Court must examine the return and witnesses in relation to the

same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent., exclusive of the expenses of a new sale, may be obtained, the Court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place; if an offer of ten per cent. more in amount than that named in the return be made to the Court in writing, by a responsible person, it is in the discretion of the Court to accept such offer and confirm the sale to such person or to order a new sale." In this condition of fact and law the following agreement in writing was entered into:

"SAN FRANCISCO, April 28, 1877.

"We hereby agree and promise to pay Isidor Danielwitz all the money in excess or over and above the sum of twenty-nine thousand and five hundred dollars, United States gold coin, for his services in the way of a commission for obtaining a purchaser for property sold on the sixteenth day of April, 1877, by order of the Probate Court of the City and County of San Francisco, belonging to the estate of John R. T. M. Sheppard, deceased. Said purchaser shall pay the sum of thirty-one thousand three hundred and fifty dollars, gold coin, or more; said sum being an advance of ten per cent., or more, as provided by law for said property so sold; the essence of this agreement being the payment to said Isidor Danielwitz of all sum or sums of money obtained or bid for such property sold as hereinafter described, in excess of the sum of twenty-nine thousand five hundred dollars, gold coin, irrespective of what said excess may be as the payment to him, said Danielwitz, in the procuring of such purchaser. Said property is described as follows: [Here follows the description of the property described in the complaint.] This agreement being made with said Danielwitz in good faith, and which we promise faithfully to carry out as hereinbefore stated.

"ANN SHEPPARD,

"Administratrix of the estate of J. R. T. M. Sheppard, deceased.

"JENNIE SHEPPARD, Heir.

"Witnessed by R. B. Turner."

Afterwards, to wit, on the thirtieth day of April, 1877, the

plaintiff procured one Corcoran to bid, in writing, for the property, the sum of thirty-one thousand five hundred dollars. On the same day one McLeran put in an advance bid of thirty-four thousand five hundred dollars, and on the first of May following, Corcoran bid the sum of thirty-seven thousand dollars, for which last-named sum the property was sold and confirmed to him; and he thereupon paid to the estate that sum, and received the administratrix's deed.

The plaintiff claims that, by virtue of the agreement above set forth, he is entitled to the difference between the sum of twenty-nine thousand five hundred dollars and the sum of thirty-seven thousand dollars, for which the property was sold to Corcoran; and he brought this action against Ann Sheppard and Jennie Sheppard, as "heirs of the estate" of J. R. T. M. Sheppard, deceased, to recover that difference.

Even if the agreement be treated as the individual contract of Ann and Jennie Sheppard, it is invalid. Neither of them had any power so to dispose of the proceeds of sale of the real property of the deceased Sheppard. That property could only be sold in the manner pointed out by statute, and all the money derived from its sale became assets of the estate, and subject to disposition only in accordance with law. The disposition contemplated by the terms of the agreement sought to be enforced in this action, of a portion of those proceeds, is unauthorized by any provision of the statute, and contrary to the policy of the law.

Judgment and order reversed.

[No. 7,984. — in Bank.]

December 12, 1882.

ISIDOR DANIELWITZ v. ANN SHEPPARD ET AL.

CONTRACT AGAINST PUBLIC POLICY — ADMINISTRATION — ESTATES OF DECEASED PERSONS. — On the authority of *Danielwitz v. Sheppard*, number 7,884, opinion filed December 12, 1882, ante, 839, judgment reversed.

APPEAL by plaintiff from the judgment of the Superior Court of the City and County of San Francisco, and from an order denying a motion for a new trial. WILSON, J.

Action on contract. The facts are the same as in the case of *Danielwitz v. Sheppard*, number 7,884. Opinion filed December 12, 1882, *ante*, 339, on the appeal of defendants in this action.

Eugene N. Deuprey and William M. Pierson, for Appellant.

Tully R. Wise, for Respondents.

The COURT:

On the authority of *Danielwitz v. Sheppard*, number 7,884, judgment reversed.

[No. 8,119 — In Bank.]

December 12, 1882.

S. L. DEWEY v. FRANK BROS. & CO.

SURPRISE AS GROUND FOR NEW TRIAL. — The plaintiff on the trial testified that A. S. Frank, an agent of defendants, gave to him before the commencement of the action, an account stated, showing a balance in favor of the plaintiff and then and there promised that the defendants would pay it. A. S. Frank at the time of the trial was absent from the State. Judgment was given in favor of the plaintiff. Defendants moved for a new trial on, among other grounds, that they were taken by surprise by this testimony of the plaintiff. The Court below granted the motion on the ground of surprise, and the plaintiff appealed.

Held: The defendants were informed at the commencement of the suit, March 10, 1880, that the action was brought to recover a balance alleged to be due on an account stated. They knew before that day that their agent, Mr. A. S. Frank, had been sent by them to the plaintiff to make some adjustment of the affairs between them and the plaintiff. They knew that the mission of A. S. Frank and its result might be of importance, and might be used by plaintiff in making out his case. They had at the trial on the eighteenth of December, 1880, the testimony of the plaintiff as to the result of the mission, and made no motion for a continuance, nor expressed any surprise other than such as would arise from evidence contrary to their own version of the facts. The case was then argued and submitted, and decided February 28, 1881. Not till after the decision did they present the view of surprise; there was no surprise in its legal meaning, and the order granting a new trial on that ground is erroneous.

FINDINGS — HOW FAR CONCLUSIVE ON APPEAL FROM ORDER GRANTING NEW TRIAL. — If a new trial be granted by the Court below on a stated ground, and an appeal be taken from the order to the Supreme Court, the Appel-

late Court, in searching for other grounds for sustaining the order, must take the findings, so far as there is any evidence to support them as true, on all questions of fact found thereby.

APPEAL by plaintiff from an order of the Superior Court of the County of Los Angeles granting a new trial. HOWARD, J.

Action on account stated. On the trial the plaintiff testified that before the commencement of the action, one A. S. Frank, an agent of the defendants, presented to him at Los Angeles an account stated between the defendants and the plaintiff showing an indebtedness from defendants to him, the plaintiff, and then and there promised that the defendants would pay it. A. S. Frank at the time of the trial was absent from the State. Judgment was given in favor of the plaintiff. Defendants moved for a new trial on, among other grounds, "surprise which ordinary prudence could not have guarded against." On the hearing of the motion the affidavit of A. S. Frank was offered and considered. In it he denied that the account was ever intended as an account stated, or that he ever promised the plaintiff that the defendants would pay the plaintiff any sum whatever, and deposed that instead of the defendants owing the plaintiff, he, the plaintiff, owed the defendants a large balance, and at the time referred to the plaintiff promised and endeavored to close the account by giving his note with other security to the defendants. The Court below granted the motion of defendants for a new trial, basing its action on the ground of the surprise claimed. This case on appeal was first heard in Department Two of this Court. As the decision of the Department is referred to in the opinion of the Court in bank, the opinion in Department is here given "*in extenso*."

"In this cause judgment passed for plaintiff. Defendants moved for a new trial on several grounds, among which was surprise which ordinary prudence could not have guarded against, insufficiency of the evidence to justify the decision, and errors of law, occurring at the trial and excepted to by the defendants. This motion was granted on the ground of *surprise*. The plaintiff appeals from this order.

"We have examined the questions as to surprise, and are of

opinion that there was no surprise in its legal meaning. The Court was not then justified in the exercise of a proper discretion in granting a new trial.

"If the order could be sustained on any of the other grounds on which defendants moved, we would affirm it. We have examined them, and do not think they justify an affirmance of the order. It is proper to add that as to the failure of the Court below to rule on the admissibility of certain correspondence offered by defendants and objected to by plaintiff, the ruling on which was reserved by the Court until the evidence was closed, we are of opinion that the point is not before us for decision. This was an irregularity in the proceedings of the Court, and the defendants did not move on that ground. It seems to have been treated as an error of law. If it is an error of law it could only be brought before the Court on affidavit. (C. C. P., § 658.) It was not, however, an error of law occurring at the trial and excepted to by the moving party, for the record shows no exception.

"The order is reversed and the cause remanded."

Brunson & Wells, for Appellant.

The counter-affidavit of plaintiff states facts not denied, by which it appears that six months before the commencement of this action, defendants were, by plaintiff's attorneys, fully advised of the nature of the action, of the acts of their agents in stating the account, etc.

The suit was commenced March 9, 1880, and from the allegations of the complaint, defendants were informed that we had an account which we relied upon as a stated account. If they wanted further information it was available under the provisions of Section 1000, C. C. P., but as appears by their affidavit they "knew the facts of the case." The showing is not sufficient to warrant the action of the Court. A party can not move for a new trial on ground not distinctly made at the trial. If surprised, he should have asked for a continuance at the time. He will not be allowed to speculate on the chance of a favorable decision on other points, and if he fails on them, fall back on his motion for a new trial on the ground of surprise. (*Schellhous v. Ball*, 29 Cal. 608; *Delmas*

v. *Martin*, 39 id. 555, 557, and 558; *Ames v. Howard*, 1 Sumn. 482; *Carr v. Gale*, 1 Curt. C. C. 384.)

A party can not be surprised by the other making good, by proof, a fact distinctly put in issue by the pleadings. (*Armstrong v. Davis*, 41 Cal. 499.) Surprise at the testimony of a witness called by the adverse party, is no ground for a new trial, it not appearing that the party against whom the new testimony was given had been misled by previous statements of the witness as to what he would testify. (*Taylor v. Cal. Stage Co.*, 6 id. 228; *Live Yankee Co. v. Oregon Co.*, 7 id. 40.)

In this case our verified complaint gave defendants notice of our testimony. When a party defendant is taken by surprise by the testimony of a witness produced by the opposite party before the close of the trial, and knows of a witness who resides out of the State by whom he can contradict the witness whose testimony surprises him, he should move for a continuance at once in order to take the deposition of the witness who resides out of the State, and not wait to move for a new trial on the ground of surprise. (*Ferrer v. Home Mutual Ins. Co.*, 47 Cal. 418; 38 id. 456.)

Glassell & Smith and *Warren Olney*, for Respondents.

A motion for a new trial is a motion addressed to the sound legal discretion of the Court, and the Appellate Court will interfere only in case of a plain abuse of such discretion. (*Moulton v. Holmes*, 7 P. C. L. J. 228; *Hall v. Bark Emily Banning*, 33 Cal. 525, and cases cited; *Quinn v. Kenyon*, 22 id. 82; *Peters v. Foss*, 16 id. 357; *Drake v. Palmer*, 2 id. 181; *O'Brien v. Brady*, 23 id. 243; *Hastings v. Steamer Uncle Sam*, 10 id. 341; *Harston's Practice*, § 657, page 290, and cases cited.)

In this case (assuming—as we must assume—that the Court below believed the affidavits of the Franks), it appeared that the plaintiff had won his case by a deliberately false statement upon the very point in issue, which could not be contradicted on account of the absence of A. S. Frank from the State. A motion for a continuance would have been of no avail because, owing to the absence of A. S. Frank, the defendant was not prepared to make an affidavit as to what his testimony would be. (*Rodriguez v. Comstock*, 24 Cal. 88.)

The objection that a motion for a continuance was not made, like all others, is addressed to the sound discretion of the Court. (*Moore v. Los Angeles Infirmary*, 49 Cal. 669.) And "cases may and do arise in which it ought not to be enforced." (*Delmas v. Martin*, 39 Cal. 558.)

The Court:

This case was heard in Department Two of this Court, and a decision was rendered July 28, 1882. (9 Pac. C. L. J. 813.) Subsequently a hearing by the Court in bank was granted, which hearing has been had. We have examined the transcript and the points made, and are satisfied with the decision of the Department. As the new trial was granted on the ground of surprise, we must take the findings, so far as there is evidence to support them, as true on all questions of fact found thereby. Where a new trial is granted upon a stated ground, we can not, in searching for other grounds for sustaining the order, consider the facts as other than found, if there be evidence to support the findings. Otherwise, we should be speculating upon what *might* have been the decision as to the facts rather than relying upon what *was* the decision. As stated in the opinion of the Department, there was no surprise in its legal meaning for which a new trial should have been granted. The defendants were informed at the commencement of the suit, March 10, 1880, that the action was brought to recover a balance alleged to be due on an account stated. They knew before that day that their agent, Mr. A. S. Frank, had been sent by them to the plaintiff to make some adjustment of the affairs between them and the plaintiff. They knew that the mission of A. S. Frank and its result might be of importance, and might be used by plaintiff in making out his case. They had at the trial on the eighteenth of December, 1880, the testimony of the plaintiff as to the result of the mission, and made no motion for a continuance, nor expressed any surprise other than such as would arise from evidence contrary to their own version of the facts. The case was then argued and submitted, and decided February 28, 1881. Not till after the decision did they present the view of surprise; and we think it was then disappointment rather than surprise; therefore, the De-

partment was correct in saying there was no surprise in its legal meaning. See Section 657, C. C. P.: "Surprise, which ordinary prudence could not have guarded against."

The order is reversed, and the cause is remanded.

Ross, J., dissented.

[No. 6,920.—In Bank.]

December 13, 1882.

ALVINZA HAYWARD v. GEORGE E. ROGERS.

RIGHT OF PLEDGER OF MINING STOCK AS AGAINST PLEDGOR — ASSUMPSIT —

INSTRUCTIONS. — Action to recover a balance alleged to be due on a promissory note and for moneys laid out and advanced for the benefit of defendant. Answer alleging payment by means of a sale by plaintiff of shares of stock of defendant held as security, leaving a balance due defendant and cross-complaint therefor. Rogers, the defendant, contended that Hayward, plaintiff, held a certain number of shares of Savage mining stock as security for money advanced by him to Rogers, and that Hayward, without his knowledge, sold the stock; that afterwards, and while he was ignorant of such sale, Hayward procured a power of attorney from him to sell said stock, and then sold of the stock of the same mining company the same number of shares that he, Hayward, held prior to said first sale as security for his said advances; that Hayward accounted to him for the sum realized on the sale of the stock last sold only, which was much less than the sum realized on the sale of the stock first sold, and which stock, first sold, R. contended was the stock which H. had as such security. On the other hand the plaintiff contended that he constantly held the identical stock certificates which he took as security from the time when he received them up to the time when he admitted he sold them, or that if he did not during all of such time have the identical stock certificates in his possession, that he did, during all of such time, have other stock certificates of the same mining company for the same number of shares, which, during all of such time, he was able, ready, and willing to deliver to the defendant upon his paying the sum for which said certificates were held as security.

Held: Taking the defendant's version of the transaction as correct, and the fact that it is not charged in the cross-complaint that he, the defendant, was induced to do what he did, by reason of any representations of the plaintiff as to the condition of the mine, or the then present or prospective value of the stock, or in regard to the quantity of it which other persons were selling, the Court did not err in sustaining objections of the plaintiff to the introduction of evidence of what plaintiff said to the defendant in regard to those subjects.

Held, further: The Court did not err in allowing the witness Peart (business manager of the plaintiff) to be asked how much stock Hayward carried for

Rogers between certain dates. Peart was better qualified to answer that question than any other witness, including Hayward himself.

Held, further: As to this question to the witness Peart, appellant's counsel seems to have assumed that the answer of the witness would contradict all the evidence to which the objections referred. But as the trial Court could not have anticipated the answer of the witness, there was no error in overruling the objections to the question. No motion was made to strike out the answer; and according to the evidence there is no such contradiction.

Id.—The evidence as to the number of shares of stock that Hayward was carrying for persons other than Rogers, and as to the contents of the letter which Rogers wrote to Hayward, may not have been relevant to any issue in the case, but if error there was in overruling the objections to it, it was error without injury.

CONVERSION OF MINING STOCK BY PLEDGER.—Upon the main issue in the case, the Court charged the jury as follows: "If you find that Hayward had sold the 690 shares before the execution of the power; that, you remember, was July 18th; and had been ready, able, and willing to transfer to Rogers an equivalent number of similar shares in the same company by a proper and valid certificate, then and in that case it was not material that these facts should be imparted to Rogers at the time he executed the power of attorney, and the power was a valid and binding one. It was not material to tell him that, for the reason that that was a thing that Hayward had a right to do anyway, and the law says, that he was selling his own stock, and not Rogers' stock, provided he was all the time able, ready, and willing to respond to Rogers, in case he should come and demand his stock. And if you find that Hayward had sold the identical 690 shares, and that he was not at the time of such sales able, willing, and ready to deliver to Rogers a similar number of shares, then, and in that case, the suppression of those facts operated as a fraud upon Rogers and destroyed the force and effect of the power of attorney, there being nothing for the power to operate upon."

Held: This was a correct and sufficiently clear exposition of the law applicable to that issue, and it obviated the necessity of the Court's giving any other or further instructions upon it. Therefore the refusal of the Court to give the instructions asked on the points covered by the instruction given, is not a sufficient ground for reversing the judgment.

WHEN JURY MAY NOT DISREGARD EVIDENCE OF WITNESS.—The Court also charged the jury as follows: "When facts are testified to by witnesses who are not impeached, and there is no inherent improbability in the statement, the jury are bound to take that evidence as proving the particular fact; and the jury have no right capriciously to disregard evidence where it is not controverted and the character of the witnesses is good, and the story is probable."

Held: Though there should be no necessity for such an instruction, still as a matter of law the instruction is correct.

JUDGMENT MODIFIED TO CORRESPOND WITH VERDICT.—The jury found for the plaintiff in the sum of \$295,345.38, and the judgment was entered for the sum of \$305,650.95.

Held: The judgment should be modified so as to correspond with the verdict of the jury.

APPEAL by the defendant from the judgment of the District Court of the Nineteenth Judicial District of the State of California in and for the City and County of San Francisco. WHEELER, J.

Action on promissory note, and on account of moneys laid out and advanced for benefit of defendant. The complaint was filed February 25, 1876. An amended complaint was filed September 8, 1876, and prays judgment against defendant for the sum of \$30,000, and interest thereon at one per cent. per month, compounded monthly, from June 4, 1872, to December 2, 1872; and from that date on \$20,278.44, alleged to be due on a promissory note of defendant to plaintiff, executed June 4, 1872; and for the sum of \$179,201.56, and interest thereon at the rate of ten per cent. per annum from April 14, 1874, for moneys paid out and advanced by plaintiff for benefit of defendant, and costs of suit. The defendant, on the twentieth day of July, A. D. 1876, filed his original answer and cross-complaint, which pleadings of the defendant were twice amended. The defendant set up payment of the indebtedness and the stock transactions between himself and the plaintiff, referred to in the opinion of the Court and also in the instructions given and refused, hereinafter set forth. The plaintiff answered and denied the cross-complaint. On the trial of the action, the Court instructed the jury as follows:

"Gentlemen of the jury: This case, which is about now drawing to a close, as you have observed, is one involving a large amount, not only when viewed from the standpoint of the plaintiff's claim, but also when we consider the cross-bill or cross-complaint that the defendant makes. This, the magnitude of the case, at first almost startles the jury and the Court; but that should simply amount to this, to insure upon the part of the jury a very careful consideration of the evidence, and also a careful attention to what the Court may declare to you to be the law of the case; for with the law the jury have nothing to do, nor has the Court. We take it from writers upon the subjects and also from the declaration and interpretation of the law as laid down by the higher Courts of the land; and where our own Supreme Court has laid down the law in a given

case, that becomes binding upon this Court, and it follows that it is the duty of this Court, in administering the law in cases where it has been settled in the Supreme Court, to state it to you as that Court has declared; and it is your duty, without any regard to any affections or sympathy or any other motives that may control you, to pay strict attention to that law, and to shape your verdict accordingly.

"This case briefly stated, is an action on the part of Hayward, the plaintiff, to recover from the defendant a balance alleged to be due for moneys laid out and advanced for the benefit of the defendant, and at his request; the sum that it is shown that he advanced, is \$267,667.25; this includes the assessments that were paid by him from time to time upon the stock that he held for Mr. Rogers; concerning this gross amount there seems to be no difference of opinion; there seems to be no contest here in the case; Hayward then gave Rogers credit for the amount of \$68,000, and odd dollars, which grew out of the sales which he alleges he made, in November, 1872, of something about \$55,000, and also the sale of April 14, 1874, for \$12,000. Those two sums added together making an aggregate of \$68,000, which the plaintiff deducts from his \$267,000, which he had advanced, leaving a balance of \$199,591.87. Upon that sum the plaintiff claims interest according to various rates, as expressed in different promissory notes and so forth, and claims that now there is a grand total of \$295,349.38.

"The computation of the interest has been made in your presence, and I do not understand that there is any controversy upon that subject — relying, I suppose, upon the familiar rule that figures do not lie; and I believe the respective attorneys for the parties do not disagree upon that computation. Then it stands thus, gentlemen, that if the defense that is set up in this case, if you should determine that it amounts to nothing under the law and the evidence, then your verdict would necessarily be for the plaintiff in that sum, two hundred and ninety-eight thousand dollars, or thereabouts, and if there were no counter-claim set up by the defendant, the case would be made plain, and that would be the result, and that would necessarily be your verdict, for when facts are testified

to by witnesses who are not impeached, and there is no inherent improbability in the statement, the jury are bound to take that evidence as proving the particular fact; and the jury have no right capriciously to disregard evidence where it is not controverted and the character of the witnesses is good and the story is probable.

“But under this case thus made out the defendant claims that between April 21 and May 14, 1872, the plaintiff sold of his stock five hundred and seventy shares, for the aggregate sum of three hundred and eighty-seven thousand six hundred dollars; that between July 6th and July 13th; and July 13th is a point in the case, that being the day on which the power of attorney was executed; he claims that between July 6th and July 13th the plaintiff sold one hundred and twenty shares more, for which he realized twenty-four thousand dollars, and that on April 14, 1874, he sold one hundred and ninety shares more, that is what is called the Hall stock, for the sum of twelve thousand and odd dollars, thus making an aggregate of receipts of four hundred and twenty-three thousand seven hundred and seventy-six dollars. Of course, if this claim should prevail, it would result in a verdict in favor of the defendant; after deducting or making the proper allowances for interest and so forth, I believe the attorney for the defendant claims it would aggregate now about two hundred thousand dollars. Those are the figures in round numbers, so far as the claims of the different parties are concerned.

“Now, as to the transaction itself, it appears from the evidence, that in the spring of 1872, about April 22d, that Hayward took up for Rogers a large amount of stock and ‘carried it’ for him, as the phrase runs among brokers and business men. The evidence of Rogers is, that there was nothing said about the terms upon which he was to carry it; there was nothing said about the rate of interest, nor about the time when he was to pay Hayward, nor, he says, did he give Hayward any power of sale; on the other hand, Hayward testifies that he made this advance upon the sole and express condition that he was at liberty to deal with the stock as his own, to sell it when and where and as he pleased.

“The evidence upon that point, then, of course, is contra-

dictory; but it is not a material matter, for the reason that if Hayward is chargeable with the sale of the stocks made at high figures in April and May, then Rogers would be entitled to that credit, and Rogers does not repudiate that sale, but in substance ratifies it, and seeks the benefit of the sale for the very plain reason that the stock has never reached so high a figure since. If Hayward had no authority to sell the stock, and he had sold it at low figures at that time, and the stock had since that risen to a higher figure, as a general rule, the pledgor, which is Rogers, could have recovered from the wrongdoer the highest market price of the stock between the day of the sale and the day of trial.

"I charge you, then, that the relation of Hayward and Rogers was that of pledgor and pledgee, and if you find that there was no agreement between them at the time the stock passed into Hayward's hands, authorizing Hayward to sell the stock, then he had no right to sell it without first demanding payment of Rogers and giving him due notice of the sale.

"Now comes the question, gentlemen, as to whether the sale by Hayward of the identical certificates that Rogers left with him was a breach of Rogers' rights. In other words, whether Rogers has the right to claim the high price at which Hayward is alleged to have sold those particular certificates during April and May. The Supreme Court of this State, in a case which arose some years ago, after very elaborate consideration, and in which all of the Judges agreed, and upon a petition for rehearing having been granted and the case heard again, they all agreed again in the first decision, held that one certificate of stock is as good as another; that all shares of stock are alike; and that if the pledgee of the stock, that is Hayward, holds himself at all times ready and able and willing to deliver to the pledgor, upon demand, an equal number of similar shares in the same company, he has the right to do that, and the pledgor is not injured by the fact that the pledgee sold the particular certificates.

"I, therefore, charge you that if you find that Hayward did sell and deliver the identical 690 shares before July 13, 1872, without authority from Rogers, he would not there-

by become liable to Rogers beyond nominal damages, if he was at all times ready, able, and willing to transfer to Rogers an equivalent number of similar shares in the same company by a proper and valid certificate. I hope the jury understands this proposition, because it is the leading and important point in this case; and this decision of the Supreme Court, while it did not meet the approbation of the entire profession, is still not a new decision; the same doctrine, precisely, was laid down by Chancellor Kent, more than fifty years ago, in the case where bank stock, of the old United States Bank, had been pledged with a broker of the city of New York; and it stands precisely as if one of you had stored with a warehouseman a hundred bushels of wheat, and he had placed it in with a thousand bushels more of his own, in bulk, not sacked or in barrels, but had been emptied into one vast bin; now, the warehouseman would have the right to go on selling the wheat from that amount in bulk; and, although he might happen to sell the identical hundred bushels you had deposited, it would not be any wrong to you providing he always kept on hand a hundred bushels of wheat of the quality and character, which he was ready to deliver to you on demand. Probably that is all that is necessary to say on that point; but I wish you to clearly understand it, as the case must necessarily turn upon that question.

“I instruct you further, that inasmuch as Rogers never made any demand on the plaintiff for his stock before July 13th, and never directed him to sell any, the plaintiff was at liberty, as he sold stock from time to time from the mass of shares on hand, to credit such sales to such particular account as he pleased; and that doctrine finds analogy in the case where a man is owing you upon two accounts, or upon a note and account, and he meets you and says: ‘Here is a hundred dollars towards what I owe you.’ You are at liberty to apply it upon the note, or to apply upon the account, as you see fit; if he gives no directions to the contrary, or rather, if he does not specify upon which particular account or indebtedness he intends the money to apply, you can place it to whichever you choose. So in this case, if you find that Hayward had a large amount of Savage stock on hand, and he sold from time to

time, he had the right, until a demand was made by some pledgor, or a direction from some pledgor for him to sell, he had the right to credit to such accounts as he pleased during his sales from time to time. Of course, gentlemen, it is for you to determine if these credits were made in good faith, and if they were made about the time of the sales. You will remember that the books were given in evidence, and there were various sales made between April and July 13th, and the balance was made at the end of each month, showing that the 690 shares were always to the credit of Rogers in those statements; it is for you to determine, of course, whether that was a truthful and fair statement of the transaction. If you find that Hayward had sold the 690 shares before the execution of the power, and that at all times from April 22d to July 13th, he had been ready, able, and willing to transfer to Rogers an equivalent number of similar shares in the same company by a proper and valid certificate, then and in that case it was not material that these facts should be imparted to Rogers at the time he executed the power of attorney and the power was a valid and binding one.

“Now upon that point the rule is, that when a man in his senses, in the possession of his faculties, deliberately executes a written agreement, he is presumed to have understood the agreement and is bound by its terms unless there was fraud, or mistake, or surprise, or something of that kind, that unfairly prevented him from knowing what he was doing; as for instance, if a man who is unable to read, signs a document, and it is read to him, but falsely read, a portion is suppressed or something is put in that is not there, in reading, and signs it, he is not bound, because he was imposed upon; or if a man is blind and an instrument is misread to him and he executes it, he is not bound by it. So if there is any suppression or misstatement of a material fact, and through which a party is led innocently to sign an agreement, that amounts to what the law calls a fraud, and he is not bound by it.

“I therefore have charged you that if Hayward — and will read this again now, that you may better understand it: If you find that Hayward had sold the 690 shares before the execution of the power; that, you remember, was July 13th,

and had been ready, able, and willing to transfer to Rogers an equivalent number of similar shares in the same company by a proper and valid certificate, then and in that case it was not material that these facts should be imparted to Rogers at the time he executed the power of attorney, and the power was a valid and binding one. It was not material to tell him that, for the reason that that was a thing that Hayward had a right to do anyway, and the law says, that he was selling his own stock, and not Rogers' stock, provided he was all the time able, ready, and willing to respond to Rogers, in case he should come and demand his stock. And if you find that Hayward had sold the identical 690 shares, and that he was not at the time of such sales able, willing, and ready to deliver to Rogers a similar number of shares, then, and in that case, the suppression of those facts operated as a fraud upon Rogers and destroyed the force and effect of the power of attorney, there being nothing for the power to operate upon.

"As to the other defense; the defense that is made to Rogers' cross-bill, namely, the Statute of Limitations. I will simply state that it is conceded that if Rogers knew all of these circumstances more than three years before he filed his cross-bill, then this defense of his is barred by the statute: 'An action must be brought within three years, if it relies on the ground of fraud or mistake; the cause of action in such case is not to be deemed to be accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.' Now, if Rogers discovered this fraud that he alleges Hayward perpetrated on him more than three years before he filed his cross-complaint in this case, then his action is barred, and you must pay no attention to the defense.

"Actual notice of these facts is not always necessary: 'Notice is, first, actual, which consists in express information of a fact; second, constructive, which is implied by law.' This is the section to which I call your attention now: 'Every person who has actual notice of a circumstance sufficient to put a prudent man upon inquiry as to a particular fact, and omits to make such inquiry with reasonable diligence, has constructive notice of the fact itself.'

"I have been asked to charge you, that the rendition of the account by Hayward, in August, 1873, showing all these sales,

was a circumstance that should be taken into consideration in determining the question as to whether Rogers did have notice of those frauds more than three years before the filing of his cross-bill; and I instruct you, of course, that that is a circumstance that you are at liberty to take into consideration; the evidence being that Hayward rendered him an account of sales in August, 1873, and by that account it appeared that the whole 690 shares was sold after the power of attorney, and in the month of November, 1872, realizing some 55,000 and odd dollars.

“Here are two instructions that I give you at the request of defendant’s counsel: ‘That when an agent is dealing with the principal, or a trustee with the beneficiary of his trust, it is his bounden duty to see that everything is fair, and that the principal or beneficiary has all the information as to the matters of fact necessary, to show him his precise situation in relation to the business on hand.’ Second. ‘It is no defense or excuse to the plaintiff, that stockholders have a custom amongst themselves, in the delivery of shares of stock to persons with whom they deal, to deliver any certificate they see fit.’ This, of course, was not a transaction between two brokers, and it is clear that Mr. Rogers’ rights are not to be determined, nor Mr. Hayward’s either, by the rules that this limited and private association, known as the Board of Brokers, have among themselves.

“Now, gentlemen, I have endeavored to state to you plainly the principles upon which this case is to be decided, and you will observe that the case pretty much turns, indeed it does turn, upon the main question: that is, if you find that Hayward sold those shares before July 13th; as to whether he was during all of those times, able, ready, and willing to deliver Mr. Rogers his 690 shares at any time that he might call for them, if he should call and pay Hayward the money he had advanced, if he was ready to respond, then Hayward did precisely what the law says he may do; he sold the stock, and he had a right to sell it, for his own account or for any account that he pleased, so long as he retained the proper number for Rogers, to give him upon demand.

“Now, gentlemen, the law makes you the judges, the exclusive judges, of all matters of fact; and it is for you to

determine, wherever there has been a conflict, upon which side the truth lies; and you are to judge from the appearance of men, and you have a right to take into consideration their demeanor upon the witness stand, their interest in the event of the suit, the probabilities of their statements and all of the surrounding circumstances, and to give such verdict, under that evidence, as your consciences and judgments may dictate. The fact that the case is large, should make you careful; but should not deter you from rendering such a verdict as you think the evidence, as given before you, and the law as given you by the Court, will justify.

“Gentlemen, the case is now with you for your consideration.”

Among others refused, the following instructions were asked by the defendant, and refused by the Court:

“If the jury believe from the evidence that the plaintiff sold certificates of Savage stock received by him for the defendant, at any time prior to his procurement of the power of attorney produced here, without the authority of the defendant, it makes no difference how much Savage stock the plaintiff had on hand belonging to persons other than himself, or belonging to Hayward & Jones.”

“If the jury believe from the evidence, that at the time when the plaintiff procured the power of attorney produced here, he did not communicate, or cause to be communicated to the defendant, that he had sold or otherwise disposed of any of the certificates of Savage stock he had received for the defendant, and that the defendant was then ignorant of the fact that the plaintiff had so sold any of the said certificates, they will not take the said power of attorney further into consideration.”

“If it appears from the evidence that the plaintiff, at any time prior to the procurement of the power of attorney produced here, sold without the defendant's consent any certificates of Savage stock received by him for the defendant as security for money loaned the defendant, and that that power was prepared by the plaintiff, or his agent or agents, without any suggestion as to the numbers of and upon the certificates therein described and identifying the same, and that the

defendant did not then know that the plaintiff had so sold any of the said certificates, then that power is void."

"If the defendant, when he executed the power of attorney produced on this trial, did not know that the plaintiff had sold any of his certificates of Savage stock, then that power is void."

"It makes no difference as to the validity of the power of attorney produced on this trial, whether the plaintiff or his manager, Peart, knew that the plaintiff had sold any of the certificates of Savage stock belonging to the defendant or not, at the time when that power was procured."

"It makes no difference whether the plaintiff placed as many shares of Savage stock as he had sold of the defendant's in an envelope, or otherwise segregated such a number for the defendant or not, unless the shares so replaced, belonged to the plaintiff."

"If the jury believe from the evidence, that nothing was said as to the plaintiff having power to sell the stock to be delivered him for defendant at the time when the plaintiff agreed to advance him moneys upon the same in April, 1872, and that before the power of attorney produced on this trial was executed, the plaintiff sold any of the certificates of Savage stock received by him for the defendant, and that the defendant did not, at the time he executed said power, know that the plaintiff had sold any of the said certificates, and that, thereafter, there ever was a time when the plaintiff did not have as many shares of Savage stock on hand of his own, then the defendant is entitled to recover of the plaintiff the highest market value of Savage stock at the time or times when the plaintiff so sold the said certificates, or any of them, for as many shares as the plaintiff did not always have and keep on hand."

"If the defendant delivered shares of stock to the plaintiff as collateral security for money loaned, and no further stipulation was made between them, the plaintiff had no right to sell the same or any part of the same, without first demanding the money due him, or, in case of default in payment, without giving notice when and where he would sell the said shares at public auction."

"It is not enough for one who has sold certificates of stock

belonging to another, without his consent, to produce and offer the owner an equal number of shares of the same stock, but the party who so sold must have always had on hand of his own that number of shares."

"It is no defense for the plaintiff that his books bore the right number of shares of stock to the credit of the defendant during the time he was responsible to the defendant for that number of shares, but it must appear that the plaintiff had in his possession, or under his absolute control, that number of shares of his own all that time."

The verdict and judgment were for the plaintiff. The defendant took this appeal and brought up the evidence in a bill of exceptions. After the decision in bank a petition for rehearing was presented by the appellant and denied by the Court.

Calhoun Benham, McClure, Dwinelle & Plaisance, and H. K. Moore, for Appellant.

The third assignment of error is as follows: "The Court erred in telling the jury, as it did, that when facts are testified to by witnesses who are not impeached, and whose statements involve no inherent improbability, the jury are bound to accept them as proved." To tell the jury they were bound to accept the facts referred to as proved, at the point and in the connection when they were so told, evinced partiality.

The fourth assignment of error is as follows: "The Court erred in allowing a witness to be asked, against the defendant's objection, whether there were other persons or not for whom the plaintiff was carrying stock while he was carrying stock for the defendant." The question was irrelevant. To let the jury know Hayward was carrying stock for others was calculated to mislead them by suggesting that he was thereby able to respond for Rogers' shares with shares of those other persons.

The fifth assignment of error was as follows: "The Court erred in allowing Hayward, when on the stand as a witness, to state, against defendant's objection, the contents of a letter received from the defendant before the suit was brought, asking him for a loan, and expressing, according to the witness, his dissatisfaction with the transaction they had with

each other in the Savage stock." The matter elicited was irrelevant, and calculated and intended to hold the defendant up to contempt and prejudice him with the jury.

The sixth assignment of error is as follows: "The Court erred in allowing Peart, a witness, to be asked, against defendant's objection, how much stock the plaintiff carried for Rogers during the period beginning April 22, 1872, and ending November, 1872." The question involved a conclusion of law. It made the witness judge of what "carrying" was, and the answer that Hayward carried the proper number of shares for Rogers until November, 1872, allowed as it was, formally authorized the jury so to find. It decided the whole case.

The evidence referred to in the seventh and eighth assignments of error was improperly excluded. Those assignments are as follows: "The Court erred in refusing to allow the defendant to prove that the plaintiff, repeatedly, before the break in Savage stock of that year, and after April 22, 1872, told the defendant that the Savage mine was a good mine—was very valuable; that the stock was sure to reach \$1,000 a share; that it could not get below \$500 a share, as he would take it all rather than it should go below \$500 a share."

"The Court erred in refusing to allow the defendant to prove that the plaintiff told the defendant, after April 22, 1872, and before the break in Savage stock of that year, that the Savage mine was very rich, and that the developments in it on certain levels were better than they were in Crown Point, and that the Savage was a better mine than Crown Point, which had been a very rich mine."

The evidence showed Hayward had sold the identical certificates belonging to Rogers, calling for one hundred and twenty-five shares, about the time he received them from Rogers, and if we had been allowed to prove that at that very time he was encouraging Rogers to hold and not to sell, it would have had a tendency to prove he was executing a plan which involved his selling at the same time all the other certificates he got from Rogers.

It is true the fact Hayward talked to Rogers about the mine in such a way as to dissuade him from selling is not alleged as the means employed by Hayward to induce him to

believe the stock was still on hand; but it is not necessary to allege in a complaint all the circumstances of fraud, and if the complaint was faulty in not alleging any act Hayward did to conceal the sales he was making, it should have been demurred to on that ground. (*Kenyon v. Woodruff*, 33 Mich. 313, 314.) It is plain for any one to see that Hayward could not have found a better mode of keeping Rogers from thinking he was selling Savage, or that he was selling Rogers' Savage or had already sold it, than to speak in such exalted terms of the wealth of the Savage mine as it was proposed to prove he did. So artful a concealment of those sales combined with so artful a prevention of sales by Rogers would have had the strongest tendency to prove that Hayward's sales were purposely made to defraud Rogers.

But more has been said about this matter than is necessary. This is a case of constructive fraud, and all that is necessary in pleading therefore is to allege the confidential relation, and the unfairness of the transaction, and that it was effected by means of those relations, and then the onus to vindicate the transaction is fixed upon the confidant, and the plaintiff may offer such matter in rebuttal as there may be, if not alleged in the complaint. (*Rubidoex v. Parks*, 48 Cal. 215; *Rhodes v. Bate*, 1 L. R. Ch. App. 256.)

The twelfth assignment of error is as follows: "The Court erred in allowing Peart, a witness for the defendant, to be asked, in rebuttal, whether he did not have six hundred and ninety shares of Savage stock belonging to the plaintiff in his possession, from April 22, 1872, to the time of the sales stated in the account rendered the defendant by the plaintiff, over and above all joint account stock (Hayward & Jones) and all stock held for parties other than defendant, plaintiff himself and Hayward & Jones." The question involved a question of law. The evidence showed incontestably and without conflict, or attempt at conflict, that Hayward sold one hundred and twenty-five shares of the defendant's stock about the end of April, 1872; that is to say, he sold the identical certificates for that many shares which he had received from Rogers.

Assuming that he set apart other certificates for the same quality of stock for Rogers' benefit, it was not for Peart to

say they belonged to Rogers. The question sought to elicit testimony contradicting the witness himself and Hayward's books offered by himself.

Pearl testified that those books were correct, and Sell, plaintiff's book-keeper, testified that they contained all Hayward's stock transactions, and they showed that Hayward received no Savage from any one but Rogers in the interval between April 21, 1872, and May 1, 1872, during which he sold certificates belonging to Rogers for one hundred and twenty-five shares, if he did not sell all of the certificates belonging to him; and it is a mathematical demonstration that if Rogers' stocks which were sold in that interval were replaced during that interval, it was done with the stocks of the pledgees, or of Hayward & Jones.

The question was deep and astute. It was so framed that, when it was answered in the affirmative, as it indicated to the witness, by its leading character, it was to be, and in fact was, it should appear to be proved that Hayward had always on hand for Rogers equivalent stock of his own until he sold out under the power of attorney, as he claims to have done. But the answer did not so prove. All it did prove was, that Rogers' credit was always kept standing and some other credit diminished whenever any of Rogers' shares were sold, or whenever any certificates from the envelope affected to his use were sold. If some of the stock in Hayward's hands credited to Hayward & Jones, or some of the stock credited to some other person than Rogers, was not put in lieu of certificates taken from Rogers' envelope, there was no effort to make the books and the envelope concur, to show the true status of each account. We know, if Pearl told the truth, that some certificates were sold from Rogers' envelope; because he must have put what he got for Rogers in it when he first got them, and because the proof is direct that some of the certificates received from Rogers were sold by Hayward as soon as they were received.

The first instruction asked for by defendant should have been given.

The second instruction asked for by the defendant ought to have been given. It is as follows: "If the jury believe from the evidence that the plaintiff sold certificates of Sav-

age stock received by him for the defendant, at any time prior to his procurement of the power of attorney produced here, without the authority of the defendant, it makes no difference how much Savage stock the plaintiff had on hand belonging to persons other than himself, or belonging to Hayward & Jones."

There was evidence on the part of the defendant to show that the plaintiff sold some of the certificates delivered to him on the defendant's account, and tending to show he sold all of them, within a few days after he got them, and when they commanded about seven hundred dollars a share, and when he had no stock at all.

And the evidence on behalf of Hayward showed that he had in his possession a great deal of stock belonging (some of it) to persons other than the defendant, and to the firm of Hayward & Jones, of which Hayward was a member. The defendant had no dealings with that firm. The defendant pledged his stock to Hayward, not to Hayward & Jones, and borrowed from him, not from Hayward & Jones. Hayward & Jones could not have been made liable to Rogers. (*Adams et al. v. Sturges et al.*, 55 Ill. 468.) It was contended for Hayward that he could screen himself from liability to the defendant if he had as much stock of persons other than himself in his mere physical possession during the continuance of his liability, as he had sold of Rogers'. Such a position is not law.

Even *Atkins v. Gamble*, 42 Cal. 86, requires that the party disposing of the certificate of another shall have as good a one of his own at hand. But *Atkins v. Gamble*, *ut supra*, ought not to be followed. It has never commanded the respect of the profession nor of other Courts. (*Parsons v. Martin*, 11 Gray (Mass.), 111; *Morton v. Preston*, 18 Mich. 60.) Rogers has no fight with *Atkins v. Gamble*. It is even authority for him. But overrule it, and every supposed difficulty of his case is leveled.

The third, fourth, fifth, and sixth instructions asked for by defendant should have been given. (*Rubidoex v. Parks*, 48 Cal. 215.) The insertion of the numbers of certificates in the power of attorney tendered to Rogers at a time when Hayward knew Rogers did not know the numbers the certificates

he had pledged to him bore, was a positive act of fraud; but it was enough to invalidate the power anyhow if Rogers executed it while in ignorance — no matter how brought about — that his stock, or any of it, had been already sold.

The twelfth instruction asked for by defendant should have been given. There was evidence tending to prove that the plaintiff held the defendant's stock in pledge pure and simple, and he had therefore no right to sell in the Stock Board of the Merchants' Exchange of San Francisco, or without notice; and it was proper the jury should have been told so, and they were not. (*Dent v. Holbrook*, 4 P. C. L. J. 549; *Tully v. Traror*, *ut supra*; *Parsons v. Martin*, *ut supra*; *Briggs v. B. & L. R. Co.*, 6 Allen, 252.)

The instruction numbered thirteen and a half should have been given. The evidence showed that the plaintiff had stock belonging to the defendant in pledge, and sold it without authority, and did not keep on hand a single share belonging to himself or anybody else after a given day, and for a very long time before the defendant filed his cross-complaint demanding satisfaction for the conversion, during all which there was no pretense of a defense if the power of attorney was fraudulently obtained.

The evidence showed that the plaintiff never had at any time but 25 shares of Savage of his own, and that even the Hayward & Jones account of Savage stock resulted in Hayward's never getting a share out of it; that the adventure was a dead failure, and resulted in loss. So that if the interest Hayward had in the Hayward & Jones stock was his shield against the defendant, he protected himself with what had no existence at the time nor ever afterwards, by the mere physical possession of stock, none of which ever came to him on settlement with his partner. (*Cal. Furniture Co. v. Halsey*, *ut supra*.)

The circumstance that the certificates were indorsed so as to pass title to the holder, if indorsement would have that effect, did not vest the legal title to the certificates in Hayward. He was a mere pledgee of the certificates. He held them by virtue of a lien upon them. Whatever the condition they were in may have been, he had only a lien upon them. He held the legal title *quoad* third parties; but *quoad* Rogers he had

only a lien. (*Wilson v. Little*, 2 Coms. (N. Y.) 447; *Morton v. Preston*, 18 Mich. 69.)

The sixteenth assignment of error is as follows: "The Court erred in charging the jury, as it did, that the defendant could not recover of the plaintiff, for the conversion of his stock, if he was always ready, able, and willing to replace such as he may have converted, if any, without at the same time informing the jury, as it did not, that to be ready and able in law to replace such stock, was to have as many shares of his own, free and unincumbered, on hand, and under his instant control, as he had so converted, and that to have had shares of third parties in his hands, was not sufficient as a defense as against such conversion."

The instruction is but a repetition of the cardinal error which runs through the case. What has already been said in preceding points sufficiently explains our views in regard to it. It would permit a party who could buy stock in the market to sell his pledge whenever he saw fit, and thus to speculate on his pledgor—which he may not do. The principle of *Atkins v. Gamble* (42 Cal. 86) is, that shares of stock are intellectual entities unsusceptible of identification, and may therefore be treated as coins not in a bag; but the operation of that principle is carefully guarded by the *proviso*, that a pledgee shall not *speculate* upon his pledgor. The *proviso*, he shall have as many shares of his own on hand when he disposes of his pledgor's as he so disposes of, means nothing else.

The twenty-ninth assignment of error is as follows: "The Court erred in saying to the jury what it did about notice sufficient to put the parties upon inquiry, and omission to make inquiry." The Court instructed the jury on the point of notice as follows: "Actual notice of these facts is not always necessary: 'Notice is, first, actual, which consists in express information of a fact; second, constructive, which is implied by law.'"

"This is the section to which I call your attention now: 'Every person who has actual notice of a circumstance sufficient to put a prudent man upon inquiry as to a particular fact, and omits to make such inquiry with reasonable diligence, has constructive notice of the fact itself.'"

However good law this may be, it was inapplicable, and calculated to mislead the jury. The case was one in which constructive notice could have no effect. The relation of principal and agent existed, and the principal was not required to pursue any inquiry. He reposed on his agent's fidelity. Before he could be held to have knowledge of the alleged fraud, it should have been proved he had actual knowledge of the facts constituting the fraud. What the Court said relieved the plaintiff of that onus as to proof, when it belonged to the plaintiff and threw it on the defendant. (*Pence v. Langdon*, 99 U. S. S. C. Rep., 9 Otto, 578; *Sears v. Shafer*, 2 Seld. 268; Civil Code of Procedure, § 1869; *Shannon v. White*, 5 Richards Eq. R., S. C., 96; *Basset v. Nosworthy*, 2 Leading Cases in Equity, 1; *Boone v. Chiles*, 10 Pet. 210; *McLure v. Ashley*, 7 Richards Eq. R. 439; 28 Iowa, 66; 30 id. 375; 4 Strobb. 155; *Pease v. Barbiers*, 10 Cal. 436.)

The judgment must be reversed because it calls for \$305,050.95, with interest thereon, and \$422.50 costs, when the verdict it recites was \$295,345.38.

Estee & Boalt, for Respondent.

There was no fraud even if plaintiff, as the agent, pledgee, or trustee of defendant, had sold the stock of the latter without his consent, if he was at all times ready, able, and willing to turn over on demand an equal quantity of similar stock. The Court below held that the relations of pledgor and pledgee existed between these parties, and upon that opinion was compelled to declare the law as laid down by this Court in *Atkins v. Gamble*, 42 Cal. 86.

That decision goes to the merits of this case, and is the law of this case upon the assumed proposition that Hayward, this plaintiff, was the pledgee of the stock in controversy, and the charge of the Court to the jury upon the law of the case, was practically an extract from that decision. So that practically the errors assigned by the defendant to the Court below are errors of this Court, and a favorable consideration thereof would result in overruling that case. The case at bar is much stronger than *Atkins v. Gamble*.

It was conceded in that case that the plaintiff was the owner of the stock and had himself deposited it with the defendant,

who thereupon became the pledgee thereof. And the Court held that although the owner of personal property which has been wrongfully converted is ordinarily entitled to recover his specific property, or its value, and can not be compelled to accept other property of the same kind and equal value in lieu of that which was converted, yet shares of stock in a corporation stand upon a different footing, and if all the shares are of equal value, there can be no reason for preferring one share to another.

Indeed, as the Court remarked, the stockholders in a corporation are the joint owners of the franchise and property of the corporation. Each holder is entitled to an undivided share in the assets and business of the corporation. All stand upon the same footing. This same view was entertained by the Supreme Court in two other cases, viz.: *Hawley v. Brumagim*, 33 Cal. 394; *Hardenbergh v. Bacon*, id. 365. Chancellor Kent in the case of *Nourse v. Prime*, 7 Johns. Ch. 87, was of the same opinion as this Court in *Atkins v. Gamble*.

The plaintiff in this case was the owner of certain shares of U. S. Bank stock, which he deposited with defendant as collateral for the payment of his note; and if the note was not paid the stock was to be sold, the note paid out of the proceeds, and the balance turned over to the plaintiff. The stock was sold afterwards at a depreciated price, and the sale did not realize enough to pay the debt; so the pledgee brought suit to recover the deficiency.

The pledgor however, filed his bill in equity to enjoin the action at law, on the ground that the pledgees were large operators in stocks, and had mingled his stock with their own and other stocks which they held in trust, in such a manner that they could not be distinguished, and that it was the duty of the defendants to have set apart the pledgor's share in such a manner that they could be identified; and not having done so, they were liable for the highest price at which the stock could have been sold.

The opinion of the Court was adverse to the plaintiff in the equity suit, on the ground that under the contract all that plaintiff could demand was a return of 430 shares of the bank stock; that if he desired to have any specific 430 shares he

should have so provided in the contract. The learned Chancellor approves the opinion of Lord Chancellor Parker in *Le Croy v. Eastman*, 10 Mod. 499, in a similar case, to the effect that the defendant was accountable only for the stock and dividends, and not for the price at which the stock was held. (See also *Horton v. Morgan*, 6 Duer, 56; *Gilpin v. Howell*, 5 Penn. St. 42; *Allen v. Dykers*, 3 Hill, 593.)

SHARPSTEIN, J.:

The principal contention on behalf of Rogers is, that Hayward held a certain number of shares of mining stock as security for money advanced by him to Rogers, and that Hayward, without the knowledge of Rogers, sold said shares of stock, and that afterwards, and while Rogers was uninformed and ignorant of said sale, Hayward procured a power from Rogers to sell said stock, and then sold of the stock of the same mining company the same number of shares that he, Hayward, had held prior to said first sale as security for his said advances to Rogers, and that Hayward accounted to Rogers for the sum realized on the sale of the stock last sold only, which was much less than the sum realized on the sale of the stock first sold, which Rogers contends was the stock which Hayward held as security for his said advances.

On the other side, it is claimed that Hayward constantly held the identical stock certificates which he took as such security from the time when he received them up to the time when he admits that he sold them, or that if he did not, during all of such time, have said identical stock certificates in his possession, that he did, during all of such time, have other stock certificates of the same mining company for the same number of shares, which, during all of such time, he was able, ready, and willing to deliver to Rogers, upon his paying the sum for which said certificates were held as security.

It is to the admission and rejection of evidence, and to the giving and refusing of instructions upon this issue, that most of the exceptions are directed.

The transaction out of which this litigation arose, as narrated by Rogers in his testimony, was as follows:

"I went to Mr. Hayward, and found him alone in his front

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office. I said to Mr. Hayward that I had two hundred and ten shares of Savage coming in on Monday; that is, it was due Monday — we speak of it as coming in, and I was afraid I would not be able to take care of it, and would sell the stock. * * * I told him that I thought that perhaps, rather than to see that amount of stock thrown on the market, he might assist me in taking care of it. He asked me at what prices the stock was coming in. I told him; and he said: 'Send it to me.' That is, the two hundred and seventy shares. * * * Then, upon his saying, 'Send it to me,' he says: 'By the way, what has become of that two hundred shares Burling was carrying for you?' I says: 'Burling is still carrying it.' He says: 'Order that up and send it to me.' I told him I would do so. That was the end of the conversation. There may have been something said about interest — probably was.

"Q.—Was anything said as to Mr. Hayward's power or authority to sell it? A.—Not a word.

"Q.—What was done in consequence of that arrangement, if anything? A.—The stock was delivered to Mr. Hayward and he paid the money that was spoken of, about \$186,000, that he advanced to these different parties for this stock."

In considering the exceptions upon which the appellant relies, we shall assume, as indeed we must, that this is the correct version of that transaction. And in view of that, and the further fact that it is not charged in the cross-complaint of Rogers that he was induced to do what he did by reason of any representations of Hayward as to the condition of the mine, or the then present or prospective value of the stock, or in regard to the quantity of it which Woods & Freeborn, or any other person or persons, were selling, we do not think that the Court erred in sustaining the objections of respondent to the introduction of evidence of what Hayward said to Rogers in regard to those subjects.

Nor do we think that the Court erred in allowing the witness Peart to be asked how much stock Hayward carried for Rogers from April 22, 1872, to November, 1872. According to the testimony of a majority of the witnesses, Peart was better qualified to answer that question than any other witness, including Hayward himself. When this question was

asked, appellant's counsel said: "I understand that question to be an offer to contradict their own witness, to contradict Mr. Hayward's books and Mr. Peart himself. I object to it as incompetent." Appellant's counsel seem to have assumed that the answer of the witness would contradict all the evidence to which the objection referred. But we are unable to see how the Court could have anticipated the answer of the witness, and if it could not, there was no error in overruling the objection. After the witness had answered the question, no motion was made to strike the answer out, and the Court, therefore, had no opportunity, after being sufficiently advised, to decide whether or not the witness had contradicted the evidence referred to. And according to our understanding of the evidence, there is no such contradiction.

The evidence as to the number of shares of stock that Hayward was carrying for persons other than Rogers, and as to the contents of the letter which Rogers wrote to Hayward, may not have been relevant to any issue in the case, but as we can not conceive how the appellant could possibly be prejudiced by it, the error, if error there was in overruling the objections to it, must be disregarded.

Upon the main issue in the case the Court charge the jury as follows: "If you find that Hayward had sold the 690 shares before the execution of the power; that you remember was July 13th; and had been ready, able, and willing to transfer to Rogers an equivalent number of similar shares in the same company by a proper and valid certificate, then and in that case it was not material that these facts should be imparted to Rogers at the time he executed the power of attorney, and the power was a valid and binding one. It was not material to tell him that, for the reason that that was a thing that Hayward had a right to do anyway, and the law says, that he was selling his own stock, and not Rogers' stock, provided he was all the time able, ready, and willing to respond to Rogers, in case he should come and demand his stock. And if you find that Hayward had sold the identical 690 shares, and that he was not at the time of such sales able, willing, and ready to deliver to Rogers a similar number of shares, then, and in that case, the suppression of those facts operated as a fraud upon Rogers, and destroyed the force and

effect of the power of attorney, there being nothing for the power to operate upon." This, in our opinion, was a correct and sufficiently clear exposition of the law applicable to that issue, and it obviated the necessity of the Court's giving any other or further instructions upon it. Therefore the refusal of the Court to give the instructions asked on the points covered by the instruction given, is not a sufficient ground for reversing the judgment.

The charge of the Court as to what would constitute a bar to Rogers' right of action against Hayward, appears to us to be substantially correct. Another portion of the charge to which exception was taken, reads as follows: "When facts are testified to by witnesses who are not impeached, and there is no inherent improbability in the statement, the jury are bound to take that evidence as proving the particular fact; and the jury have no right capriciously to disregard evidence where it is not controverted and the character of the witnesses is good, and the story is probable."

There ought to be no necessity for giving such an instruction to a jury. A juror who required to be so instructed would be utterly unfit for the position. But as a matter of law we think the instruction was correct, and, so far as we can see, it was as favorable to one side as it was to the other.

We do not think that the judgment should be reversed; but it must be modified. The jury found for the plaintiff in the sum of \$295,345.38 and the judgment was entered for the sum of \$305,050.95.

It is therefore ordered that this cause be remanded to the Court below with directions to so modify the judgment as to make it correspond with the verdict of the jury; and, when so modified, it is hereby affirmed.

MORRISON, C. J., and McKEE and McKINSTRY, JJ., concurred.

Ross, J., concurring:

The plaintiff was justified in acting in accordance with the views expressed by this Court in the case of *Atkins v. Gamble*, 42 Cal. 86. It matters not whether those views accord with our own notion as to what the law ought to be. That

case was the law when the transactions in question occurred, and has remained so ever since. Whatever certificates of stock the plaintiff sold, of those received by him on account of the defendant, were replaced by him with like certificates prior to the execution of the power of attorney from defendant to plaintiff. At the time the power of attorney was drawn the defendant was present with the plaintiff's agent, the certificates of stock were produced, and from them the attorney obtained the number of the certificates and the number of shares, and drew a power of attorney, which the defendant executed, authorizing the plaintiff to sell them; and this he did.

[No. 8,397. — Department Two.]

December 14, 1882.

JOHN T. CAREY v. WILLIAM K. BROWN.

ACTION OF EJECTMENT.— Defendant formerly owned the premises, and to secure an indebtedness, executed a deed of trust, in which it was provided that in default of payment and in the event of a sale, the recitals in any deed executed by the trustees should be conclusive evidence of such default, or the application of the creditor for the sale of the property, and of the publication of the notice of sale.

Held: In the absence of fraud, the defendant is concluded by the recitals in a deed which was executed by the trustees.

ID. — INNOCENT PURCHASER AT TRUSTEE'S SALE.— One of the trustees became the owner, by assignment, of the note, the payment of which the deed of trust was given to secure, but the purchaser at the sale had no notice of this, and believed that the sale was regularly made for the benefit of the payee of the note.

Held: The purchaser's title to the property was not affected by the fact that one of the trustees had purchased the note.

PAYMENT BY CHECK.— The purchaser paid for the property with a check, instead of gold coin, as provided in the deed of trust.

Held: As the money was actually paid on the check, defendant's objection to the sale was not well taken.

REFUSAL TO ALLOW IMMATERIAL AMENDMENT.— It is not error, if the Court refuses to allow an immaterial amendment to a pleading.

APPEAL by defendant from the judgment of the Superior Court of the County of Sacramento and from an order denying a motion for a new trial. CLARK, J.

Action in ejectment. The facts are stated in the opinion

of the Court. After the decision in department, a petition for a hearing in bank was presented, and denied.

D. E. Alexander and James B. Devine, for Appellant.

Freeman & Bates, for Respondent.

MORRISON, C. J.:

On the sixteenth day of June, 1880, the defendant was indebted to one P. Bohl in the sum of seven hundred dollars, as was evidenced by a promissory note of that date, and for that amount, payable in six months, and to secure such indebtedness, the defendant executed a deed of trust to W. A. Fountain and A. Leonard on the certain lots of land in controversy, situated in the City of Sacramento. The deed of trust authorized the trustees therein named to sell the property in case defendant failed to pay the note when due, and provided that in the event of a sale, the recitals in any deed executed by the trustees, of default on the part of the defendant to pay the note, and of the application of the payee of the note for the sale of the premises, and of publication of the notice of sale required by the trust deed, should be *conclusive evidence* of the facts recited. The language is: "Any such deed or deeds, with such recitals, therein, shall be effectual and conclusive against said party of the first part (the defendant herein), his heirs, assigns, and all other persons; and the receipt for the purchase money contained in any deeds executed to the purchaser, shall be a sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase money according to the trusts aforesaid."

The property was sold in the presence and by the direction of Fountain, one of the trustees, and a deed was executed by both of the trustees to the purchaser on the twenty-second day of September, 1881; and the deed recites "that on the — day of July, 1881, the said promissory note having long prior thereto become due, and said W. K. Brown having made default in the payment of the principal and interest of said note, and the holder of the same having made application to the parties of the first part, requiring them (the trustees) to sell the whole of said real estate, and said parties of the first part

did, on the twenty-sixth day of August, 1881, cause notice of the time and place of sale to be published in the *Sacramento Daily Record-Union*, a newspaper printed and published in the county where said lands were situate, in which notice the seventeenth day of September, 1881, at the Court-house door in said county, at the hour of ten o'clock A. M., was fixed as the time and place when and where said premises would be sold at public auction, under the provisions of said trust deed. That said notice was published one time each week for three successive weeks, previous to said day of sale, in said newspaper. That on the seventeenth day of September, 1881, at the hour of ten o'clock A. M., at the Court-house door, in said county, the said trustees sold at public auction, for cash in gold coin, said land and premises to the highest bidder therefor. That at such sale the said party of the second part was the highest bidder and best bidder," etc.

The foregoing deed was executed to one Weyant, and he executed a deed to the plaintiff.

1. It appears from the evidence in the case that Bohl, the payee of the note, to secure the payment of which the deed of trust was given, assigned the note to Fountain, one of the trustees, on the twenty-seventh day of September, 1880, and on the trial of the case the defendant offered to prove that neither Bohl nor any other person ever made any application to Leonard or Fountain (the trustees) to sell the land to satisfy the indebtedness secured thereby; but objection was made to the introduction of such evidence, and it was excluded by the Court.

It is expressly provided in the deed of trust, that any recitals contained in a deed executed by the trustees to a purchaser of the trust property, shall be *conclusive evidence* of the truth of the facts recited; and under the circumstances developed on the trial of this case, the defendant was concluded thereby. It is true that the answer charges fraud and collusion on the part of the plaintiff and the trustees, but there is no evidence in the transcript sustaining such charge; and the finding of the Court was the other way.

2. The next point in the case deserving of notice, is the fact that Fountain, one of the trustees, became the owner by assignment of the note executed by the defendant to Bohl.

and it is claimed that he had no right to sell the trust property for his own benefit. By Section 2263 of the Civil Code it is provided, that "a trustee can not enforce any claim against the trust property which he purchases after or in contemplation of his appointment as trustee; but he may be allowed, by any competent Court, to charge to the trust property what he has in good faith paid for the claim, upon discharging the same." If the contest in this case were between the defendant and the trustee, it is very plain that the trustee could claim nothing by virtue of the sale; but it does not appear that the purchaser of the property at the trustees' sale had any notice of the assignment of the note to the trustee; and, so far as the proceedings in the case show, the purchaser believed, and had a right to believe, that the sale was made regularly and for the benefit of Bohl, the payee of the note. We think that, in the absence of all knowledge of the unlawful dealings of the trustee, the title of the purchaser was not affected by the fact that the trustee was dealing with the trust property for his own benefit.

3. There are two other points, that may be noticed together:

The defendant was not prejudiced by the refusal of the Court to allow a proposed amendment to the answer, for the reason that the amendment would not have helped the defendant's case; and the other point, that the purchaser paid for the property with a check instead of gold coin, as provided in the deed of trust, is not well taken. It appears from the evidence not only that a check was given, but that the money was actually paid on the check.

Judgment and order affirmed.

SHARPSTEIN and MYRIOK, JJ., concurred.

[No. 10,662. — In Bank.]
December 15, 1882.

THE PEOPLE v. NANCY HAMILTON.

EXAMINATION OF JUROR — CHALLENGE — ACTUAL BIAS. — Upon the examination of a juror, who has stated that he has formed a qualified opinion as to the guilt or innocence of the defendant, the juror can not, in the absence of a challenge for actual bias, be asked whether he believes the defendant to be guilty or not guilty.

Id. — Id. — Id. — Upon a challenge for actual bias such a question might properly be asked, as tending to show an existence of actual bias.

Id. — Id. — Id. — **CASE DISTINGUISHED.** — What is said in *People v. Williams*, 6 Cal. 206, with reference to the impropriety of permitting the inquiry on which side an opinion has been expressed, was not called for in the case. But treating the case as correctly deciding, that, upon the issue of "implied bias," which, as the law then stood, was established by showing that a juror "had formed or expressed an unqualified opinion," etc., it was immaterial to know, and therefore (in view of the possible effect upon other persons summoned as jurors and awaiting examination) improper to inquire, whether the "unqualified opinion" was for or against the prisoner; such an issue can no longer be raised, since "the having formed or expressed an unqualified opinion as to the guilt or innocence of the accused" is no longer a cause of challenge for implied bias. (Penal Code, 1074.)

Id. — Id. — Id. — **CASE EXPLAINED.** — The language of the Court in *People v. Backus*, 5 Cal. 277, is not to be construed as holding that a defendant need not interpose a challenge, as for implied or actual bias, until he has proved that it ought to be allowed, or that he can complain of any ruling with reference to a question he may ask, without challenging the juror, but only that it is the better practice to permit preliminary inquiries, which, if answered satisfactorily to defendant, may relieve him of the necessity of challenging. But, if it be admitted to be the rule, that the examination may be exhaustive before the challenge, the examination, or any ruling during its continuance, can not be made the foundation for alleged error, unless the challenge is taken at some stage of the proceedings in the Court below.

Id. — Id. — **PEREMPTORY CHALLENGE — CASES EXPLAINED AND LIMITED.** — After a trial of an issue as to the existence of actual bias in the mind of the juror, and a finding against the challenging party, it would appear that he should be sufficiently informed to exercise his right of peremptory challenge. The law gives him the advantage of any knowledge he may thus acquire, but does not afford him an opportunity to examine a juror for the avowed object of determining whether he will challenge him peremptorily. *Watson v. Whitney* (28 Cal. 379) and *People v. Car Boy* (57 Id. 102) explained, and the dicta on this point disapproved.

INSANITY — REASONABLE DOUBT — BURDEN OF PROOF — SATISFACTORY PROOF — DEFINITION — CASE EXPLAINED AND LIMITED. — The Court below charged the jury as follows: "Where insanity is relied upon as a defense, the burden of proof is on the defendant; and that the proof must be such in

amount that if the single issue of sanity or insanity of the defendant should be submitted to the jury in a civil case, they must find that he was insane. That the insanity must be clearly established by satisfactory proof."

Held: In the connection in which the words are used, to say that insanity must be "clearly established," is not to say that the evidence must more than preponderate, but only that the preponderance must be plainly apparent. Such must be the case in every instance where the affirmative of an issue is sought to be established and a peculiar presumption be overcome. There may be a greater or less degree of lucidity, but the preponderance must be distinctly perceptible. It is in this sense that the expression is often used by Courts and law writers in speaking of the degree of evidence necessary to overcome a presumption greater than that which arises, that a particular fact—as probably existing as non-existing—exists—*e. g.*, as when it is said that fraud must be clearly proved. In civil cases fraud is proved by a preponderance of the evidence, yet, inasmuch as the law, to the credit of human nature, presumes that men are oftener honest than dishonest, the preponderance must clearly appear. Thus only can the fact of fraud or insanity be "satisfactorily proved." The majority opinion in *People v. Wreden* (59 Cal. 392) on this point disapproved.

APPEAL from a judgment of conviction and from an order denying a new trial in the Superior Court of the County of Sacramento. DENSON, J.

Clinton L. White, for Appellant.

A. L. Hart, Attorney General, for Respondent.

McKINSTRY, J.:

In his petition for rehearing, counsel for defendant and appellant insists that two propositions, by him advanced, have been entirely misapprehended by this Court. The first of these relates to the ruling of the Court below in sustaining objections to questions asked by defendant at the impaneling of the jury; the second, to an instruction given to the jury upon the subject of insanity.

1. Wilkinson was examined on oath as to his qualifications to sit upon the jury. After stating that he had an opinion as to the guilt or innocence of defendant, he was asked by counsel for defendant: "Does your opinion go to the question of her guilt, or does it go to the question of her innocence?" The Court sustained the District Attorney's objection to the question, and defendant duly excepted. The bill of exceptions

proceeds: "The juror was afterwards excused upon a challenge for cause."

It is perfectly manifest that defendant was deprived of no substantial right — even conceding the ruling to have been erroneous — in so far as was concerned her privilege to challenge for bias, actual or implied.

Counsel for appellant argues, however, that the question should have been allowed, "to enable the defendant to intelligently exercise the right of peremptory challenge." But if counsel be correct in this assertion, still no injury was done to defendant, who had no occasion to determine whether she should peremptorily challenge the person under examination, since such person "was excused upon a challenge for cause."

J. M. Henderson was examined as to his qualifications to serve on the jury. He stated that he had a *qualified* opinion as to the case. He was asked by counsel for defendant: "From the opinion you have formed in the case, and which you say is a qualified opinion, do you believe the defendant to be guilty, or do you believe her to be innocent?" The District Attorney objected, on the ground that the question was incompetent, irrelevant, and improper. The Court sustained the objection, to which ruling defendant excepted.

If Henderson had been challenged for actual bias, we think — notwithstanding the fact that counsel for appellant disavows the proposition — the question might properly have been asked. The issue being in such case, "the existence of a state of mind on the part of the juror * * * in reference to either of the parties which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party" — (Penal Code, 1073) — the fact that a jurymen had a qualified opinion, or even impression, of defendant's guilt, might *tend* to show an existence of actual bias. And this is true, although it is also true that actual bias does not exist, provided the juror, notwithstanding his qualified or unqualified opinion, can and will "act impartially and fairly."

It has been supposed that *People v. Williams* (6 Cal. 206) lays down different doctrine. In that case the question did not arise. There the juror was asked if he had formed or expressed an unqualified opinion "as to the guilt or innocence

of the accused," and answered that he had formed an unqualified opinion, or an opinion "not qualified." There seems to have been no further examination, yet, upon this evidence the District Court held the juror competent and qualified. The Supreme Court decided that the Court below should, upon the uncontradicted testimony, have sustained a challenge for implied bias. The only argument adduced in support of the ruling of the lower Court was that it did not appear from the record that the unqualified opinion was adverse to defendant, although it did appear that the person examined had expressed an unqualified opinion as to the guilt or innocence of the accused.

What is said in *People v. Williams* with reference to the impropriety of permitting the inquiry on which side an opinion has been expressed, was not called for in the case. But treating the case as correctly deciding, that, upon the issue of "implied bias," which, as the law then stood, was established by showing that a juror "had formed or expressed an unqualified opinion," etc., it was immaterial to know, and, therefore (in view of the possible effect upon other persons summoned as jurors and awaiting examination), improper to inquire, whether the "unqualified opinion" was for or against the prisoner; such an issue can no longer be raised, since "the having formed or expressed an unqualified opinion as to the guilt or innocence of the accused" is no longer a cause of challenge for implied bias. (Penal Code, 1074, as amended April 9, 1880.)

The reason suggested in *People v. Williams* never applied to a question put upon the trial of an issue of actual bias, and the importance of ascertaining the exact condition of the juror's mind requires the freest latitude in an investigation, the end of which is to ascertain—"Is the juror impartial?"

But the juror Henderson was not challenged for actual bias, nor challenged at all. Here again, it would seem, certain early cases in California have been somewhat misunderstood. In the case of *The People v. Backus* (5 Cal. 277), Murray, C. J., said: "There is another objection raised by the appellant which, if not sufficiently erroneous to reverse the judgment, at least calls for correction at the hands of this Court. I refer to the course adopted by the Court below in refusing to allow the

prisoner to propound any interrogations to the jurors without first challenging them for cause. It is usual everywhere to ask the juror if he has formed or expressed an opinion as to the guilt or innocence of the accused, but in the present case the Court refused to allow these questions to be asked, and the prisoner was compelled to prejudice his case by first challenging the jurors and then having the fact of their bias determined by triers appointed by the Court. Before being thus compelled to challenge, he should have been allowed to ascertain whether there was any fact from which the presumption of bias or prejudice would arise, and this fact having been ascertained, then the challenge would properly have followed, and the triers would have had to ascertain whether there was bias in fact."

Read as a whole, the language quoted is not to be construed as holding that a defendant need not interpose a challenge, as for implied or actual bias, until he has proved that it ought to be *allowed*, or that he can complain of any ruling with reference to a question he may ask, without challenging the juror, but only that it is the better practice to permit preliminary inquiries, which, if answered satisfactorily to defendant, may relieve him of the necessity of challenging. But, if it be admitted to be the rule, that the examination may be exhaustive before the challenge, the examination, or any ruling during its continuance, can not be made the foundation for alleged error, unless the challenge is taken at some stage of the proceedings in the Court below. In *People v. Reynolds*, 16 Cal. 129, the Court, by Baldwin, J., said: "It is the common practice in this State to interrogate a juror upon his *voir dire* generally as to his qualifications, with a view to obtain information upon which to rest a specific challenge. The practice, though productive of some inconvenience, is one of necessity; for unless it be followed, it will often be quite impossible to ascertain the qualifications of the juror. * * * If, therefore, the challenge for implied bias be not taken before the juror is examined, the proper course to pursue is to make the challenge, stating distinctly its causes, *immediately after the preliminary examination is closed*. The District Attorney can then except to the challenge, or deny the facts it alleges. If the latter course be adopted, the juror

can be further examined, and other witnesses called, and the matter be thus submitted to the Court." Of course, under the Penal Code, the same rule applies to the matter of actual bias.

In the present case, the transcript shows that *Henderson* was not challenged before or after his examination upon his *voir dire*, either for actual or implied bias. His examination, therefore, went for naught. No issue was made to which his testimony was directed, and of course the action of the Court, refusing to allow the question whether his qualified opinion was favorable or hostile to defendant, can not be assigned as error.

After a trial of an issue as to the existence of actual bias in the mind of the juror, and a finding against the challenging party, it would appear that he should be sufficiently informed to exercise his right of peremptory challenge. The law gives him the advantage of any knowledge which he may thus acquire, but does not afford him an opportunity to examine a juror for the avowed object of determining whether he will challenge him peremptorily.

Mr. Justice Crocker, in *Watson v. Whitney*, 23 Cal. 379, remarked: "Each party has a right to put questions to a juror to show, not only that there exists proper grounds of a challenge for cause, but to elicit facts to enable the party to decide whether or not he will make a peremptory challenge." But this language was clearly *dictum*, since one of the questions asked was evidently directed to an ascertainment of the fact whether or not the juror had formed or expressed an *opinion*, and the having formed or expressed an unqualified opinion was (under the law then in force) cause of challenge for implied bias.

In *People v. Car Soy*, 57 Cal. 102, two of the Justices in Department Two cited the language of Mr. Justice Crocker, above quoted, with apparent approval. But an examination of that case will show that the questions there objected to were such as, if answered in the affirmative, would lead to facts tending to prove that the juror was *actually biased*.

It has never been declared, in any case where such declaration was necessary to the decision, that a person summoned as a juror may be questioned for the mere purpose of ascer-

taining whether the questioner shall determine to challenge him peremptorily.

The Penal Code, after enumerating a large number of facts, the mere existence of which shall conclusively establish bias on the part of an individual juror, gives to the parties to a criminal action an opportunity to enter into an enlarged inquiry as to the state of mind of the juror; whether, with or without reason, he is not strictly impartial. With reference to the existence of any one of the facts, which, by law, conclusively establishes implied bias, and with reference to the existence of a state of mind in the juror rendering him not strictly impartial, an issue must be made up before or after a preliminary examination. After giving the opportunity thus to ascertain the existence or non-existence of implied or actual bias, the Penal Code accords to a defendant on trial for an offense punishable with death twenty *peremptory* challenges. These he exercises at his own volition. The State can not say he ought not to challenge peremptorily a particular juror. No issue is raised upon the result of the trial of which his right depends. As no issue can be made or tried, to which the question, intended simply to enable a defendant to make up his mind whether he will challenge peremptorily, can apply, it would follow, if appellant is right, that the trial Court can place no limit upon the questions which defendant may choose to ask.

While, therefore, a defendant may, when the opportunity to interpose a peremptory challenge arises, have the benefit of any information acquired during the trial of a challenge for implied or actual bias, he can not embark in a general exploration for the sole purpose of satisfying himself whether it will be safe to be tried by a juror against whom no legal objections can be urged.

2. It is said that the Court below erred in charging the jury as follows: "Where insanity is relied upon as a defense, the burden of proof is on the defendant; and that the proof must be such in amount that if the single issue of sanity or insanity of the defendant should be submitted to the jury in a civil case, they must find that he was insane. That the insanity must be clearly established by satisfactory proof."

In answer to questions propounded by the House of Lords

(Roscoe's Cr. Ev. 953), Tindal, C. J., said: "To establish a defense on the ground of insanity, it must be *clearly proved* that at the time of committing the act the party accused was laboring under such a defect of reason," etc. In *People v. M'Donell*, 47 Cal. 136, an instruction given in the Court below was approved, and was thus construed: "In other words, insanity must be clearly established by satisfactory proof."

Appellant relies upon *People v. Wreden*, 8 Pac. C. L. J. 191. We do not find it necessary to dissent from the philological criticism found in the opinion of two of the Justices in that case. The judgment of the trial Court was there properly reversed, if for no other reason, because the instructions were clearly contradictory. In the same charge the jury were told "if they entertained a reasonable doubt of the sanity of the defendant he must be acquitted," and "it was not sufficient" (to justify an acquittal) "that they should merely entertain a reasonable doubt of his sanity."

The first question to be solved in every review of an instruction is, of course, what idea was conveyed by it to the jurymen? In the case before us the jurors were told, in effect, that the burden of proving insanity is on the defendant; that he is not obliged to prove his insanity beyond a reasonable doubt, but, on the other hand, it is not sufficient to create a reasonable doubt that the defendant is or may be insane; that it is enough, if the evidence be such as would justify a jury in a civil case in finding defendant insane, were the single issue "sane or insane" submitted to them — that is, it is enough if the insanity be established by a preponderance of evidence. We are convinced the phrase used in connection with the last proposition — "the insanity must be clearly established by satisfactory proof" — could not have misled the jury. The words were added, it would appear, in opposition to any suggestion that defendant would be entitled to the benefit of a reasonable doubt on the question of insanity, and to guard the jury from the effect of such suggestion. Reading the charge as a whole — as far as it treats of insanity — the jury were informed that insanity was established satisfactorily if it was proved by a clear preponderance of the evidence.

Having been told that the evidence in favor of insanity must outweigh the evidence in favor of sanity, the jury were further instructed that this must clearly appear; that they must not mistake a *quantum* of evidence which creates a doubt of defendant's sanity for that which overcomes the presumption of sanity, and the proof of such facts as may be established affirmatively for the purpose of strengthening the presumption. In the connection in which the words are used, to say that insanity must be "clearly established" is not to say that the evidence must more than preponderate, but only that the preponderance must be plainly apparent. Such must be the case in every instance where the affirmative of an issue is sought to be established and a peculiar presumption be overcome. There may be a greater or less degree of lucidity, but the preponderance must be distinctly perceptible. It is in this sense that the expression is often used by Courts and law writers in speaking of the degree of evidence necessary to overcome a presumption greater than that which arises, that a particular fact — as probably existing as non-existing — exists, *e. g.*, as when it is said that fraud must be clearly proved. In civil cases fraud is proved by a preponderance of the evidence, yet, inasmuch as the law, to the credit of human nature, presumes that men are oftener honest than dishonest, the preponderance must clearly appear. Thus only can the fact of fraud or insanity be "satisfactorily proved."

Judgment and order affirmed.

MORRISON, C. J., and ROSS, MYRICK, and MCKEE, JJ., concurred.

SHARPSTEIN, J., dissented.

[No. 3,664. — Department One.]
December 15, 1882.

A. MONTGOMERY v. N. S. MERRILL ET AL.

EFFECT OF ORDER IN INSOLVENCY STAYING PROCEEDINGS. — After execution of the mortgage in suit, and prior to the commencement of the action, the mortgagor was adjudged insolvent, and a stay of proceedings ordered. No judgment herein was asked for any deficiency after sale of the mortgaged property, but the same was waived.

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Held: The order in the matter of the insolvency staying proceedings did not prevent plaintiff from foreclosing his mortgage lien.

ID.—PRESUMPTION.—The plaintiff in his complaint averred that the “action was brought by leave of the Court first had and obtained.”

Held: If the order staying proceedings could be construed as having any effect upon the plaintiff's right to foreclose his lien, the presumption is that the Court which made the order had, in the exercise of its power, modified it so as to permit the plaintiff to bring the action.

ID.—HOMESTEAD—JUDGMENT ON PLEADINGS—ANSWER.—The answer of the defendants admitted the allegations of the complaint, but affirmative matter as to the insolvency of the mortgagor, and as to a declaration of homestead was set up to defeat the plaintiff's action. As to the homestead, it was alleged that on the — day of —, A. D., 18—, the defendant, as head of a family, had acquired a homestead interest in the mortgaged premises, by making, acknowledging, and recording, according to law, “on that day,” a declaration of homestead upon the premises.

Held: The answer did not show any existing claim which had attached prior to the mortgage lien. Taken in connection with the admission in the defendants' answer of the allegation in the complaint that the claim asserted by the defendants was subsequent and subject to the mortgage, the answer must be regarded as frivolous, and containing no defense to the action. It was therefore proper for the Court to grant the motion for judgment on the pleadings.

PRESUMPTION—ATTORNEY'S FEE IN FORECLOSURE.—The Court also gave judgment for the sum of \$188.65, “attorney's fee provided in the mortgage.” The appellant contends that the Court should have fixed the fee.

Held: As there is in the record no bill of exceptions or statement showing the contrary, it must be presumed that the Court proceeded regularly in fixing the amount of the attorney's fee, and that the judgment is in all respects correct.

APPEAL by defendants from the judgment of the Superior Court of the County of Colusa. **BLANCHARD, J.**

Action of foreclosure of mortgage. The facts are stated in the opinion of the Court.

John T. Harrington, for Appellants.

It is not claimed that the denials, as such, in the answer, afford a defense to the motion for judgment on the pleadings. But it is contended that if any of the matters alleged were such as would defeat or delay the plaintiff's action, then such motion should not have been granted, and the judgment is accordingly erroneous. “The ground upon which a motion made by plaintiff for judgment on the pleadings proceeds in any case is that his complaint is sufficient to warrant it, and that the answer presents nothing, either by way of denial or

of new matter, to bar or defeat the action." (*Felch v. Beaudry*, 40 Cal. 439.) The answer sets up the insolvency proceedings of the defendant N. S. Merrill, and shows that an order was made by the Court therein, staying all proceedings against the defendant, which order had not been vacated, modified, or changed in any manner whatever, at the time of the commencement of this action, and that the insolvency proceedings were still pending. By section 6 of the Insolvent Act of 1880, C. C. P. 647, it is made the duty of the Court, upon receiving and filing the petition, schedule, and inventory, to declare the petitioner therein insolvent, etc., and the section further provides that, "upon granting said order, all proceedings against the said insolvent shall be stayed."

But, it is claimed that by Sections 44 and 45 of said Act, creditors of the insolvent debtor, whose claims are secured by mortgage or other liens, are excepted from the operation of the order staying proceedings. It will be seen, however, by an inspection of the several provisions of the Insolvent Act, that there is no distinction made in the class or character of debts, which may be proved in insolvency.

Section 37 provides: "All debts due and payable from the debtor at the time of the adjudication of insolvency, and all debts then existing but not payable until a future time, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the debtor." And Section 44, together with subdivision 6 of Section 21, confers the power upon and provides the means for the assignee to discharge the property of the insolvent debtor from mortgage or other liens. The assignee takes and is entitled to all the property of the insolvent debtor, except such as may be exempt from execution. (Section 17, Insolvent Act.) It was not, of course, the purpose or design of the insolvent law to deprive any holder of his lien against the insolvent debtor. But, in giving to the assignee power to redeem all valid mortgages or other liens, or to sell the property subject to them, was to postpone the right of action in the holders of such liens, pending the insolvency proceedings. And this is made apparent from the provisions of Section 45, as follows: * * * "And no creditor whose debt is provable under this Act shall be allowed, after the commencement

of proceedings in insolvency, to prosecute to final judgment any action therefor against the debtor until the question of the debtor's discharge shall have been determined. * * * Provided, there be no unreasonable delay on the part of the debtor, * * * in prosecuting the case to its conclusion; and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the Court, in insolvency may proceed to judgment, for the purpose of ascertaining the amount due," etc.

With one exception, not material to this controversy, there are but two conditions given by the statute upon which any action can be prosecuted to judgment by a creditor, after the commencement of insolvency proceedings. These conditions should appear affirmatively. But when, as in this case, the contrary actually appears, there was no authority of law for the prosecution of the action to final judgment, or even for the commencement of it.

The averments in the answer, respecting the claim of the defendants to the premises, by virtue of the declaration of homestead made and filed thereon, constituted a defense to the action, which the motion for judgment on the pleadings confessed.

Such motion confesses the facts as stated, and is equivalent to a general demurrer to the answer. (*Taylor v. Palmer*, 31 Cal. 257.)

The particular time when the homestead interest attached to the premises does not appear from the answer. But, when tested by general demurrer, it would be held sufficient to entitle defendants to offer proof of the averment.

The homestead interest is necessarily disposed of, by a decree to which both husband and wife are parties. And they would be estopped from asserting such interest in any subsequent action. Hence it is a proper matter of defense in the foreclosure suit.

If there should be any question of the sufficiency of the foregoing objections to the judgment in this case, that which affects the granting of attorney's fee, by judgment on the pleadings, must be considered as fatal to it. The prayer of the complaint in this respect is, that plaintiff have "judgment against the defendant N. S. Merrill for counsel fees, upon the

amount found due for principal, and interest at the rate of five per cent." This is the stipulated rate in the mortgage, as averred in the complaint. The judgment is according to the prayer of the complaint, and it adjudges that there is due plaintiff "the sum of one hundred and eighty-eight dollars and sixty-five cents attorney's fee, provided in said mortgage." By statute it is provided that, "in all cases of foreclosure of mortgage, the attorney's fee shall be fixed by the Court in which the proceedings in foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding." (Stats. 1873-4, p. 707.) It is the duty of the Court in such cases to fix the amount of the attorney's fees. (*Stockton Savings and Loan Society v. Donnelly*, 9 P. C. L. J. 487.)

Now, it will not be contended that, in granting a motion for judgment on the pleadings, the Court fixes the attorney's fee; or that there is, in such case, any means afforded the Court to fix it.

H. M. Albery, for Respondent.

The proceedings in insolvency of the defendant N. S. Merrill, as shown in the answer, constitute no defense or bar to this action.

1. Because the plaintiff has not presented or proved his "debt or claim" (§ 45, Insolvency Laws) against the estate of the insolvent debtor.

2. Because this is not an action to recover judgment upon a debt or claim, "proved" or "provable" against the estate of the insolvent debtor. (§ 44, Insolvency Laws.)

3. Because this is an action to foreclose a mortgage—to have the mortgaged property applied to the mortgage debt.

4. Because no personal judgment ever was asked or granted in the action.

5. Because the plaintiff asked and obtained leave of the Court to commence this action.

6. Because the Court had jurisdiction and control of the insolvency proceedings, as well as the foreclosure proceedings.

The defendants could have no independent or other interest in the land, by virtue of a declaration of homestead, or otherwise, arising after the execution of the mortgage, that

could not be foreclosed and determined in this action. (C. C. P., § 726; C. C., § 1241, subd. 4.)

It is alleged in the complaint that the defendant Nancy Merrill, wife of N. S. Merrill, has or claims to have some interest in or claim upon said premises or some part thereof, which interest or claim is subsequent to and subject to the lien of the plaintiff's mortgage. This allegation not being denied, is sufficient to bind any interest that the defendant Nancy Merrill may have had in the land which arose after the execution of the mortgage; and as to the defendant N. S. Merrill, of course his interest in the land, whatever it may have been, was subject to the lien of the mortgage. No valid homestead claim is set out in the answer. It is alleged that in the year of our Lord *eighteen*, defendant was the head of a family, and at said time resided with his family on the land described in the complaint; and that at said time he made and acknowledged his certain declaration of homestead, etc. This declaration of homestead is too ancient to be good; it contains recitals which are against the knowledge of the Court. Now matter, in order to constitute a bar or defense to any action, must not only be well pleaded, but must disclose some existing claim or right in the party pleading it as well.

It is admitted by counsel for appellants that the precise time at which the homestead right attached is not disclosed in the answer, but it is claimed that the Court will presume that the homestead attached prior to plaintiff's mortgage, etc. To so hold would be to overrule the well-settled doctrine that no presumptions can be indulged as against a final judgment.

It is alleged in the complaint, and the Court found, that there is due plaintiff upon the note and mortgage set out in the complaint, in addition to the amount due for principal and interest, the sum of \$188.65, for attorneys' fees, etc. This is sufficient. (See *The Stockton Savings and Loan Society v. Donnelly*, 9 P. C. L. J. 487.)

There being no bill of exceptions before this Court, the ruling of the lower Court granting plaintiff's motion for a judgment upon the pleadings can not be reviewed upon this appeal. (*Hemme v. Hays*, 55 Cal. 837, which see, as being very similar to the case at bar.)

All presumptions are in favor of the validity and regularity of the judgment. If necessary to support the judgment this Court will presume that the lower Court heard testimony, fixed the attorney's fees, and did everything necessary in order to a valid judgment. For aught that appears in the record, the lower Court attended to all of these matters.

McKEE, J.:

This appeal is taken on the judgment roll, from a final judgment entered on the pleadings in the case. The judgment was entered in an action commenced December 8, 1881, to foreclose a mortgage given to secure payment of a promissory note and a counsel fee, at the rate of five per cent. upon the principal and interest due upon the note in case of foreclosure. In the complaint it was alleged that the wife of the mortgagor, who was named in the complaint as a party defendant, had or claimed to have some interest in or lien upon the mortgage premises, which she claimed to have acquired subsequent and subject to the mortgage lien; and that, since the execution of the mortgage the mortgagor had become insolvent, and, therefore, against him, no judgment was asked for any deficiency after a sale of the mortgage premises. By the answer of the defendants all the allegations of the complaint were admitted; but it was affirmatively averred that the mortgagor had been adjudicated insolvent on October 29, 1881, and that all proceedings against him, as an insolvent debtor, had been stayed. Also, "that on the ——— day of ———, A. D., 18—," the defendant, as head of a family, had acquired a homestead interest in the mortgaged premises, by making, acknowledging, and filing, according to law, "on that day," a declaration of homestead upon the premises.

Upon these pleadings the Court, on motion, gave judgment in favor of the plaintiff, according to the prayer of his complaint, for the amount of the principal and interest of the mortgage debt, and \$188.65, "attorney's fee provided in the mortgage," and costs; and to this no exception was taken by the defendants. But it is contended that the judgment is erroneous, because the answer contained matter which operated as a bar to the maintenance of the action.

The adjudication of the defendant's insolvency did not con-

stitute a defense to the action, nor did the existence of a stay of all proceedings against the insolvent debtor have that effect. The action was not brought against the insolvent to recover a money judgment upon the debt; it was brought to obtain a decree of foreclosure and sale of the mortgaged premises for the satisfaction of the debt. As a creditor of the insolvent debtor, having a mortgage lien, the plaintiff had the right, when the mortgagor was adjudged insolvent, to look to the mortgage alone, or to prove the mortgage debt against the estate of the insolvent, pursuant to the provisions of Section 44 of the Insolvent Act. (Stats. 1880, p. 92.) According to those provisions, a mortgage creditor of an insolvent debtor is not permitted to prove his debt in whole, unless he releases or transfers his mortgage to the assignee in insolvency; nor in part, unless he agrees with the assignee upon the value of the mortgaged premises, and the value should be less than the mortgage debt; or unless he agrees that a sale of the mortgaged premises may be made, under an order of the Court, "in such manner as the Court may direct;" in such cases he will be admitted to prove any deficiency. Or, if he releases or transfers his mortgage to the assignee, he will be admitted to prove the entire debt and share in the administration of the assets. But unless the value of the mortgaged premises shall be ascertained by agreement, or the property itself shall be sold under the directions of the Court, or the mortgage shall have been released or transferred to the assignee in insolvency, it is not permissible for the mortgage creditor to prove his debt in whole or in part, nor to maintain any action against the insolvent debtor for the collection of his debt. Such an action would be against the policy of the insolvent law and in violation of the order of the Court, which stayed all proceedings against the insolvent debtor. Yet as the assignee in insolvency takes only such interest and rights as the insolvent debtor had in the mortgaged premises, subject to the mortgage, the insolvency proceedings do not affect the right of the mortgagee to foreclose his lien; and in this case the mortgagee relied wholly on his mortgage lien. By his complaint he waived personal judgment for any deficiency which might be remaining after execution of a foreclosure and sale; he, therefore, had no debt or claim proved or prov-

able against the estate of the insolvent debtor, and as his action was not to enforce the collection of his debt out of the assets of the estate, it could not interfere with the insolvency proceedings, and the order staying all proceedings against the estate did not operate to prevent the plaintiff from maintaining the action.

But if the order could be construed as having any effect whatever upon the right of the plaintiff to sue for foreclosure, the Court that made the order had jurisdiction to modify or set it aside in favor of a mortgage creditor, so as to permit him to proceed by action on the equity side of the Court to foreclose; and the presumption is, that the "stay" was so modified or set aside as to the plaintiff, because the complaint avers, and it is not denied, "that the action was brought by leave of the Court first had and obtained." The stay of proceedings, therefore, in no way affected the right of the plaintiff to maintain his action, nor did it operate to postpone the action pending the insolvency proceedings.

Nor did the answer otherwise disclose any defense to the action, or contain any matter which would defeat or delay the action. The new matter, by which the defendant attempted to assert a homestead claim or interest in the mortgaged premises, was not well pleaded; it did not, affirmatively or otherwise, show any existing claim which had attached prior to the mortgage lien. Taken in connection with the admission by the defendants of the allegations in the complaint, that the "claim" asserted by the defendants was subsequent and subject to the mortgage, the answer itself must be regarded as frivolous—it admitted every averment in the complaint, and contained no defense; and the case was one in which it was proper for the Court to order judgment for the plaintiff upon the pleadings. (*Hemme v. Hays*, 55 Cal. 337.)

And in adjudging that the plaintiff was entitled to the sum awarded for an attorney's fee, as provided in the mortgage, there appears no error. It was the duty of the Court to fix the amount of the attorney's fee. (Stats. 1873-4, p. 707.) Presumably the Court discharged that duty. The judgment rendered recites that there was due the amount stated, for principal and interest, upon the mortgage debt, and one hundred and eighty-eight dollars and sixty-five cents for an attor-

ney's fee, provided in the mortgage, and the judgment to that effect was according to the allegations and prayer of the complaint in the case. There is no bill of exceptions or statement on appeal, and, in the absence from the record of anything to the contrary, it must be presumed by the appellate Court, that the Court below proceeded regularly in fixing the amount of the attorney's fee, and that the judgment is, in all respects, correct. (*Hastings v. Cunningham*, 39 Cal. 137.)

Judgment affirmed.

Ross and McKINSTRY, JJ., concurred.

[No. 8,632.— Department One.]

December 15, 1882.

OCCIDENTAL BUILDING AND LOAN ASSOCIATION v. J. H. SULLIVAN ET AL.

CONSTRUCTION OF BY-LAW OF CORPORATION — CONTRACT — PENALTY — FORFEITURE — MORTGAGE — FORECLOSURE. — Action to foreclose mortgage, etc. The defendants, S. and wife, owners of stock in the plaintiff corporation, a building and loan association, borrowed money from the plaintiff, and executed their promissory notes to it. To secure the payment of the notes, they mortgaged certain real estate, and hypothecated their stock to the plaintiff. The ninth by-law of the plaintiff is as follows: "Every stockholder for every share of stock shall pay to the Secretary, on the second Wednesday in every month, the sum of one dollar in gold." The eleventh by-law of the plaintiff is in the following words: "Any stockholder failing to pay his or her monthly installments or interest shall pay a fine of ten per cent. per month upon the amount of the indebtedness. This fine shall be charged by the Secretary, and collected with the delinquent's monthly dues; and in case any stockholder shall neglect or refuse to pay the monthly dues or fines for the space of six months, the Secretary shall tender to the delinquent the amount actually paid in, deducting all fines and forfeitures that may be charged against him or her, and from that time he or she shall cease to be a member of the association."

Held: 1. By-law xi. in no way affects or changes the terms of any contract of loan between the association and a stockholder; 2. The word "interest" in by-law xi. does not refer to interest due upon any loan from the corporation to a stockholder; 3. Penalties and forfeitures are not to be favored, but must be created by unambiguous language.

APPEAL by defendants from the judgment of the Superior

Court of the County of Sacramento, and from an order denying a motion for a new trial. **DENSON, J.**

Action of foreclosure of mortgage. The defendants, S. and wife, were the owners of six shares of stock in the plaintiff corporation, a building and loan association in the city of Sacramento, and on two several dates borrowed money from the plaintiff, for which they executed their promissory notes. To secure the payment of the promissory notes, they mortgaged to the plaintiff certain real estate, and hypothecated to the plaintiff the said stock. The first note was as follows:

"\$800.

SACRAMENTO, December 16, 1879.

"Six years after date I promise to pay to the order of the Occidental Building and Loan Association eight hundred dollars in gold coin, with interest thereon at the rate of ten per cent. per annum, in like gold coin, to be paid monthly, on the second Wednesday of each month. Should default be made in any of the payments aforesaid, or in the payment of any installment hereafter to fall due on my stock in said Association, then said Association may, at its option, declare the whole debt to be due, and proceed at pleasure to enforce its collection.

"EMMA SULLIVAN,

"JAMES H. SULLIVAN."

The second, in all essential particulars, was the same. Nothing was paid on either of the notes, or as installments on the stock, except such amounts as became due prior to the second Wednesday in May, 1881. In September, 1881, the plaintiff declared the whole of the notes to be due, for default in the payment of the interest thereon and in the payment of the installments on the stock, and commenced this action to recover judgment and to foreclose its lien. Judgment was given for the plaintiff. The other facts are stated in the opinion of the Court.

J. H. McKune, for Appellants.

The plaintiff bases its claim to compound interest on the notes sued on, and the installments due on stock per month, on by-law xi. The language is: "Any stockholder failing to pay his or her monthly installment, or interest, shall pay a fine of ten per cent. per month on the amount of the indebtedness."

Plaintiff claims that the words "or interest" mean interest on any note the stockholder may have given the plaintiff. The defendants insist that the words have no reference to any interest on a note outstanding, but refer to and mean the same thing as installments.

That the latter is the true construction, we submit the following considerations: It is only a stockholder to whom the words apply. To hold the contrary would be to determine that the plaintiff discriminates against its members, and whilst a mere borrower can secure loans at simple interest, a member must pay compound interest at ten per cent. per month. If the construction claimed by plaintiff be correct, it can not only claim ten per cent. on the interest due but upon the whole debt. There are no apt words in the by-law showing an intention to levy ten per cent. per month fine on a borrower.

And this Court ought not to construe the by-law to favor a harsh construction. There may be reasons why a by-law shall be so framed as to require a member to pay a ten per cent. per month fine on installments, but there can be none to levy such a fine on a borrower. The defendants, as to the notes, have a right to stand on their contract under the Civil Code, and the by-law in question can not be made to interpolate a new provision in the notes sued on.

If that had been the intention of the framers of by-law xi., apt words would have been used, indicating it clearly. Even plaintiff does not now claim that the word "indebtedness" covers the principal of the notes given. Why, then, the interest? The notes, whether due or not, are debts, and the interest is part of the debt. If the word "indebtedness" applies at all to the loan, it covers the whole loan and the interest to accrue thereon. This consideration shows that the word "indebtedness" contained in by-law xi. is limited to the monthly installments; called, also, interest on stock. This construction is further strengthened by the further provision of the same article, wherein the consequences of default are pointed out and provided for, *i. e.*, the stockholder ceases to be such. The fines are charged against the stockholder. He is credited with the amount paid in, and the secretary tenders the balance to the stockholder, thus providing for an equi-

table adjustment of accounts, without reference to any loans or the interest.

The construction given by plaintiff to its by-laws is simply outrageous. It takes the stock — gives no credit for payments. The installments and fines go on and accumulate, and the stockholder finds himself ruined by what he is led to believe by the company to be a friendly party.

Frecman & Bates, for Respondent.

The plaintiff is a building and loan association, having a capital stock, on each share of which an installment of one dollar is due on the second Wednesday of each month. At each regular monthly meeting the association loans its moneys to the highest bidder, the sum bid being called premium. It is of the utmost importance to the association that the installments and interest be paid when due, otherwise it could not regularly offer its moneys to be loaned and bid for. It therefore imposes the fine, shown by article xi., which is "ten per cent. per month on the amount of the indebtedness." Indebtedness, as here used, means installment on stock and the interest, if any, falling due each month on loans. There is no reason to suppose that "installments" and "interest" mean the same thing. The association was primarily to loan to stockholders. It was expected that each month moneys would be due from stockholders, both for installments and for interest. It was equally important that both sums should be paid, and the fine was therefore put against both.

McKINSTRY, J.:

Plaintiff's by-law ix. provides: "Every stockholder for every share of stock shall pay to the Secretary, on the second Wednesday in every month, the sum of one dollar in gold." And by-law xi.: "Any stockholder failing to pay his or her monthly installments or interest shall pay a fine of ten per cent. per month upon the amount of the indebtedness. This fine shall be charged by the Secretary, and collected with the delinquent's monthly dues; and in case any stockholder shall neglect or refuse to pay the monthly dues or fines for the space of six months, the Secretary shall tender to the delinquent the amount actually paid in, deducting all fines and

forfeitures that may be charged against him or her, and from that time he or she shall cease to be a member of the association."

It was held by the Court below that the fine imposed for the non-payment of any monthly installment or installments (as required by the ninth by-law), "or interest," is ten per cent. upon the installment due and ten per cent. upon all *interest* due, upon any *loan* which may have been made by plaintiff to the stockholder. Even if this were assumed to be true, it would by no means follow that the failure to pay the fine could be made to constitute a term of the contract of loan, so that if, as in the case before us, the loan is represented by promissory note secured by mortgage, the note or mortgage can be made to *read*, not only that the borrower shall pay the fines and the same be secured by the mortgage, but that a failure to pay a "fine" shall make the whole principal sum due, although the loan has not otherwise matured. The only consequence provided in by-law xi., in case a stockholder shall fail to pay (for six months) his monthly dues (installments) or *fines*, or interest, is that if the Secretary shall tender to the delinquent the amount actually paid in — deducting all fines and forfeitures that may be charged against him or her — *from that time he or she "shall cease to be a member of the association."*

By-law xi. in no way affects or changes the terms of any contract of loan between the association and a stockholder. We are convinced, however, that the word "interest" as used in the by-law does not refer to interest due upon any loan from the corporation to a stockholder. Penalties and forfeitures are not to be favored; they must be created by unambiguous language.

Judgment and order reversed, and cause remanded for a new trial.

Ross and McKee, JJ., concurred.

[No. 7,227. — Department One.]

December 15, 1882.

JAMES DOVE ET AL. v. MATTHEW NUNAN.

EXEMPTION FROM EXECUTION — HORSES AND WAGON OF TEAMSTERS — EXECUTION — TROVER — SHERIFF. — The plaintiff claimed the property consisting of two horses and a wagon as exempt from execution. The Court below found that "the plaintiffs were and are a firm doing business as coal dealers. * * * That the plaintiffs used the property sued for as teamsters. That they hauled coal and other commodities for others, for hire and pay, and received money therefor; all of which was expended in the support of plaintiffs and their families, all of whom resided in the same house and ate at the same table. That as coal dealers, and for the purpose of delivering coal at retail and in small quantities, the plaintiffs had and owned a smaller cart, truck, or wagon, and one other horse. That the only use which the plaintiffs made of the wagon and horses, the subject of this suit, for themselves, other than as teamsters for pay, was in hauling coal and wood from plaintiffs' coal yard, and other coal and wood yards, to the place where the plaintiffs retailed the same, as above found herein.

Held: The findings are not sufficient to show that the property is exempt. In order to entitle a party to claim as exempt from execution two horses, etc., under the sixth subdivision of Section 690, C. C. P., he must show that he is a cartman, drayman, truckman, huckster, peddler, teamster, or other laborer, and that he habitually earns his living by the use of such property.

APPEAL by defendant from the judgment of the Superior Court of the City and County of San Francisco, and from an order denying a motion for a new trial. DAINGERFIELD, J.

Action for the conversion of personal property. The defendant, as Sheriff of the City and County of San Francisco, justified under writs of attachment, judgments, and executions in three several actions against the plaintiffs in this action, under which executions the property alleged to have been converted was sold by him, and the proceeds of such sale applied towards the satisfaction of the judgments. The other facts are stated in the opinion of the Court.

Charles F. Hanlon and L. H. Van Shaick, for Appellant.

This is a parallel case with *Brusie v. Griffiths*, 34 Cal. 302. See also, *Calhoun v. Knight*, 10 id. 393.

A. W. Thompson, for Respondents.

Ross, J.:

The property in controversy consists of two horses and a wagon, and is claimed by the plaintiffs to have been exempt from execution by virtue of the sixth subdivision of Section 690 of the Code of Civil Procedure.

The Court below found that "the plaintiffs were and are a firm doing business as coal dealers. * * * That the plaintiffs used the property sued for as teamsters. That they hauled coal and other commodities for others, for hire and pay, and received money therefor; all of which was expended in the support of plaintiffs and their families, all of whom resided in the same house and ate at the same table. That as coal dealers, and for the purpose of delivering coal at retail and in small quantities, the plaintiffs had and owned a smaller cart, truck, or wagon, and one other horse. That the only use which the plaintiffs made of the wagon and horses, the subject of this suit, for themselves, other than as teamsters for pay, was in hauling coal and wood from plaintiffs' coal yard, and other coal and wood yards, to the place where the plaintiffs retailed the same, as above found herein." The fact that the plaintiffs used the horses and wagon in question as teamsters for hire, and that they expended the money thus received in the support of themselves and their families, did not exempt the property from execution. In order to entitle a party to claim as exempt from execution two horses, etc., under the sixth subdivision of Section 690, he must show that he is a cartman, drayman, truckman, huckster, peddler, teamster, or other laborer, *and that he habitually earns his living* by the use of such horses, etc. (C. C. P., § 690; *Brusie v. Griffiths*, 34 Cal. 302.) The findings in this case do not show that state of facts.

Judgment and order reversed.

McKINSTY and McKEE, JJ., concurred.

[No. 8,570. — Department One.]

December 15, 1882.

CATHERINE C. HORGAN v. WILLIAM AMICK.

GRAIN HARVESTED FROM HOMESTEAD NOT EXEMPT FROM EXECUTION.

HOMESTEAD — CROP — EXECUTION — EXEMPTION — TROVER. — Grain which was harvested from lands constituting a homestead (lands which before the declaration of homestead were community property) is not, as such, exempt from execution.

APPEAL by defendant from the judgment of the Superior Court of the County of Yolo. BUSH, J.

Action to recover a lot of wheat, or the value thereof. The plaintiff was a married woman, the wife of Cornelius Horgan. The defendant, a constable, justified under writs of attachment against the husband of plaintiff. A bill of exceptions shows that the action was determined in the Court below on the following agreed statements of facts:

1. That the wheat described in the complaint was raised by the husband of plaintiff, upon the premises in said complaint described; plaintiff at that time residing with her husband and doing the household work.

2. That the seed from which said wheat was raised was sowed partly in the month of September, 1880, and partly in the month of January, 1881.

3. That at the time of the filing of the declaration of homestead in said complaint mentioned, all of said grain was growing and above the ground, but the same was not cut until more than one month after the filing of said declaration.

4. That said wheat was taken by defendant on the said premises, on the same day that the same was threshed.

5. That the value of said wheat was and is the sum of five hundred and fifty-one dollars and sixty-six cents.

6. That the allegations in the answer concerning the issuance and levy of the writs of attachment therein mentioned, and concerning the actions in which said writs were issued, are true.

After the decision in department, a petition for hearing in bank was presented and denied.

J. C. Ball, Jo. Craig, and J. W. Armstrong, for Appellants.

The plaintiff must, to bring her case within the exception to the general rule that all property of the judgment debtor is liable to execution, show that the wheat was exempt from execution. Section 690 of the Code of Civil Procedure contains an enumeration of all the property which is exempt from execution; but wheat grown upon the homestead is not among the enumerated property. The homestead itself is not included; but Section 1240 of the Civil Code declares: "The homestead is exempt from execution on forced sale, except as in this title provided." Nothing is said about wheat grown on the homestead; but when the homestead is of greater value than \$5,000, and is sold under proceedings under execution as directed by the Civil Code, §§ 1245 to 1255, the amount of the homestead exemption must be paid to the claimant, and the balance of the proceeds of sale must be applied in satisfaction of the execution (C. C., § 1256); and Section 1257 of that Code declares: "The money paid to the claimant is entitled, for the period of six months thereafter, to the same protection against legal process and the voluntary disposition of the husband, which the law gives to the homestead." Wheat grown on the land is not "money paid to the claimant." and is not within this section.

This is the definition of a homestead as given in Section 1237 of the Civil Code: "The homestead consists of the dwelling-house in which the claimant resides and the land on which the same is situated, selected as in the title provided." Then as wheat, threshed wheat, is neither a dwelling-house nor land, it is not a "homestead," and if not a "homestead," it is not within Section 1240 of the Civil Code, already cited, which only mentions the "homestead" as exempt from execution.

According to the maxim *expressio unius est exclusio alterius*, the enumeration of property in Section 690 of the Code of Civil Procedure, and in Sections 1240 and 1257 of the Civil Code, which shall be exempt from execution, excludes all other property from exemption, and the following cases were decided upon this principle: *Quigley v. Gorham*, 5 Cal. 418; *Robert v. Adams*, 38 id. 383; *Brusie v. Griffiths*, 34

id. 302. If the Legislature had intended that the "rents, issues, and profits" of the homestead should be exempt from execution, they would have so provided in terms, and would have declared that the husband should not make a voluntary disposition thereof, as they did in the case of the proceeds of the sale of the homestead. In construing the sections of the Codes cited, the Court will "not insert what has been omitted, or omit what has been inserted." (C. C. P., § 1858.)

The judgment should be reversed.

W. B. Treadwell, for Respondent.

This case presents but one question, viz.: Whether a crop of grain, raised on premises constituting a homestead, when the value of the land and crop together is less than five thousand dollars, is exempt from execution for the debts of the husband. The Court below held that such crop was so exempt, and we submit that this ruling is correct. The statute concerning homesteads, like other statutes of exemption, is founded upon considerations of public policy, beneficial in their nature, and is therefore to be liberally expounded in furtherance of the object intended to be attained. (Thompson on Homesteads, §§ 4, 7, and authorities therein cited.) In determining what constitutes the homestead exemption, the reason and spirit of the law must be considered, and such a construction given as will include within the exemption all things coming under that reason and not contrary to the letter of the law, while excluding all things not within that reason, even though apparently within the letter. In conformity with this rule the Courts have always been liberal in ascertaining the extent of this exemption, so as to carry into effect the intention of the Legislature in creating it. (Id., Chap. iii., Art. i.; *Greeley v. Scott*, 2 Woods, 657; *Clark v. Shannon*, 1 Nev. 568; *Goldman v. Clark*, id. 607; *Krueger v. Pierce*, 37 Wis. 269; *Hubbell v. Canady*, 58 Ill. 427; *Stevens v. Hollingsworth*, 74 id. 206; *Anderson v. McKay*, 30 Tex. 186; *Bunker v. Paquette*, 37 Mich. 79.) The object of the homestead exemption is not merely to afford a naked shelter to the family, but, like all other exemptions, to afford it a means of livelihood, and thus to prevent its members from being driven by destitution to seek a support from public

charity. The policy of the law in this country has always been, so far as possible, to prevent persons, whether through misfortune or improvidence, from becoming a charge upon the public purse; and, to this end, the statutes of exemption have been so framed as to secure to all persons the means of obtaining a support through their own exertions. In view of this fact, it would be absurd to suppose that the Legislature intended that, though the land and buildings constituted a homestead, the owners should not be allowed to use them for any useful purpose. It has been frequently decided that a homestead may include or consist of a garden or farm; but, if the products of such farm are not exempt, then all motives for exertion are withdrawn in the very cases to which the statute was intended to apply, viz.: those in which the owners are in impoverished circumstances. To construe this statute otherwise would not only defeat its manifest object, but would convert it into an instrument of fraud and oppression. On the theory of appellant, a man may invest \$5,000 in a splendid and luxurious mansion, and place it beyond the reach of his creditors; but if he has a little farm worth \$1,000, and is content with the humble shelter of a cottage, he dare not raise food for his hungry family upon those premises, without allowing a rapacious creditor to seize it before it can be used. So to hold would make the statute a mockery. On the contrary, we contend that, at least in cases where the total exemption does not exceed the statutory limit of \$5,000, the debtor may safely cultivate the homestead premises or apply them to any other useful purpose, and that the fruit of such exertions will be beyond the reach of creditors. In accordance with these views it has been decided that the proceeds of an insurance policy on a homestead building are exempt (*Houghton v. Lee*, 50 Cal. 101); that butter made from the milk of an exempt cow is also exempt (*Leavitt v. Metcalf*, 2 Vt. 342; S. C., 19 Am. Dec. 718); and that the exemption of a horse includes a saddle and bridle necessary for its beneficial use (*Cobbs v. Coleman*, 14 Tex. 594).

The cases cited by appellant (*Quigley v. Gorham*, 5 Cal. 418; *Brusie v. Griffiths*, 34 id. 302; and *Robert v. Adams*, 38 id. 383) are in no respect in conflict with these views, but decidedly support them. In all of them the inquiry was not

whether the thing claimed as exempt was within the strict letter of the law, but whether it was included within its reason and spirit. As was said in the latter case: "From this summary of the Act, it is entirely plain that its purpose was to secure to the judgment debtor the means to prosecute his vocation, and thus earn a support for himself and family. In securing to a farmer two * * horses, * * * the Legislature intended, by this exemption, to enable him to prosecute his business of farming, in the ordinary sense of that term; and the * * horses * * * which are reserved to him must be such as are suitable and intended for that use. If a contrary construction of this provision were to prevail, a farmer in failing circumstances might invest his whole estate in two valuable stallions or race horses, worth \$10,000 or \$20,000 each, with no intention whatever to use them for farming purposes; and, by claiming them as exempt from execution, might defraud his creditors, under color of law, to a large amount. The benevolent design of the statute might thus be perverted to purposes of the grossest fraud." Accordingly it was held in that case that a stallion, owned by a farmer, but used and intended for breeding purposes only, was not exempt. It will thus be seen that the manifest purpose and object of the Act was held to control the meaning of the words used, and to exclude things included within the letter of the law, when the object intended required their exclusion.

So far as we have been able to ascertain, the precise question here involved has been discussed or decided in one case only. In that case it was held that the profits of the homestead were exempt in the same manner as the homestead itself. (*Marshall v. Cook*, 46 Ga. 302.)

McKINSTRY, J.:

Is grain which was harvested from lands constituting a homestead (lands which before the declaration of homestead were community property) exempt from execution for debts of the husband?

All the products of the homestead are not *in terms* made to constitute a portion of the homestead. It is urged that homestead laws are framed upon considerations of public policy,

beneficial in their nature, and ought to be liberally expounded. We agree that such laws should be construed in such manner as shall further the object intended to be attained, and as will include within the exemption all things coming within the spirit of the law, except where such construction is contrary to the evident meaning of the statute, or (where the statute is silent) of other statutes bearing upon the subject. But reading our homestead law in connection with Section 690 of the Code of Civil Procedure, it seems clear that the Legislature intended that the whole crop of grain raised upon a homestead farm, without reference to its quality, should not be exempt from execution. The third subdivision of the section of the Code of Civil Procedure referred to reads: "The farming utensils or implements of husbandry of the judgment debtor; also, two oxen, or two horses, or two mules, and their harness; one cart or wagon, and food for such oxen, horses, or mules for one month; also, all seed, grain, or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars, and seventy-five bee-hives, and one horse and vehicle belonging to any person who is maimed or crippled, and the same is necessary in his business."

It would be giving a strained interpretation of the language of the foregoing to say it was intended, *in addition* to all the crop grown upon the homestead, that the debtor should be secured seed-grain to the value of two hundred dollars. It is obvious it is meant that only grain to that amount shall be exempt. It does not appear that the statutes of Georgia, under which *Marshall v. Cook*, 46 Ga. 302, was decided, were like ours.

Judgment reversed.

Ross and McKee, JJ., concurred.

[No. 8,429. — Department Two.]
December 18, 1882.

THE FARMERS' CO-OPERATIVE UNION v. M. S.
THRESHER, TAX COLLECTOR OF THE COUNTY OF SAN
JOAQUIN.

POWER OF LEGISLATURE AS TO WRITS OF PROHIBITION. — The Legislature can not extend or enlarge the office of the writ of prohibition so as to include ministerial functions.

Id. — CONSTITUTIONAL PROVISIONS AS TO SUPERIOR COURTS SAME IN THIS RESPECT AS THOSE RELATING TO SUPREME COURT. — There is no distinction in this regard in the provisions of the Constitution relating to the Supreme Court and those relating to the Superior Court.

APPEAL by plaintiff from judgment of the Superior Court of the County of San Joaquin. PATERSON, J.

Petition for writ of prohibition. The petition shows: The petitioner is a corporation engaged in the warehouse business at Stockton, in this State. On the first Monday of March, 1881, it was the owner of certain real and personal property, and also had certain wheat, barley, etc., in its warehouses upon storage; the property so on storage had been received from various persons, to each of whom the petitioner had issued a warehouse receipt for the grain by him stored, which receipts were transferable, and carried the ownership of the property represented thereby. In the early part of said month of March, the Assessor of San Joaquin County presented to petitioner a blank form of a statement, or "assessment list," with directions that it fill out and return the same on or before the thirtieth day of that month. Pursuant to this request the corporation, by its Secretary, made out, verified, and returned to the Assessor said list, containing a statement of all its property, real and personal, by it owned on said first Monday in March, and to which the Assessor gave the value of thirty-three thousand two hundred and ninety-five dollars. At the request of said Assessor, it made a further statement that there were certain lots of wheat, barley, rye, and beans in its warehouse on said first Monday, giving the amounts thereof, and which had been left there on storage by various persons, to whom transfer-

able receipts had been given for each lot separately, and that it could not tell who then owned any of said property, or what was its value, and that it did not own or claim any part of said property; and then requested said Assessor that if he proposed to assess any of said property to it, that he would assess the same to it as bailee, that it might have its remedy against the owners for taxes paid thereon. The Assessor refused to make the assessment to it as bailee, and arbitrarily entered an assessment against it for the property, valued at two hundred and ninety-nine thousand six hundred and thirty-four dollars, and upon which the tax amounted to three thousand eight hundred and ninety-five dollars and twenty-four cents. The property was all assessed to petitioner individually, and not as bailee or trustee, etc., and constituted but one assessment; but on the assessment roll the assessor entered the following remark opposite the property held on storage, viz.: "The grain herein assessed to the Farmers' Co-operative Union was in their possession on the first Monday of March, at twelve o'clock M., A. D. 1881, and they, the said Farmers' Co-operative Union, refused to give any information in regard to the ownership thereof or by whom it was stored." When the time arrived for paying the taxes of 1881, petitioner tendered the amount of taxes assessed upon its property, which the Collector refused to receive; whereupon the petitioner instituted this proceeding to prohibit a sale of its property for the tax alleged to be illegal. The application for a writ in the Court below was denied, on the ground that the Court had no jurisdiction to grant the writ, and a general demurrer to the petition was sustained.

F. T. Baldwin and Pillsbury & Titus, for Appellant.

We submit that this is a proper case for the writ to issue. By Section 5 of Article vi. of the new Constitution, it is provided that the Superior Court shall have original jurisdiction of "all such special cases and proceedings as are not otherwise provided for." There was no such provision in the old Constitution. The Legislature of 1881, following this provision of the new Constitution, amended Section 1102 of

the Code of Civil Procedure so as to permit the writ to run against a person exercising ministerial as well as judicial functions. There is nothing, as we understand them, in the cases of *Spring Valley Water Works v. San Francisco*, 52 Cal. 111; *Maurer v. Mitchell*, 53 id. 289; and *Camron v. Kenfield*, 57 id. 550, which militates against our position that the writ will lie from the Superior Court to restrain a board or officer, whether exercising judicial or ministerial functions. There can be no question that the Legislature intended to confer on the Superior Court by its amendment to Section 1102, before cited, the power invoked by the petitioner in this case. We insist that under this clause of the new Constitution, authorizing it to confer upon the Superior Court jurisdiction of all such special cases and proceedings as are not otherwise provided for, the Legislature had the power to confer such jurisdiction upon that Court in a case like the one at bar, and the mode or manner of conferring it, whether by extending the scope of the writ of prohibition, or providing a new or different form of proceeding, was a matter entirely within the discretion of that body.

J. C. Campbell, for Respondent.

Prohibition is not the proper remedy for alleged illegal taxation. (*Savings and Loan Society v. Austin*, 46 Cal. 455-459; *Houghton v. Austin*, 47 id. 651; *Bucknall v. Story*, 36 id. 67; *C. P. R. R. v. Corcoran*, 48 id. 65; *Smith v. Commissioners of Leavenworth*, 9 Kans. 300; *State Railroad Tax Cases*, 92 U. S. 606; *Lincoln v. City of Worcester*, 8 Cush. 55; *Howe v. City of Boston*, 7 id. 277.) In *Brewer v. City of Springfield*, 97 Mass. 152, the Court say that the taxpayer suffers no wrong until he pays the tax; and if it be illegal, he can recover it back. An action for the recovery of money paid under protest, is the remedy prescribed in the State of California for illegal taxation. (*Meek v. McClure*, 49 Cal. 628; *Bank of Mendocino v. Chalfant*, 51 id. 369; *Smith v. Farrelly*, 52 id. 80; *Bank of Santa Rosa v. Chalfant*, 52 id. 170; *De Fremery v. Austin*, 53 id. 380.) The writ of prohibition will not run to a Tax Collector, for the reason that he is a ministerial and not a judicial officer. The writ of prohibition will not issue to prevent a ministerial officer from per-

forming acts ministerial. (*Camron v. Kenfield*, 57 id. 550; *Maurer v. Mitchell*, 53 id. 289; *Spring Valley Water Works v. San Francisco*, 52 id. 111.)

The petitioner, in his able brief, attempts to avoid the effect of the decision in the case of *Camron v. Kenfield*, upon the ground that the Legislature have the power under the Constitution to enlarge the jurisdiction of the Superior Court.

We can not see, from reading the Constitution, where any power is given the Legislature to enlarge the jurisdiction of the Superior Courts that has not been given the same body to enlarge the jurisdiction of the Supreme Court. But it is not a question of the jurisdiction of the Courts, but a question of enlarging the office of the writ of prohibition. Section 5, Article vi., of the Constitution gives the Supreme Court jurisdiction to issue writs of prohibition. Section 5 of the same article gives the Superior Court the same jurisdiction. It can be readily seen, by comparing the two sections, that both Courts have the same jurisdiction in regard to writs of prohibition. And the Legislature, in their amendment to Section 1102 of the Code of Civil Procedure, did not attempt to enlarge the jurisdiction of either of the Courts; but they did attempt to enlarge the province of the writ of prohibition; and that, we submit, under the decisions of our own State, can not be done. And the decision in *Camron v. Kenfield* is as applicable to writs issued from the Superior Courts as it is to writs issued from the Supreme Court. Hence we submit that the judgment should be affirmed.

The COURT:

This case is within the principle decided in *Camron v. Kenfield*, 57 Cal. 550, in which it was held that the Legislature could not enlarge or extend the office of the writ of prohibition so as to include ministerial functions. We perceive no distinction, in this regard, in the provisions of the Constitution relating to the Supreme Court and the Superior Courts.

The judgment and orders appealed from are affirmed.

[No. 10,746. — In Bank.]

December 20, 1882.

THE PEOPLE v. MARTIN MITCHELL.

TRIAL — STATEMENT OF EVIDENCE BY COUNSEL — IRREGULARITY. — In his closing argument to the jury the District Attorney was permitted by the Court, notwithstanding the objection and exception of defendant, to aver, and argue from, the existence of facts as to which no evidence had been offered or introduced.

Held: For counsel to state facts not proven or sought to be proven is, in effect, to place unsworn evidence before the jury, and when improper evidence is admitted without objection on one side, this will not authorize improper evidence on the other. It is error sufficient to reverse a judgment for counsel, against objection, to state facts pertinent to the issue and not in evidence, or to assume, *arguendo*, such facts to be in the case when they are not.

Id. — Id. — Id. — CASE DISTINGUISHED. — *People v. Barnhart*, 59 Cal. 381, has no bearing upon the question now involved.

APPEAL from a judgment of conviction and from an order denying a new trial in the Superior Court of the County of Butte. HUNDLEY, J.

Reardon & Freer and *F. C. Lusk*, for Appellant.

A. L. Hart, Attorney General, for Respondent.

McKINSTRY, J.:

In his closing argument to the jury the District Attorney was permitted by the Court — notwithstanding the objection and exception of defendant — to aver, and argue from, the existence of facts as to which no evidence had been offered or introduced.

The impropriety of the statements, and apparently their materiality, were conceded by the District Attorney and by the Court, but the Court held that the District Attorney was justified in departing from the testimony, because counsel for defendant had done the same thing. If the record showed (which it does not) that such statements had been made by counsel for defendant, the fact would not cure the error of the Court. The District Attorney might have objected to such statements on the part of defendant's counsel when they were made, or have asked the Court specifically to charge the

jury that they were to be disregarded. But to say that because an impropriety on the one side has passed unrebuked, it ceases to be an impropriety when committed on the other, would lead to confusion worse confounded. The jury would have the allegations of fact of the respective counsel pitted against each other, and the fate of a defendant would, perhaps, be determined, not by the evidence in the case, but by the degree of confidence which the jury might repose in the honesty or intelligence — or both combined — of one or the other of the counsel. For counsel to state a fact not proven or sought to be proven, is, in effect, to place unsworn evidence before the jury; and when improper evidence is admitted without objection on the one side, this will not authorize improper evidence on the other. (*Donnelly v. Curran*, 54 Cal. 282.) Only sworn testimony can go to the jury. (*People v. Wheeler*, 9 Pac. C. L. J. 581, and cases there cited; 41 N. H. 317; 66 Me. 564; 67 N. Y. 638; 22 Iowa, 504; 49 Ind. 33, 124; 51 id. 507; 15 Ga. 633; 25 id. 225; 33 Conn. 471; 75 N. C. 306.)

In *Brown v. Swineford*, 44 Wis. 291, Ryan, C. J., said: "It sufficiently appears in the present case that the learned counsel for plaintiff did not properly confine his closing argument to a reply. * * * The learned counsel went beyond the legitimate scope of all argument, by stating and commenting on facts not in evidence." "Enough appears to show, not only that the learned counsel commented on facts not in evidence, but in effect testified to facts himself." * * * "The appellant took his exception, and his counsel now supports it by numerous cases, some of which are — so far as they go — admirable discussions of professional ethics," etc. "All of them support the rule now adopted by this Court, that it is error sufficient to reverse a judgment, for counsel, against objection, to state facts pertinent to the issue, and not in evidence, or to assume *arguendo* such facts to be in the case when they are not. Some of the cases go further, and reverse judgments for imputation by counsel of facts not pertinent to the issue, but calculated to prejudice the case." (*Tucker v. Henniker*, 41 N. H. 317; *State v. Smith*, 75 N. C. 306; *Ferguson v. State*, 49 Ind. 33; *Hennies v. Vogel*, Sup. Ct. Ill. 7 Cent. L. J. 18.) "Doubtless the Circuit Court can, as it did in

this case " (but as the Superior Court in the case, the record of which is now before us, *did not*), "charge the jury to disregard all statements of fact not in evidence. But it is not so certain a jury will do so," etc. There are cases in other States, it is said, in conflict with the rule above laid down. But the rule is supported by principle; in this State by precedent, and, as we believe, by the great weight of authority everywhere. *People v. Barnhart*, 59 Cal. 381, has no direct bearing upon the question we have been considering. In that case there was a dispute between counsel as to the exact testimony of a witness. When such a dispute arises, if the presiding Judge is not prepared from his memory or notes to settle it — but is convinced that testimony was given with respect to the point as to which the dispute has arisen — he may submit the matter to the recollection of the jury. But, in the case now before us, there was no pretense in the Court below that there was any evidence tending to prove the matters asserted to be facts by the District Attorney.

Judgment and order reversed and cause remanded for a new trial.

MORRISON, C. J., and ROSS, SHARPSTEIN, and MYRIOK, JJ., concurred.

[No. 8,466. — Department Two.]

December 20, 1882.

IN THE MATTER OF THE ESTATE OF H. LOSHE, DECEASED.

BURDEN OF PROOF ON CONTEST OF CLAIM ALLOWED AGAINST ESTATE — ESTATES OF DECEASED PERSONS — CONTEST OF CLAIM — ACCOUNT OF EXECUTOR OR ADMINISTRATOR — BURDEN OF PROOF — EVIDENCE. — Under Section 1497, C. C. P., a claim which has been duly allowed, approved, and filed against the estate of a decedent is ranked among the acknowledged debts of the estate, to be paid in due course of administration, and in the event thereafter of a contest as to such claim arising in the course of administration, the burden of proof is on the contestant of such claim.

APPEAL by the claimant, John Ziegenbein, from the order or judgment of the Superior Court of the County of Placer, disallowing his claim, and also from the order of said Court denying a motion for a new trial. MYRES, J.

Contest of a claim on settlement of account of executor. The facts are stated in the opinion of the Court.

Jo Hamilton, for Appellant.

The claim of appellant having been allowed, approved, and filed against the estate, had the force and effect of a judgment. (*Deck's Estate v. Gherke*, 6 Cal. 667; *Beckett v. Selover*, 7 id. 228; *Estate of Schroeder*, 46 id. 319; *Estate of McKinley*, 49 id. 154.) Having the force and effect of a judgment, all the presumptions are in favor of its validity. (*Estate of Schroeder*, 46 id. 319; *Hillebrant v. Burton*, 17 Tex. 138.) In compelling the claimant to assume the affirmative on the contest, the Court below, therefore, committed an error.

C. A. & C. Tuttle, for Respondents.

At the hearing, the Court held that the affirmative of the issue lay with Ziegenbein, the creditor whose claim was contested, and this is assigned as error. We maintain the Court was correct. When a claim is allowed, the executor can not afterwards contest it. (*Estate of McKinley*, 49 Cal. 152.) If an executor rejects a claim, the claimant must sue. He then holds the affirmative of the issue. In other words, the one who presents a claim for allowance, if it is contested, must first offer testimony to show that it is correct. Is the case changed when the executor allows the claim, and so reports it in his account, and the other creditors then contest it? To say that the contesting creditors hold the affirmative is, in effect, asking them to prove a negative. The issue is this: Z., one creditor, alleges that the estate owes him eighteen thousand dollars, and G., another creditor, says the estate does not owe him. Certainly, if Z. does not prove his claim it can not be allowed.

Let us assume that the contesting creditor holds the affirmative. The case is called for trial, and the contesting creditor says he has no testimony to offer. Must judgment go for the claimant without proof? In any other case, if the one alleging a fact offers no testimony, he is nonsuited. We can not see that the allowance of the claim by the executor alters the case. His allowance does not bind the other creditors, if they choose to contest. (C. C. P., § 1635.)

MYRICK, J.:

In due time J. Ziegenbein presented in due form to the executor a claim against the above estate for \$18,628.35. The executor indorsed upon the claim his allowance thereof at the sum of \$18,548.35, rejecting an item of \$80. The Judge of the Superior Court indorsed on the claim his approval of the allowance of the executor. The executor having filed his account and report of his administration, A. H. Gates and others, creditors of the estate, contested the account, and excepted thereto, especially the claim of Ziegenbein, and stated in writing their grounds of contest. A day for hearing the contest was set. At the hearing, the Judge of the Court below "ruled that the affirmative of the issue lay with the parties who sought to sustain the report of the executor."

This ruling was error. Section 1497, C. C. P., declares that a claim allowed and approved, and filed, shall be "ranked among the acknowledged debts of the estate, to be paid in due course of administration." When a claim, in the course of allowance and approval, reaches the point that it is to rank among the acknowledged debts of the estate, we apprehend that the claimant may rest on that point until he be attacked.

There are at least two points in the administration of an estate at which an approved claim may be contested, viz., when application is made for the sale of property (C. C. P., § 1540), and when an account is rendered for settlement (*id.*, § 1636); but, in making the contest, the contestant has the affirmative, and must show cause. It is not necessary to consider how far the allowance and approval of a claim resemble or give the effect of a judgment; it is sufficient to say that such a claim is to "rank among the *acknowledged* debts of the estate, to be paid in due course." If it be an acknowledged debt, it is good until cause be shown.

Orders reversed and cause remanded for further proceedings.

SHARPSTEIN, J., and MORRISON, C. J., concurred.

[No. 7,411. — Department One.]

December 20, 1882.

THE MECHANICS' FOUNDRY OF SAN FRANCISCO
v. JOSEPH E. RYALL

INJUNCTION AGAINST REPEATED TRESPASSES — EQUITY — INJUNCTION — TRESPASS — PLEADING — ACTION FOR AN INJUNCTION.—The complaint charges that the defendant "is a stockholder in said corporation (plaintiff), and was, up to July 23, 1879, an employee engaged in working in the foundry or shop of the plaintiff. That on said date, for good cause, defendant was dismissed from plaintiff's employ; that though thus discharged, he has ever since said date come daily to plaintiff's shop or foundry and insisted upon occupying his place as an employee of said plaintiff, and threatens continue daily so to do. That there is a certain part of said foundry known as a bench and floor, whereon the said Ryall formerly worked, and upon which he still daily intrudes, and threatens to continue to occupy said space, and to prevent any one else from working therein. That while the said Ryall thus refuses to vacate said bench and floor, it is impossible for said plaintiff to procure another workman to occupy and work in the said department. That the work of said shop is thus retarded, and the plaintiff is prevented from fulfilling its contracts and is obliged to refuse work, and to lose the profits thereof, and that if such conduct is not prevented the business of the corporation will be totally ruined. That in addition to the certainty of the said corporation's ultimate ruin by the continuation of said acts and conduct of this defendant, it has suffered damage, and will continue to be damaged by this defendant's acts and conduct, at the rate of \$50 per week from the twenty-third of July, A. D. 1879."

Held: The complaint does not state facts sufficient to warrant the interposition of a court of equity.

APPEAL by defendant from the judgment of the Superior Court of the City and County of San Francisco. **DAINGERFIELD, J.**

Action for injunction. The Court below, after trial, made the following findings of fact:

1. That the said Mechanics' Foundry of San Francisco is a corporation duly incorporated under the laws of the State of California.

2. That the defendant was, prior to July 23, 1879, an employee of plaintiff, and was for good cause discharged, on said date, from plaintiff's employ. That after his discharge, he daily entered plaintiff's shop and occupied a certain floor in

said shop and prevented any other workman from working there, until restrained by injunction issued in this action.

3. That on account of the conduct of defendant, it was impossible for plaintiff properly to turn out work and fulfill its contracts, and that the business of plaintiff was in danger of being ruined, unless the defendant was restrained from intruding into said shop.

4. That by the conduct of defendant, plaintiff was damaged in at least the sum of ten dollars, and would, if defendant had not been restrained, have been irreparably damaged in its business by the acts of defendant.

Judgment was thereupon given against the defendant for the sum of ten dollars damages, with interest at seven per cent. per annum from date of judgment till paid, and for costs of suit, and the injunction theretofore issued against him was made perpetual. The appeal was taken on the judgment roll.

R. Percy Wright, for Appellant.

The complaint does not state facts sufficient to constitute a cause of action, and the demurrer thereto should have been sustained. At the most, the facts alleged constitute only a case of ordinary trespass, for which it is apparent from the complaint that plaintiff had an adequate remedy without resort to a court of equity. There is no allegation that the defendant is unable to respond in damages, and none of the allegations which are held to be indispensable in order to justify the granting of an injunction. The complaint does not disclose any equity whatever. (*Waldron v. Joiner*, 5 Cal. 120; *Burnett v. Whitesides*, 13 id. 156; *Tomlinson v. Rubio*, 16 id. 206; *Leach v. Day*, 27 id. 644; *Jerome v. Ross*, 7 Johns. Ch. 315; S. C., 11 Am. Dec. 484; *Hatcher v. Hampton*, 7 Ga. 49; *Catching v. Terrell*, 10 id. 576; *Branton v. Bush*, 32 id. 671; *James v. Dixon*, 20 Mo. 80; High on Injunctions, 2d ed., vol. 1, pp. 451-465.)

M. Eyre, Jr., for Respondent.

Ross, J.:

The complaint in this case does not state facts sufficient to

warrant the interposition of a court of equity. It charges that the defendant "is a stockholder in said corporation (plaintiff), and was, up to July 23, 1879, an employee engaged in working in the foundry or shop of the plaintiff. That on said date, for good cause, defendant was dismissed from plaintiff's employ; that though thus discharged, he has, ever since said date, come daily to plaintiff's shop or foundry, and insisted upon occupying his place as an employee of said plaintiff, and threatens to continue daily so to do. That there is a certain part of said foundry known as a bench and floor, whereon the said Ryall formerly worked, and upon which he still daily intrudes, and threatens to continue to occupy said space, and to prevent any one else from working therein. That while the said Ryall thus refuses to vacate said bench and floor, it is impossible for said plaintiff to procure another workman to occupy and work in said department. That the work of said shop is thus retarded, and the plaintiff is prevented from fulfilling its contracts, and is obliged to refuse work and to lose the profits thereof, and that if such conduct is not prevented the business of the corporation will be totally ruined. That in addition to the certainty of the said corporation's ultimate ruin by the continuation of said acts and conduct of this defendant, it has suffered damage, and will continue to be damaged by this defendant's acts and conduct, at the rate of fifty dollars per week from the twenty-third of July, A. D. 1879."

It is only by inference that the complaint charges the defendant with the commission of a trespass. But even repeated trespasses are not of themselves sufficient to justify the interference of a court of equity by injunction. (*Jerome v. Ross*, 7 Johns. Ch. 332; S. C., 11 Am. Dec. 484; *Catching v. Terrell*, 10 Ga. 576; *Thomas v. James*, 32 Ala. 725; High on Injunctions, 2d ed., vol. 1, p. 476; Hilliard on Injunctions, 3d ed., 345.) There is no averment in the complaint in this case, that the defendant is insolvent; nor does it appear therefrom that the wrongs complained of are irreparable, or destructive of the plaintiff's estate in its nature and substance; nor that they are not susceptible of adequate compensation in damages. And if we look at the findings made after trial, we see that up to the time of the issuance of the restraining order, "by the

conduct of defendant, plaintiff was damaged in at least the sum of ten dollars."

The case, in truth, seems at most to be one of ordinary trespass; annoying it may be, but one, nevertheless, for which the ordinary remedies of the law are ample.

Judgment reversed and cause remanded.

McKINSTY and McKEE, JJ., concurred.

[No. 8,646. — Department Two.]

December 20, 1882.

CAPITAL SAVINGS BANK v. JOHN REEL ET AL.

DISCHARGE OF SURETY — PROMISSORY NOTE — PAYMENT — ACCOMMODATION MAKER — DEFENSES TO ACTION ON NOTE — RELEASE OF ATTACHMENT. — Action upon a joint and several promissory note given by the firm of Reel & McGraw, with the defendant Cave as accommodation maker. The defendant Cave defended on the ground that the note was paid by Reel & McGraw, and was surrendered to them, but was afterwards retaken by the plaintiff from them, and held by it, without his (Cave's) knowledge or consent. The jury found a verdict for the defendant Cave.

Held: There was evidence tending to prove the facts as pleaded by the defendant, and the verdict of the jury would not be disturbed.

Id. — The defendant also pleaded, as a defense to the action, that the plaintiff in the action had attached sufficient property of Reel & McGraw to secure the payment of the note, and had without his knowledge or consent released the attachment.

Held: There was evidence also tending to show these facts, and that Cave, being an accommodation maker, should not, under these circumstances, be injured by the acts of the plaintiff.

APPEAL by plaintiff from an order of the Superior Court of the County of Sacramento denying motion for a new trial.
DENSON, J.

Action on a joint and several promissory note. The note was executed at the city of Sacramento by the defendants John Reel and Peter McGraw, as copartners, under firm name of Reel & McGraw, and by the defendant J. B. Cave, to the plaintiff, May 9th, 1878, for \$2,000, payable one month after date, with interest at one per cent. per month, compounding monthly. The answer of the defendants Reel & McGraw

was stricken out by the Court, and judgment was given against them as by default. Defendant Cave answered separately, and after denying all indebtedness to plaintiff, and the non-payment of the note, set up affirmatively the following defenses:

And for a further defense this defendant avers that on or about the 9th day of May, A. D. 1878, said defendants John Reel and Peter McGraw, under the firm name of Reel & McGraw, and as co-partners under such firm name, were indebted to plaintiff in the sum of two thousand dollars, for and on account of moneys before that time had and received by them from plaintiff, and on that day this defendant executed said promissory note, with said Reel & McGraw as surety thereon, for them to plaintiff, and said note was thereupon delivered to and received by plaintiff to secure said indebtedness, and with notice and knowledge by plaintiff that this defendant executed the same as surety for said Reel & McGraw, and in no other way.

That prior to the maturity of said note this defendant notified said plaintiff that if said note was not paid at the maturity thereof by said Reel & McGraw, to proceed, without delay, to collect the same.

That on or about the 3d day of August, 1878, plaintiff was wrongfully and without right in the possession of said note, and then claimed and pretended that the same had not been paid, whereupon this defendant requested plaintiff to bring an action upon said note and to sue out a writ of attachment upon the same, and under said writ to levy upon and seize certain property of said Reel & McGraw as surety, for the payment of any judgment which might be recovered in such action, whereupon, on the day last mentioned, plaintiff commenced this action, and on the same day filed therein the affidavit and undertaking required by law for the issuing of said writ, and afterwards, on the same day, such writ was issued in due form out of this Court and delivered to the Sheriff of said county, and on the same day, under and by virtue of said writ, said Sheriff levied upon and seized a large amount of personal property, which then was in the possession of and belonged to said Reel & McGraw, and was of the value of four thousand dollars, and was more than suffi-

cient to satisfy plaintiff's said demand, together with all the costs of this action, and the costs and expenses of taking and keeping said personal property under said attachment.

That afterwards, to wit, on the fifth day of August, 1879, plaintiff, without cause and without notice to this defendant, and without his knowledge or consent, voluntarily released said property from said attachment, and caused the same to be delivered to other creditors of said Reel & McGraw.

That prior to the aforesaid release of said property from said attachment, said Reel & McGraw had become insolvent and wholly unable to pay any judgment which might have been or may be recovered in this action. That said Reel & McGraw ever since that time have been and now are insolvent, and have no property liable to be taken under execution.

This answer is made upon information and belief as to payment of said note and the levy and release of said attachment.

That this defendant had no notice or knowledge of such release of said property until the thirtieth day of January, 1880, at which time said writ of attachment was returned by said Sheriff and filed in this Court. Wherefore defendant prays judgment and costs.

As between the plaintiff and the defendant Cave, the action was tried with a jury, who returned a verdict for the defendant. The evidence was conflicting, but there was evidence given tending to show the following facts:

Defendant Cave was surety, though appearing as principal, and this fact was known to plaintiff. The day after the note was signed, Cave called on the President of the bank (Mr. Carey, who personally transacted the whole business), and told him he was sorry he had "gone on the note," and asked plaintiff to make Reel & McGraw pay the note at maturity, and plaintiff then promised to do so. During the running of the note, Reel & McGraw accumulated at the bank one thousand seven hundred dollars, and had that amount on deposit to their credit at the maturity of the note, at which time McGraw called at the bank and informed the President that he came to pay the note. This was in the President's office in the bank. The President stepped into the bank and examined Reel & McGraw's account; went to his account, saw how

it stood, and said, "All right." The President then furnished McGraw with a blank check for the amount, and directed him to fill it out, which was done. The check was delivered to the President by McGraw, and the note was delivered to McGraw by the President. As McGraw was about leaving the office he remarked to Carey that he "had bought a lot of wheat, and should need money the following week." To which Carey replied, "Well, all right, but you leave Uncle Brad's note, and you can draw what money you require;" and thereupon the note was returned to Carey, and the check was destroyed. This last transaction was without the consent or knowledge of "Uncle Brad" (the name by which defendant Cave was familiarly known). Plaintiff then allowed Reel & McGraw to overdraw their accounts, from time to time, until they failed, on the twentieth day of July, when they were indebted to the bank in an amount exceeding \$2,000. The note was given in the first instance to secure the bank upon an acceptance of a draft upon Reel & McGraw for \$2,000. At the time the note matured, this acceptance had been paid, and Reel & McGraw had, as before stated, \$1,700 on deposit to their credit, and the bank was willing that he should then overdraw enough to pay the Cave note. At or immediately after the failure, the bank attached sufficient property of Reel & McGraw to satisfy all its demands. The property attached was merchandise, book accounts, notes, and cash, of the cash value of \$21,000. There were two attachments, amounting to \$6,000, ahead of the bank attachment. The attorney for the bank afterwards, without the consent or knowledge of defendant, released the attachment in favor of Pritchard, the first attaching creditor, who had also, on the twenty-fifth of July, taken an assignment from Reel & McGraw of all their property for the benefit of creditors. Cave had no notice of the release of said attachment until the thirtieth day of January, 1880, when the Sheriff made return of his proceedings. Pritchard's attachment was on the twentieth July, Wilcoxson & Farris' attachment was on the twenty-second July, the assignment to Pritchard was on twenty-fourth July, and plaintiff's attachment was on third August.

George E. Bates, for Appellant.

The note sued on was never paid. There is no contrary evidence. No money was ever deposited with plaintiff for the purpose of paying this note. Even if Cave was surety to the bank (which we deny), he would not be released from liability on this note by principal debtors having sufficient money on deposit with the bank to pay this debt. (Brandt on Suretyship and Guaranty, § 376; Munger on Application of Payments, 76, and following; *Clark v. Sickler*, 21 Am. Rep. 606; *Dawson v. Real Estate Bank*, 5 Ark. 283; *National Bank of Newburgh v. Smith*, 66 N. Y. 271; *Martin v. Mechanics' Bank*, 6 Harris & Johnson, 235.)

The defendant Cave was not surety as to plaintiff, and his answer does not aver that plaintiff consented to deal with him in that capacity. The admission of his suretyship can not be construed to be broader than the averments of his answer. Both show only that he was "surety for Reel & McGraw," but fail to show that he was not principal as to plaintiff. (*Farmers' National Gold Bank v. Stover*, 9 P. C. L. J. 306; *Harlan v. Ely*, 55 Cal. 340; *Dane v. Corduan*, 24 id. 165.) The defendant Cave, even if surety, was not released from liability by any act of plaintiff. Cave has not shown that any property of Reel & McGraw was attached, or that if attached that its value was sufficient to pay the prior liens thereon. A surety is only released to the extent to which he shows himself injured. (C. C., § 2845; Brandt on Suretyship, § 380.) The Sheriff's return is the only evidence offered to prove the value of the property, and it is no part of a Sheriff's return, and is no evidence of value. The Sheriff's return does not show any levy on the books, accounts, or notes; these could be attached only in one way. (C. C. P., § 543.) The return upon a writ must show that everything necessary to a good attachment has been done. (*Charless v. Marney*, 1 Mo. 537.)

L. S. Taylor and *A. P. Catlin*, for Respondent.

The answer avers payment by Reel & McGraw, and upon this issue the verdict is founded on sufficient evidence. The

answer also avers that Cave executed the note as surety, and this is found for defendant on sufficient evidence.

The transaction at the maturity of the note between McGraw and Carey (outside of it as a payment) exonerates the defendant under the provisions of Section 2839 of the Civil Code. If it was not in fact a performance of the principal obligation, it was an offer of such performance, coupled with the present ability to perform. The Court said, in *Hayes v. Josephi*, 26 Cal. 545: "It is true that a tender by the principal debtor does not discharge the debt, and he is bound to keep his tender good. * * * But there are substantial reasons why a tender should operate as a discharge of a mortgage or surety which do not apply to the debtor personally."

The rule, since the Code, is that the real relation (except as against innocent third persons) may be shown by parol as against the apparent relation. (C. C., § 2832.) In *Harlan v. Ely*, 55 Cal. 343 (case of a joint note), the Court said: "It was lent to both. The character which it was agreed should be performed by defendant in the transaction with plaintiff was that of principal. If plaintiff had advanced his money without notice of the suretyship, they could have held defendant as maker. If they had agreed to take him as surety, they could only have held him as such, although he appeared as principal upon the written instrument. The present is a case beyond the statute, in which the Court below reached the conclusion that the defendant had not appeared in duplicate character in his transaction with plaintiff, but that his real and apparent relation to them was the same."

In the case at bar, the jury found as a fact upon all the testimony, that the real relation between defendant and plaintiff was that of suretyship, and not that of principal, which, upon the face of the written instrument, it appeared to be. With this relation found by the verdict, there are a number of sufficient facts found to exonerate the defendant. 1. Plaintiff agreed with defendant to make the principal pay the note at maturity. 2. Plaintiff had the power to perform this agreement, and violated it, without any motive, other than one exclusively between itself and Reel & McGraw as a customer of its bank. 3. It was the duty of the bank to apply the \$1,700 in its hands to the payment of the note. "Where the means of

satisfying the debt subsequently come into the hands of the creditor, and he does not avail himself of such means, but parts with them without the knowledge or consent of the surety, the surety is discharged," is what the Supreme Court said in *Hayes v. Josephi*, 26 Cal. 542, quoting, in support, *Baker v. Briggs*, 8 Pick. 121; S. C., 19 Am. Dec. 311; *Hayes v. Ward*, 4 Johns. Ch. 122; S. C., 8 Am. Dec. 554; 8 Serg. & R. 457; 13 id. 157. Carey's duty to apply the \$1,700 was reinforced by his special promise to Cave. 4. It was the avowed purpose of the principal to apply the \$1,700 to the payment of the note, and if this purpose was not consummated, as we contend it was, it was thwarted upon the motion of plaintiff, when he said to McGraw: "You leave Uncle Brad's note, and you can draw what money you require;" and this was a gross and inexcusable violation of plaintiff's duty. (C. C., § 2840.) 5. The \$1,700 in cash in plaintiff's hands, and its avowed willingness to accept Reel & McGraw's check for the full amount due on the note (saying nothing of the acceptance of the check and the surrender of the note), was an exoneration of the defendant from all liability as surety. 6. The leaving of the note, that is, giving it back after it had been surrendered, was in pursuance of a new contract between Reel & McGraw and plaintiff, to which defendant was a stranger.

It is further averred in the answer that plaintiff secured the claim by attachment upon personal property more than sufficient to satisfy its demand, and afterwards, without defendant's knowledge or consent, and to favor other creditors, released the attachment. (C. C., §§ 2840, 2845.)

The Court:

There was evidence tending to show that the note in suit was paid by Reel & McGraw and surrendered to them, although subsequently retaken by the plaintiff from Reel & McGraw, and held by it without the knowledge or consent of the defendant Cave. If the jury believed such evidence, notwithstanding the evidence in conflict, the verdict was correct. In such case we will not disturb the verdict. There was evidence, also, tending to show that the plaintiff had sufficient property of Reel & McGraw attached to secure the

payment of the note, and that the attachment was released without the knowledge or consent of the defendant Cave. Cave being an accommodation maker, should not, under such circumstances, be injured by the acts of plaintiff.

No error appearing, the order is affirmed.

[No. 6,993. — In Bank.]

December 21, 1882.

JOHN HILL v. P. A. FINIGAN.

PURCHASE BY PLEDGEE AT SALE — CONSENT OR RATIFICATION BY PLEDGOR. —

A pledgor may consent to or ratify a purchase, at public auction, by the pledgee of the property pledged.

Id. — INSTRUCTION TO JURY. — In its instructions, the Court below, in effect, told the jury that Section 3010 of the Civil Code, which prohibits the pledgee from purchasing the property pledged, except by direct dealing with the pledgor, requires the direct dealing to precede the sale, to be something which changes the form of the original contract, and be supported by a consideration.

Held: In each particular the instruction is erroneous. In the first place, it entirely excludes the question of ratification; and in the second place, as the statute was intended for the protection of the pledgor, he may, at the time of the making of the pledge, or at any subsequent time, without changing the form of the original contract, and without consideration, consent that the pledgee may purchase at the sale.

Id. — INSTRUCTION TENDING TO PREJUDICE JURY. — (Per MORRISON, C. J., and ROSS and MYRICK, JJ.) The Court below also instructed the jury as follows: "The object of the law is for the purpose of guarding against the greed and rapacity of money-lenders, and those who deal in securities of this character." And again: "There are many reasons why this law is a wholesome one, independent of the rapacity and greed of creditors."

Held: In view of the circumstances of this case, these instructions were manifestly improper, as tending to prejudice the jury against the defendant.

APPEAL by the defendant from the judgment of the District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, and from an order denying a motion for a new trial.
DWINELLE, J.

Action for the conversion of a lot of mining stock and jewelry. The complaint of the plaintiff, filed August 8, 1878, al-

leged: That on the seventh day of August, A. D. 1878, he was and still is the owner of, and he then was and still is entitled to the possession of, the following-described articles of personal property, to wit: One hundred shares of the capital stock of the Sierra Nevada Silver Mining Company; one hundred shares of the capital stock of the Caledonia Silver Mining Company; fifty shares of the capital stock of the Yellow Jacket Silver Mining Company; fifty shares of the capital stock of the Best and Belcher Mining Company; fifty shares of the capital stock of the Hale and Norcross Silver Mining Company; twenty-five shares of the capital stock of the Kentucky Mining Company; two hundred shares of the capital stock of the Consolidated Imperial Mining Company; one hundred and fifty shares of the capital stock of the Golden Chariot Mining Company; one gold pin, or brooch, set with sixteen diamonds; one pair gold earrings, set with seven diamonds each; one gold finger-ring set with nine diamonds; one gold cross set with twenty-six diamonds; one gold cross set with a single diamond; that the defendant on the said seventh day of August, 1878, was in the possession of said property; that on the same day the plaintiff demanded of the defendant the possession of the said property, and the restoration of the same to him, but the defendant wrongfully and unlawfully refused, and still does wrongfully and unlawfully refuse, to deliver or restore the same, or any part thereof, to the plaintiff, and has converted the same to his own use, and still wrongfully and unlawfully withholds and detains the same from the plaintiff; that said property was on said seventh day of August, 1878, of the value of \$6,921.25 in gold coin. Wherefore plaintiff demands judgment against the defendant for the sum of \$6,921.25 in gold coin, with legal interest thereon from the seventh day of August, 1878, or in case the said property should hereafter increase in value, then the highest market value of said property at any time between the said seventh day of August, 1878, and the verdict in this action without interest, besides his costs of suit, and for such further judgment as to this Court may seem meet.

The defendant, after denying that the plaintiff since the thirteenth day of June, A. D. 1878, ever was the owner, or since the fifteenth day of February, A. D. 1878, ever was en-

titled to the possession, of any part of the property described in the complaint, and that the defendant had converted the property alleged. That heretofore, and on the fifteenth day of February, 1878, at said City and County of San Francisco, said defendant, at the special instance and request of plaintiff, loaned and advanced unto said plaintiff the full sum of \$3,628.50, in gold coin of the United States, and which sum plaintiff then and there undertook and promised to repay unto defendant whenever requested so to do, with interest thereon, in gold coin of the United States; and thereupon, and on said fifteenth day of February, 1878, at said city and county, plaintiff delivered to and deposited with defendant, by way of security for the payment of said sum of money so loaned unto him by defendant, all and singular the articles of personal property mentioned and described in the complaint. And said defendant then and there received said articles of personal property, and held the same by way of security for the repayment of said sum of money and interest thereon. That during the time said plaintiff held said articles of personal property prior to the sale thereof hereinafter mentioned, it became and was necessary for the protection of such security to advance and pay various sums of money, as and for assessments levied and assessed upon the shares of mining stock mentioned in complaint and pledged unto him, and said defendant did advance and pay such assessments, amounting to the sum of \$300.50, in said gold coin. That thereafter, and on or about the sixth day of June, 1878, the defendant duly demanded of plaintiff the payment to him of said sum of money so loaned and advanced, and the sums of money as aforesaid paid, laid out, and expended by defendant for assessments upon said shares of mining stocks, and interest upon said sums. And plaintiff neglected and refused to pay said sums, or any part thereof, and thereupon, and on or about said sixth day of June, 1878, the defendant gave to plaintiff actual notice that thereafter and on the thirteenth day of June, 1878, at the hour of ten o'clock in the forenoon of that day, at the auction-house of Maurice Dore & Co., at No. 410 Pine street, between Montgomery and Kearny streets, in said City and County of San Francisco, he would, through H. A. Cobb, Esq., auc-

tioneer of said house, offer and sell all of said stock and property described in complaint, at public auction, for the highest obtainable price, and out of the proceeds of such sale would pay the expenses thereof, and said debt, so far as the money obtained from the sale would defray the same. That such notice of the time and place at which the property pledged would be sold was actually given to and received by plaintiff, at said city and county, at such reasonable time before the sale as would enable said pledgor, to wit, said plaintiff, to attend thereat. That thereafter and on said thirteenth day of June, 1878, the plaintiff having failed and neglected to pay said indebtedness, or any part thereof, and the same being wholly due and unpaid, and amounting on said day to the sum of \$4,077.50, in gold coin of the United States, at said hour of ten o'clock in the forenoon of said day, at said auction-house of Maurice Dore & Co., said defendant, by and through said H. A. Cobb, Esq., auctioneer, offered and sold all the personal property mentioned and described in complaint and so pledged unto defendant, except as hereinafter stated; and that said sale was made by public auction in the manner and upon the notice to the public usual at the place of sale in respect to auction sales of similar property, and was for the highest obtainable price, and at such sale all said personal property described in complaint and so pledged unto defendant, except as hereinafter stated, was sold at public auction in the manner and upon the notice to the public usual at the place of sale in respect to auction sales of similar property, pursuant and according to said notice, for the highest obtainable price, to wit, the sum of \$3,123.75, and that after deducting the expense of said sale, to wit, the sum of \$25, there remained of the proceeds of said sale, to be applied upon the indebtedness aforesaid the sum of \$3,098.75, which was applied upon said indebtedness, leaving a balance due unto defendant from plaintiff of the sum of \$978, and no part of which sum plaintiff has paid, and the same now remains due and owing unto defendant. That of said shares of stock so pledged unto defendant by plaintiff, the fifty shares of the capital stock of the Golden Chariot Mining Company mentioned in complaint had been sold for assessment prior to the delivery thereof to defendant,

and the same were of no value and were not offered for sale, and defendant still retains the same. That the sale aforesaid was in all respects fairly and legally conducted, and the prices obtained for all of the articles of personal property so sold were the highest market prices for said articles in the market at the city and county aforesaid on the day of said sale.

And said defendant, for a further and separate answer, herein alleges and shows: That heretofore, and on the fifteenth day of February, 1878, at said City and County of San Francisco, said defendant, at the special instance and request of plaintiff, loaned and advanced unto said plaintiff the full sum of \$3,628.50, in gold coin of the United States, and which sum plaintiff then and there undertook and promised to repay unto defendant whenever requested so to do, with interest thereon, in gold coin of the United States; and thereupon, and on said fifteenth day of February, 1878, at said City and County, plaintiff delivered to and deposited with defendant, by way of security for the payment of said sum of money so loaned unto him by defendant, all and singular the articles of personal property mentioned and described in the complaint, and said defendant then and there received said articles of personal property, and held the same by way of security for the repayment of said sum of money and interest thereon. That during the time said plaintiff held said articles of personal property prior to the sale thereof hereinafter mentioned, it became and was necessary for the protection of said security to advance and pay various sums of money as and for assessments levied and assessed upon the shares of mining stock mentioned in complaint and pledged unto him, and said defendant did advance and pay such assessments, amounting to the sum of \$300.50, in said gold coin. That thereafter, and on or about the sixth day of June, 1878, the defendant duly demanded of plaintiff the payment to him of said sum of money so loaned and advanced, and the sums of money as aforesaid paid, laid out, and expended by defendant for assessments upon said shares of mining stocks and interest upon said sums. And plaintiff neglected and refused to pay said sums or any part thereof, and thereupon, and on or about said sixth day of June, 1878, the defendant gave to plaintiff actual notice that thereafter, and on the thir-

teenth day of June, 1878, at the hour of ten o'clock in the forenoon, of that day, at the auction-house of Maurice Dore & Co., at No. 410 Pine street, between Montgomery and Kearny streets, in said City and County of San Francisco, he would, through H. A. Cobb, Esq., auctioneer of said house, offer and sell all of said stock and property described in complaint, at public auction, for the highest obtainable price, and out of the proceeds of such sale would pay the expenses thereof, and said debt, so far as the money obtained from the sale would defray the same. That such notice of the time and place at which the property pledged would be sold was actually given to and received by plaintiff at said city and county at such reasonable time before the sale as would enable said pledgor, to wit, said plaintiff, to attend thereat, and thereupon said plaintiff agreed with defendant that said sale should be made at the time and place specified in said notice, and without any other or further notice to the public or to him thereof, and agreed that the sale so made should in all respects be valid and binding, and waived any other or further notice to the public or to himself thereof; and thereafter, and on said thirteenth day of June, 1878, the plaintiff having failed and neglected to pay such indebtedness or any part thereof, and the same being wholly due and unpaid and amounting on said day to the sum of \$4,077.50, in gold coin of the United States, at said hour of ten o'clock in the forenoon of said day, at said auction-house of Maurice Dore & Co., said defendant, through H. A. Cobb, Esq., auctioneer, offered and sold all the personal property mentioned and described in the complaint and so pledged unto defendant, except as hereinafter stated, and that said sale was made by public auction, in the manner usual at the place of sale in respect to auction sales of similar property, and was for the highest obtainable price, and at such sale all said personal property described in complaint and so pledged unto defendant, except as hereinafter stated, was sold at public auction, in the manner usual at the place of sale in respect to auction sales of similar property, pursuant and according to said notice, for the highest obtainable price, to wit, the sum of \$3,123.75, and that after deducting the expenses of sale, to wit, the sum of \$25, there remained of the proceeds of said sale, to be applied upon the indebtedness aforesaid, the

sum of \$3,098.75, which was applied upon said indebtedness, leaving a balance due unto defendant from plaintiff of the sum of \$978, and no part of which sum plaintiff has paid, and the same now remains due and owing unto defendant. That of said shares of stock so pledged unto defendant by plaintiff, the fifty shares of the capital stock of the Golden Chariot Mining Company, mentioned in complaint, had been sold for assessment prior to the delivery thereof to defendant, and the same were of no value and were not offered for sale, and defendant still retains the same; that the sale aforesaid was in all respects fairly and legally conducted, and the prices obtained for all of the articles of personal property so sold were the highest market prices for said articles in the market at the city and county aforesaid, on the day of said sale.

And said defendant, for a further and separate answer herein, alleges and shows, that heretofore, and on the fifteenth day of February, 1878, at said City and County of San Francisco, said defendant, at the special instance and request of plaintiff, loaned and advanced unto plaintiff the full sum of \$3,628.50, in gold coin of the United States, and which sum plaintiff then and there undertook and promised to repay unto defendant whenever requested so to do, with interest thereon, in gold coin of the United States; and thereupon, and on said fifteenth day of February, 1878, at said city and county, plaintiff delivered to and deposited with defendant, by way of security for the payment of said sum of money so loaned unto him by defendant, all and singular the articles of personal property mentioned and described in the complaint, and said defendant then and there received said articles of personal property and held the same by way of security for the repayment of said sum of money and interest thereon. That during the time said plaintiff held said articles of personal property prior to the sale thereof hereinafter mentioned, it became and was necessary for the protection of such security to advance and pay various sums of money as and for assessments levied and assessed upon the shares of mining stock mentioned in complaint and pledged unto him, and said defendant did advance and pay such assessments, amounting to the sum of \$300.50, in said gold coin; that thereafter, and on or about the sixth day of June, 1878, the defendant duly

demanding of plaintiff the payment to him of said sum of money so loaned and advanced, and the sums of money as aforesaid paid, laid out, and expended by defendant for assessments upon said shares of mining stock and interest upon said sums; and plaintiff neglected and refused to pay said sums or any part thereof, and thereupon, and on or about said sixth day of June, 1878, the defendant gave the plaintiff actual notice that thereafter and on the thirteenth day of June, 1878, at the hour of 10 o'clock in the forenoon of that day, at the auction-house of Maurice Dore & Co., at No. 410 Pine street, between Montgomery and Kearny streets, in said City and County of San Francisco, he would, through H. A. Cobb, Esq., auctioneer of said house, offer and sell all of said stock and property described in complaint at public auction, for the highest obtainable price, and out of the proceeds of such sale would pay the expenses thereof, and said debt, so far as the money obtained from the sale would defray the same; that such notice of the time and place at which the property pledged would be sold was actually given to and received by plaintiff at said city and county, at such reasonable time before the sale as would enable said pledgor, to wit, said plaintiff, to attend thereat; and thereafter, and on said thirteenth day of June, 1878, the plaintiff having failed and neglected to pay said indebtedness or any part thereof, and the same being wholly due and unpaid and amounting on said day to the sum of \$4,077.50, in gold coin of the United States, at said hour of 10 o'clock in the forenoon of said day, at said auction-house of Maurice Dore & Co., the defendant, through said H. A. Cobb, Esq., offered and sold all the personal property mentioned and described in the complaint and so pledged unto defendant, except as hereinafter stated, and that said sale was made by public auction, in the manner usual at the place of sale in respect to auction sales of similar property, and was for the highest obtainable price, and at such sale all such personal property described in complaint and so pledged unto defendant, except as hereinafter stated, was sold at public auction in the manner usual at the place of sale in respect to auction sales of similar property, pursuant and according to said notice, for the highest obtainable

price, to wit, the sum of \$3,123.75; and that after deducting the expenses of said sale, to wit, the sum of \$25, there remained of the proceeds of said sale, to be applied upon the indebtedness aforesaid, the sum of \$3,098.75, which was applied upon said indebtedness, leaving a balance due unto defendant from plaintiff of the sum of \$978, and no part of which sum plaintiff has paid, and the same now remains due and owing unto defendant; that of said shares of stock so pledged unto defendant by plaintiff, the fifty shares of the capital stock of the Golden Chariot Mining Company mentioned in complaint had been sold for assessment prior to the delivery thereof to defendant, and the same were of no value and were not offered for sale, and defendant still retains the same; that the sale aforesaid was in all respects fairly and legally conducted, and the prices obtained for all of the articles of personal property so sold were the highest market prices for said articles in the market at the City and County of San Francisco aforesaid on the day of said sale; and thereafter, plaintiff being fully informed of the facts, did fully, wholly, and entirely ratify and confirm the said sale and all of said proceedings, and did undertake and agree upon request to pay said defendant said sum of \$978.75 in said gold coin, the balance of said debt so remaining due and unpaid.

And for a further and separate answer and defense, and by way of counter-claim, the defendant alleges and shows that heretofore, and on or about the thirteenth day of June, A. D. 1878, at the City and County of San Francisco, an account was stated between plaintiff and defendant, and upon such statement a balance of \$978.75 in gold coin of the United States was found to be due from said plaintiff to this defendant, and plaintiff then and there promised to pay said sum, but has paid no part thereof.

Wherefore defendant demands judgment against said plaintiff for said sum of \$978.75, with interest thereon from June 13, 1878, and costs of suit.

On August 1, 1879, the defendant filed a supplemental answer as follows: Now comes the above-named defendant, by leave of Court first had and obtained, and for further and additional answer to the answer heretofore filed in this cause, and not in any manner waiving any of the defenses in the

answer heretofore filed; that the plaintiff, on the first day of February, 1878, was indebted to the firm of Randolph, McIntosh & Co., stock brokers of this city, in the sum of \$3,628.50 gold coin, and said Randolph, McIntosh & Co. held and had a lien upon all and singular the personal property particularly described in the complaint to secure the payment of said money due them as aforesaid, with power to sell the same or any part thereof, without making any previous demand for payment thereof, with or without notice of either time or place of sale, at any session of the San Francisco Stock and Exchange Board, or at private or public sale, whenever the market value of said property was reduced to less than twice the amount of the sums of money advanced thereon by said Randolph, McIntosh & Co., or whenever in their judgment the said property is liable to depreciate so as to make the security insufficient, or whenever they shall elect to close the account; that said loan bore interest at the rate of one and a half per cent. per month, and compounded monthly when not paid; that said Randolph, McIntosh & Co., on or about the fifteenth day of February, 1878, at the instance and request of plaintiff, sold and transferred to this defendant all their interest, rights, and privileges in and to their said claim against plaintiff, and in and to said personal property described in said complaint and their contract of security given to secure the same; that on the sixth day of June, 1878, there was due and owing to this defendant from plaintiff on the aforesaid indebtedness the sum of \$4,077.50, and this defendant, prior to and on the sixth day of June, 1878, deemed that the property described in said complaint was liable to depreciate, and defendant elected to close said account of said plaintiff; that the market value of the property pledged to secure the same was then reduced to less than twice the amount advanced thereon; that this defendant, on said sixth day of June, 1878, notified said plaintiff in writing that he elected to close said account, and demanded the payment of \$4,077.50 then and there due this defendant from plaintiff, and in default of payment thereof he would sell said property at auction at the auction-house of Maurice Dore & Co., No. 410 Pine street, in the city of San Francisco, on the thirteenth day of June, 1878, at ten o'clock A. M.; that

said plaintiff failed and neglected to pay said amount due, or any part thereof, and this defendant on said day, through Maurice Dore & Co., offered and sold all of said property so pledged as aforesaid, except the property hereafter stated; that said sale was made by public auction in pursuance of the calls of said notice, for the highest obtainable price, to wit, (\$3,123.75) three thousand one hundred and twenty-three dollars and seventy-five cents, leaving a balance due defendant on said indebtedness of (\$978) nine hundred and seventy-eight dollars, and said balance now remains due and unpaid from plaintiff to defendant. That of said property, fifty shares of the capital stock of the Golden Chariot Mining Company had been sold for assessments prior to the delivery thereof to defendant. The case was tried before a jury August 7, 1879, and a verdict was rendered in favor of the plaintiff for \$29,960. Judgment was thereupon entered. Defendant moved for a new trial. The other facts are stated in the opinion of the Court.

W. T. Wallace and Lloyd & Wood, for Appellant.

The Court erred in charging the jury that at a sale of pledged property the pledgee could not purchase. (§ 3010, Civ. Code; 41 Cal. 519.) The Court erred in charging the jury that the pledgor of pledged property could not, before a sale, empower the pledgee to buy. (Civ. Code, §§ 3010, 3513.) The Court erred in charging the jury that a consideration was necessary to confirm a sale, or empower a pledgee to buy, or to waive any provision of the Code concerning the sale of pledge. The Court charged the jury in these words: "I have already held, though I think the jury were absent at the time, that the pledgee can not purchase the thing pledged except by direct dealing with the pledgor. That means by something subsequent to the sale, not sub — not subsequent to the sale — but it must be something that changes the form of the original contract, and that it must be for a consideration." (Civ. Code, §§ 2307, 2308, 3515, 3516.) The Court erred in charging the jury that a sale of pledged property, made without an observance of the provisions of the Code, is void. The Court erred in charging the jury that a waiver of any of the requirements of the Code concerning the sale of pledged prop-

erty by the pledgor is unlawful. (Sedgwick on Statutory and Const. Law, 109; 10 N. Y. 446; 3 id. 197, 511.) The Court erred in charging the jury: "The object of the law is for the purpose of guarding against the greed and rapacity of money-loaners and those who deal in securities of this character." "There are very many reasons why this law is a wholesome one, independent of the rapacity and greed of creditors."

Stanly, Stoney & Hayes, for Respondent.

The familiar doctrine that persons holding fiduciary relations are incompetent to purchase the property held by them in trust, is a rule of universal application to all persons coming within the principle that no party can be permitted to purchase an interest where he has a duty to perform, inconsistent with the character of a purchaser. The rule rests upon grounds of public policy, is to be found alike in the Roman and common law, and is enforced without regard to the question of *bona fides* in the particular case. The case of pledgor and pledgee comes within the rule. The sale of the pledged property by Finigan to himself was contrary to the faith of the bailment, forbidden alike by the common law and the Civil Code of this State, and was, in the absence of an express, deliberate, clear, and intentional ratification by Hill, so null and void that it did not even amount to a conversion, except at the election of Hill, the pledgor. Failing such election (and none such was made), the possession of the stock and jewelry remaining unchanged, the bailment continued thereafter as before, until the tender on August 7th of the amount of the debt, and the demand and refusal of the return of the property pledged, which constituted the conversion on which this action is based. (Civil Code of California, § 3010; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 243, 265-7; *Baltimore Mar. Ins. Co. v. Same*, id. 269, 302; *Middlesex Bank v. Minot*, 4 Metc. 325-9; *Bank of the Old Dominion v. D. & P. R. R. Co.*, 8 Iowa, 280; *Bryan v. Baldwin*, 52 N. Y. 235; *Stokes v. Frazier*, 72 Ill. 432, 433; Story on Bailments, § 319; *Perkins v. Thompson*, 3 N. H. 145, 146; *Wright v. Ross*, 36 Cal. 442.)

We call the special attention of the Court to the first four of the cases above cited. A ratification of a sale impeachable

under the rule adverted to in the preceding point, can only be effected by an independent and substantive act founded on complete information, of perfect freedom of volition, not under the force, pressure, or influence of the prior transaction, not qualified with conditions, and done with the knowledge that the sale was illegal, and that the act being done will have the effect of confirming and validating what was an impeachable transaction. *Hoffman Coal Co. v. Cumberland C. & I. Co.*, 16 Md. 508, 509; *Mulford v. Minch*, 3 Stockt. 22, 23; *Beeson v. Beeson*, 9 Barr. 300; *M'Cants v. Bee*, 1 McCord's Ch. (S. C.) 391; S. C., 16 Am. Dec. 610; *Ricketts v. Montgomery*, 15 Md. 52; *Boyd v. Hawkins*, 2 Dev. Eq. 215; *Tucker v. Moreland*, 10 Peters, 75, 76; *Murray v. Palmer*, 2 Sch. & Lef. 486; *Salmon v. Cutts*, 4 De G. & Sm. 132; *Waters v. Thorn*, 22 Beav. 559; *Molony v. L'Estrange*, Beatty's Ch. R. 413, 414; *Roche v. O'Brien*, 1 Ball & Beatty, 339; *Cockerell v. Cholmeley*, 1 Russ. & My. 425; Lewin on Trusts, 3d ed., 655.)

It is true that there are cases where a prompt repudiation is required, where mere silence when notice of the transaction is given is said to work a ratification, but they are not cases falling under the principle which renders the sale in the case at bar void. They are principally cases where an agent, purporting to act with a third party on behalf of his principal, does an act beyond the scope of his authority, or without authority. In such cases, when the matter is brought to the knowledge of the principal, he owes to the third party the duty of promptly repudiating the transaction. Failing to do so, he is said to have ratified the act of his agent. But it may be questioned whether this is the proper expression to use. It would seem to be more correct to say, that by his silence, when for the protection of the third party he should have spoken, he is estopped to deny the authority of the agent. Even in cases of agency, however, this rule does not obtain between the principal and his agent, as between them mere acquiescence in order to work a ratification must have continued an unreasonable length of time. (*Clarke v. Meigs*, 10 Bosw. 349; *Brass v. Worth*, 40 Barb. 654.) In the two cases in the 25th Maryland and that in 4 Metcalf, cited under our first point, nearly two years elapsed before dissent from the sale was expressed. Tested by the above rules, it will be

found that the rulings of the Court below were erroneous only in being too favorable to appellant.

Ross, J.:

There was some testimony tending to show that the plaintiff not only consented that the defendant might purchase the property at the sale, but requested him to do so, and some testimony tending to show a ratification of the sale by the defendant, if it admitted of ratification. Sections 3001 *et seq.* of the Civil Code provide for the sale of pledged property at public auction, and by Section 3010 it is declared: "A pledgee or pledge-holder can not purchase the property pledged, except by direct dealing with the pledgor."

The Court below instructed the jury: "That means by something subsequent to the sale, not sub—not subsequent to the sale, but it must be something that changes the form of the original contract, and it must be for a consideration." In effect, the Court told the jury that the "direct dealing" mentioned in the statute must precede the sale, must be something that changes the form of the original contract, and must have a consideration to support it.

In each particular the instruction is erroneous. In the first place it entirely excludes the question of ratification. There can be no doubt that a sale made by a pledgee in contravention of the provisions of the statute may be ratified by the pledgor; and it has been expressly so decided by this Court, in the case of *Child v. Hugg*, 41 Cal. 519. In the second place the instruction exacts proof of the elements necessary to make a new contract. Obviously, such is not the meaning of the statute. The section was undoubtedly enacted for the protection of the pledgor, to the end that no unfair advantage be taken of him. It prohibits a pledgee or pledge-holder from purchasing the property pledged "except by direct dealing with the pledgor." By such dealing with the pledgor, the pledgee *may* purchase it. Why should it be held that by this is meant that the pledgee or pledge-holder can only purchase by taking a direct transfer from the pledgor? The statute does not say so, and the reason of the prohibition suggests the contrary. If the pledgor chooses to do so, we see no reason why he may not consent that the pledgee

may buy at the public sale. In some cases it may be to his interest that this be done. Such consent may be given either at the time of making the pledge, or at any subsequent time, without changing "the form of the original contract," and without consideration.

The Court below also erred—particularly in view of the circumstances appearing in this case—in instructing the jury as follows: "The object of the law is for the purpose of guarding against the greed and rapacity of money-lenders and those who deal in securities of this character." And again: "There are many reasons why this law is a wholesome one, independent of the rapacity and greed of creditors."

This was manifestly improper. No one can measure the extent of the influence upon the jury of such instructions coming from the Court. The defendant was entitled to a fair trial. He did not have it in the Court below, and we can not permit the judgment to stand.

Judgment and order reversed, and cause remanded for a new trial.

MORRISON, O. J., and MYRICK, J., concurred.

SHARPSTEIN, J., concurring specially:

I concur. The instruction first referred to in the opinion of Mr. Justice Ross is, in my opinion, clearly erroneous. Upon the other questions discussed in the leading opinion, I express no opinion.

THORNTON and MCKINSTRY, JJ., concurred in the judgment on the first point discussed in the opinion of Mr. Justice Ross.

McKEE, J., concurred in the judgment.

[No. 8,345. — In Bank.]
December 22, 1882.

JOHN S. BARRETT v. J. V. SIMMS ET AL.

HOMESTEAD — INSOLVENCY PROCEEDINGS — ORDER OF SALE — JURISDICTION.
— An order of the Court in an insolvency proceeding for the sale of the homestead of the insolvent is without jurisdiction, and a sale thereunder passes no title.

APPEAL from a judgment for the plaintiff and from an order denying a new trial in the Superior Court of the County of Sacramento. DENSON, J.

In an insolvency proceeding the Court made an order setting apart to the insolvent his homestead, which contained the following clause: "Nothing contained herein shall have the effect to set aside to said Simms property of any greater value than \$5,000. Nor shall it prejudice the right of the assignee herein, or of any creditor of said Simms, to sell said property, or to have it sold in case a bid of over \$5,000 shall be made therefor." Afterwards an order was made for the sale of the homestead, and the same was sold for the sum of \$7,000 to the plaintiff, who brought this action to recover the land.

L. S. Taylor and A. L. Hart, for Appellant.

The decree of the Court in the insolvency proceeding, setting apart the premises, had the effect to create a conclusive presumption that the said premises were a homestead properly selected. (C. C. P., §§ 1908, 1962.) The effect of such an order is to withdraw the said property from the assets of the estate to be administered, and to deprive the Court of all jurisdiction or power over it. (*Estate of Hardwick*, 59 Cal. 292; *Estate of William H. Orr*, 29 id. 101; *Shadt v. Heppe*, 45 id. 433.)

To the proceeding in which this order was made all the creditors were parties; and from and after the date and entry of the order, independently of its previous condition or character, the said land became the property, not of the insolvent, but of the husband and wife, and was by them held in joint tenancy. (Civil Code, § 1265; *Estate of B. F. Headen*, 52 Cal. 294.) The order made by the lower Court, that the property be sold if it should bring more than \$5,000, was a palpable violation of the provisions of our statute, and was absolutely void. Ample provision for the determination of the value of homesteads, and their partition and sale in case they exceed the statutory value, has been made by the Code. (Civil Code, §§ 1245-1259; *People v. Craycroft*, 2 Cal. 243; *Ward v. Severance*, 7 id. 126.) The method provided is expressly made exclusive; "in no way, therefore, except as in that title pro-

vided, can property which has been declared a homestead, no matter what may be its actual value, be subject to execution or forced sale." (Civil Code, § 1240; *Barrett v. Sims*, 59 Cal. 615.)

Freeman & Bates, for Respondents.

The Insolvent Act must control here. It does not confer on the Court any power to appoint appraisers. Where no homestead is selected it gives the Court power to proceed as in Section 1465, C. C. P. That section does not provide for any appraisement whatsoever. Under that section lands may be sold and a homestead set apart out of the proceeds. (*McCauley's Estate*, 50 Cal. 544.) But this is not a case falling under Section 1465. The Court, in this case, has the power, under Section 60, to set apart for the use and benefit of the bankrupt the property exempt from execution. It may, therefore, adopt its own mode, the statute not having designated any. (C. C. P., § 187.) It is sufficient that it gives the insolvent \$5,000, for that is the limit of his homestead. (C. C., § 1260.)

The order directing a sale of the property has never been appealed from. Even if it be erroneous, it is not void.

The COURT:

There is no statute of this State authorizing a sale, in insolvency proceedings, of property which has been declared a homestead. Therefore, the proceedings had for a sale in this case passed no title.

Judgment and order reversed.

[No. 7,918. — In Bank.]
December 22, 1882.

M. C. HAWLEY & CO. v. W. D. CAMPBELL ET AL.

DISCHARGE IN INSOLVENCY OF INDIVIDUAL MEMBER OF FIRM FROM FIRM DEBTS.—Under the Insolvency Act of May 4, 1852, and the Acts amendatory thereof and supplemental thereto, the discharge of an individual member of a firm from all his debts operates as a discharge from all his individual liability for the debts of the firm.

CASES DISTINGUISHED. — Neither of the cases entitled, respectively, *Meyer v. Kohlman*, 8 Cal. 44; *California Furniture Company v. Halsey*, 54 id. 815; *Glenn v. Arnold*, 56 id. 631; *Freeman v. Campbell*, id. 639; and *In re Baker & Hamilton*, 55 id. 302, went further than to hold that by the Insolvency Act of May 4, 1852, and the Act amendatory thereof and supplemental thereto, no provision was made for the relief of an insolvent partnership, and, as a consequence, that the insolvency Court under those Acts could not administer partnership property nor prevent partnership creditors from subjecting such property to the payment of their debts. In none of the cases mentioned was it held that, under the Acts referred to, an individual member of a firm could not be discharged from his individual liability for firm debts. Nor, in our opinion, does such result necessarily or logically follow from the doctrine of those cases.

APPEAL by plaintiffs from the judgment of the Superior Court of the County of Colusa. HATCH, J.

Action on promissory notes. This action was brought by plaintiffs, M. C. Hawley & Co., to recover of the defendants, Campbell & Spurgeon, \$3,700 and interest on two several promissory notes, executed by them as partners, to plaintiffs, on October 1, 1878. The defendants answered, and set up their individual proceedings in insolvency and discharges under the Act of May 4, 1852, and the Acts amendatory thereof and supplemental thereto, as a bar to the action. As individuals they, at the time, surrendered all of their property. The Court made and filed its written findings, and drew as conclusions of law therefrom, that defendants were entitled to judgment against plaintiffs for their costs, and gave judgment accordingly. From the judgment, this appeal is prosecuted by the plaintiffs.

John T. Harrington, for Appellants.

It would seem that it is no longer an open question in this State, that where partners have severally filed their petitions in insolvency under the Act of May 4, 1852, no jurisdiction was thereby acquired by the insolvent Court over the estate of the partnership, and that discharges of the individual members of the firm could not be made operative against the firm debts. (*Glenn v. Arnold*, 56 Cal. 631; *Freeman v. Campbell*, id. 639.) In these cases the legal effect of the insolvency proceedings and discharges of these identical defendants came under review by this Court, and it was there dis-

tinctly held that they were not thereby discharged from their partnership or firm debts. The insolvency Court acquired no jurisdiction of the subject-matter of the partnership, and therefore could not discharge its members from partnership liabilities.

Questions of a like character have arisen under the United States Bankrupt Act, with this difference: that by the latter, provision is made for the insolvency of partnerships; while under our law there is no authority for such proceedings. But even under the United States Bankrupt Act, it has been uniformly held, under proceedings by individual members of a partnership that, giving no schedule of firm debts or assets, nor praying for a discharge from firm liabilities, the discharge when obtained will relieve the bankrupt from his individual indebtedness and not from partnership liability. (*Corey v. Perry*, 67 Maine, 140; 77 N. Y. 218; 1 Bank. R. 341; 22 Wall. 395; 3 Biss. 491; *Hudgins v. Lane*, 11 Nat. Bank. Reg. 463; 15 id. 417; 2 Ben. 96; 3 id. 386; 6 id. 20; Nat. Bank. Reg. 331; 17 id. 76.)

The insolvency proceedings and discharges of the defendants relied upon by them, as a bar to the plaintiffs' demand, had no effect whatever to relieve them from their partnership liabilities, and the plaintiffs were, therefore, entitled to judgment upon the findings for their demand.

A. L. Hart, for Respondents.

The appeal in this cause presents but a single question, viz.: Whether the members of a firm may be compelled to pay the firm debts after the discharge of the individual members of said firm in insolvency, and after all the assets of the firm have been exhausted in the payment of the firm liabilities. The case differs from the cases of *Freeman v. Campbell & Spurgeon*, and *Glenn v. Arnold*, cited in appellant's points, in that in those cases the firm property had not been exhausted, and this Court, expressly reserving the question herein involved, decided that the discharge in insolvency did not operate to release the partnership property from partnership indebtedness. In the form of those two cases the judgment was in the nature of judgment *in rem* against the property of the partnership remaining, and contained

a provision that the said property should be sold, and the proceeds thereof applied to the judgment, and thereupon the said judgment should be satisfied. The ground upon which those decisions were based was that the insolvency Court, by its insolvency proceedings, acquired no jurisdiction over the partnership property. In this cause it appears that all of the property of Campbell & Spurgeon, both individual and partnership, was surrendered to the assignee, and the whole thereof was applied to the payment of the partnership indebtedness long prior to the commencement of this action. Another essential and important difference between the case of *Freeman et al. v. Campbell & Spurgeon* and this case is that in the former a writ of attachment had been issued under which property of the firm had been attached, while in this case no attachment appears to have been issued, and there was no firm property to attach.

The decrees finally discharging the defendants in insolvency establish, at least primarily, the existence of all facts that are essential to valid decrees, all intendments being in favor of the jurisdiction of the Court and the regularity of its exercise, and the effect of those decrees was to discharge the defendants from individual responsibility for firm indebtedness. The statute under which the said proceedings in insolvency were had provided: "Every insolvent debtor may be discharged from his debts as hereinafter provided," etc. (Hittell's Codes and Statutes, 15,505.)

The statute is couched in language sufficiently general to cover all persons, whatever may be their relations in business. The rule contended for by appellant would require the section of the statute quoted above to be so construed as to make it read: "Every insolvent debtor, except members of firms, may be discharged," etc. This exception is not contained in the statute, and the language of the statute is itself in conflict with such a construction. Each partner is individually liable for the debts of the firm, and this liability may be satisfied out of his individual property under an execution issued upon a judgment against the firm. Liability for firm indebtedness is, in its nature, joint and several; each partner is liable *in solido* for the indebtedness of the firm. The decree in insolvency operates to discharge the partner

from individual responsibility for firm indebtedness, and his assignment vests his individual property as well as his individual interest in the firm property in his assignee. (*Lothrop v. Tilden*, 8 Cush. 375; *Hilliard on Bankruptcy*, 59, 60, 61, 79; *Story on Partnership*, 339, 340; *Willson v. Gomperts*, 11 Johns. 193; *Alter v. McCullen*, 27 La. Ann. 251; *Dorn v. O'Neale*, 6 Nev. 155; *Murray v. Murray*, 5 Johns. Ch. 70; *Halsey v. Norton*, 45 Miss. 703; *Gibson v. Green*, 45 Miss. 209; *Ex parte Foster*, 2 Story, 131; *Lowry v. Morrison*, 11 Paige, 327; *Lacy v. Rockett*, 11 Ala. 1002; *Tucker v. Oxley*, 5 Cranch, 34.)

In this case, there being no firm property out of which to direct the satisfaction of the plaintiff's demand, any judgment that might be rendered against the defendants would practically operate as an individual judgment only, and would be executed against the individual property of the defendants acquired since their several discharges of insolvency. There is an evident distinction between the liability of the firm and the individual liability of the members of the firm for firm indebtedness. The latter is not a firm liability, it is the individual liability of a member of the firm created by law, and from such indebtedness the individuals may be relieved by the insolvency Court. A judgment in favor of the plaintiff, unless limited in its operation to firm property, would necessarily follow the nature of the demand, and hence would partake partially of the nature of an individual judgment. But in this cause, the record showing that the firm property has been exhausted, there could be no such thing as a judgment against property that has no existence.

Ross, J.:

No one of the cases entitled, respectively, *Meyer v. Kohlman*, 8 Cal. 44; *California Furniture Company v. Halsey*, 54 id. 315; *Glenn v. Arnold*, 56 id. 631; *Freeman v. Campbell*, id. 639, and *In re Baker & Hamilton*, 55 id. 302, went further than to hold that by the Insolvent Act of May 4, 1852, and the Act amendatory thereof and supplemental thereto, no provision was made for the relief of an insolvent partnership, and, as a consequence, that the insolvency Court under those Acts could not administer partnership

property nor prevent partnership creditors from subjecting such property to the payment of their debts. In none of the cases mentioned was it held that, under the Acts referred to an individual member of a firm could not be discharged from his individual liability from firm debts. Nor, in our opinion, does such result necessarily or logically follow from the doctrine of those cases.

Inasmuch as the insolvency Court has, under the Act of 1852 and the Acts amendatory thereof and supplemental thereto, no jurisdiction of a partnership or of partnership property, the creditors of such firm can lawfully pursue the firm property regardless of the insolvency proceedings. As long as there remains any partnership property, it is primarily liable for partnership debts. When those debts are paid, if anything remains of the partnership property, it belongs to the partnership; and in this each of the members of the firm have an interest. Such interest is liable for the individual debts of the individual members of the firm. But each member of the firm is also individually liable for all of the debts of the firm of which he is a member. When as an individual he seeks the benefit of the Act in question, he is required to execute an assignment of all of his property, and to file a schedule setting forth, among other things, a full, complete, and perfect inventory of all of his property, with a list of losses he may have sustained, giving the names of his creditors, if known, the amount due to each creditor, and the cause and nature of said indebtedness, and when it accrued. His individual interest in the residuum of the partnership property, if any, is included in this schedule and assignment; and when such assignment is made in good faith and without fraud, the insolvent debtor may, in our opinion, be discharged from all individual liability for partnership as well as other debts. The language of the statute is: "Every insolvent debtor may be discharged from his debts," etc. A partnership debt for which he is individually liable is as much "his" debt as is any other individual debt he may owe; and to hold that from the former he can not be discharged, would be to import into the statute an exception not there made; and not authorized nor indeed called for for the protection of the partnership credi-

tors, since, as we have seen, they may pursue the partnership property without regard to the insolvency proceedings.

Judgment affirmed.

THORNTON, MYRICK, MCKINSTY, and MCKEE, JJ., and MORRISON, C. J., concurred.

SHARPSTEIN, J., dissented.

[No. 7,413. — Department Two.]

December 22, 1882.

SAMUEL H. HARMON v. LUCY B. PAGE ET AL.

LIABILITY IN EQUITY OF STOCKHOLDER TO CREDITOR OF AN INSOLVENT COMMERCIAL CORPORATION. — A Court of equity will, for the benefit of a creditor of an insolvent commercial corporation, compel a stockholder in such corporation to pay in the amount of capital stock which he has contracted with the corporation to take.

CONSTITUTION OF 1879 AS TO LIABILITY OF STOCKHOLDERS. — Neither Section 2 nor Section 3 of Article xii. of the Constitution of 1879, relating to the liability of stockholders in corporations, has any application to this case, because the liability of the stockholders accrued prior to the adoption of that Constitution.

Id. — **CONSTITUTION OF 1863.** — But Sections 32 and 36 of Article iv. of the Constitution of 1863 are substantially the same as Sections 2 and 3 of Article xii. of the Constitution of 1879.

CONCURRENT REMEDIES OF CREDITOR OF SUCH CORPORATION. — None of the provisions of either Sections 32 or 36 of Article iv. of the Constitution of 1863, or of Section 322 of the Civil Code of this State, ousts a Court of equity of its jurisdiction to compel the stockholders of such corporations, under those circumstances, to pay in, for the benefit of creditors, the amount of the capital stock so contracted for by them. The two remedies of the creditor are concurrent — in the one case it is constitutional or statutory, in the other equitable.

STATUTE OF LIMITATIONS — PLEADINGS — DEMURRER. — The defendants demurred to the complaint in this action, and contended that the cause of action is barred by the Statute of Limitations. The complaint was filed August 30, 1878; in the complaint it was alleged that the plaintiff, on the second day of May, 1878, recovered a judgment against the insolvent corporation, upon an indebtedness which accrued between the ninth of May and the fifteenth of October, 1873. No disbandment of the company, no cesser of business, no call upon the subscribers to pay, nor the existence of any other fact that would put the Statute of Limitations in motion, was averred in the complaint.

Held: A defendant can not avail himself of the Statute of Limitations by demurrer to the complaint, unless it affirmatively appears therefrom that the action is barred by some provision of that statute; in this case it does not so appear, and the demurrer should be overruled.

APPEAL by the plaintiff from the judgment of the District Court of the Fourth Judicial District of the State of California in and for the City and County of San Francisco. MORRISON, J.

Action in equity to compel the defendants, as stockholders in insolvent commercial corporation, to pay in for benefit of plaintiff amount of stock contracted for by them. The facts are stated in the opinion of the Court.

Roche & Desbeck and J. W. Carter, for Appellant.

In equity the unpaid subscription of a stockholder is regarded as a trust fund, pledged for the payment of the debts of the corporation. Such unpaid shares or balances are assets of the corporation, and are as much a part of the capital stock as the sums that have been realized thereon. They often constitute the only resource of the company. It has been long a principle of equity that where there is a claim which may be directly enforced at law against one party, but to the due discharge of which another party is ultimately liable, a court of equity treats it as a trust by the party ultimately liable, which may be directly enforced in favor of the party ultimately entitled to the benefit of it. (2 Story's Eq. Jur., §§ 1250-1252.) In this case we have a judgment against the corporation. It has a right to enforce payment of its subscriptions, and with them pay our judgment. This doctrine has always been applied to the unpaid subscription of a corporation in favor of creditors, and is found in the text-books. (Angell & Ames on Corp., §§ 602 *et seq.*, and authorities cited.) The following authorities affirm and apply the principle to cases such as the one at bar: *Adler v. Milwaukee Pat. Brick Co.*, 13 Wis. 57; *Bartlett v. Drew*, 57 N. Y. 587; *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593; *Curran v. State of Arkansas*, 15 How. 307; *Nathan v. Mohawk Ins. Co.*, 3 Edw. Ch. 228; *Mann v. Currie*, 2 Barb. 294; *Wallworth v. Holt*, 4 Myl. & Cr. 619; *Allen v. Montgomery*

R. R. Co., 11 Ala. (N. S.) 437; 1 Am. Law Mag. 96; *Mann v. Cooke*, 20 Conn. 177; *Sanger v. Upton*, 91 U. S. 60; *Hatch v. Dana*, 101 id. 210.)

The statutory remedy by selling delinquent shares for assessments does not affect the right of action of the corporation on the subscription. In the case of *Instone v. The Frankfort Bridge Co.*, 2 Bibb. 576, in discussing this question, the Court says: "A corporation is an artificial person, which, when formed and named acquires many powers, capacities, and incapacities. Some of them, as Blackstone observes, are necessary and inseparably incident to every corporation, and are tacitly annexed, of course, as soon as the corporation is duly created. Such is the right or capacity to sue or be sued, implead or be impleaded, grant or receive, and do all other acts as a natural person may. (1 Bl. Com. 502.) It follows, therefore, that the right to sue would attach to the company as soon as it was organized upon principles of the common law, independent of any provision in the Act creating the company. Nor can we perceive that it can make any difference with respect to the right to sue, whether the debt or demand is due by subscription or accrues on any other account. The subscriber is as much bound to pay the amount of the shares subscribed by him as he would be to pay any other debt, and the right of the company to demand payment is incontestable. Where there is such an obligation on the one to pay, and a right in the other to demand payment, the failure to pay necessarily superinduces a remedy by suit. That the provision of the Act giving to the company the right to sell the shares of a delinquent subscriber does not amount to a negation of the right, seems equally clear. The provision is in the affirmative, and it is a maxim of law that an affirmative statute does not take away the common law. The remedy given by the Act is cumulative only, and the company had a right to resort either to that or the remedy which the common law gave. It was mentioned in the argument as a rule of law, that where a statute creates a right, and prescribes a mode in which it shall be enforced, the mode prescribed by statute and no other must be pursued. Whether such a rule exists or not, is not material to decide, for it is plain that it is wholly inapplicable to the case before the

Court. The right to the demand due from the defendant was not given to the company by the Act of incorporation. That Act, by creating the corporation, gave it capacity to acquire the right, but the right itself was acquired by the defendant's becoming a subscriber; its existence, therefore, depended upon his consent, and was not and could not have been created by the Act of incorporation." The following authorities sustain these views: 1 Redf. on Rail. 163, note 3; Ang. & Ames on Corp., § 549; *Rutland etc. R. R. v. Thrall*, 35 Vt. 536; *Hartford etc. R. R. v. Kennedy*, 12 Conn. 499; *Buffalo and N. Y. City R. R. v. Dudley*, 14 N. Y. 336; *Spangler v. Indiana etc. R. R.*, 21 Ill. 276; *N. H. R. R. Co. v. Johnson*, 30 N. H. 402; *Piscataqua Ferry Co. v. Jones*, 39 id. 491; *Herkimer M. and H. Co. v. Small*, 21 Wend. 273.

It follows that the statutory liability imposed upon stockholders for the debts of the company in no way interferes with the equitable remedy sought here to be enforced. "Unpaid stock is part of the assets of an insolvent corporation without the aid of any statute, and creditors may compel its collection by the trustees by proceedings in equity." (*Briggs v. Penniman*, 8 Cow. 387; S. C., 18 Am. Dec. 454.) In *Haskins v. Harding*, 2 Dill. 106, the Court say: "Without the aid of any statute the unpaid subscriptions to the capital stock constitute a fund available to creditors who are unable to make their demands from the corporate debtor, and equity will lend its aid to enforce payment for the benefit of creditors." The same rule is stated in almost the same words in *Winans v. McKean R. R. and Nav. Co.*, 6 Blatchf. 222. The same reasons that have been adduced to show that the statutory remedy for the collection of assessments or calls was not exclusive in the case of the corporation, apply with equal force to establish that the creditor is not confined exclusively to his statutory remedy, unless where the right attempted to be enforced is conferred by statute. (*Instone v. Frankfort Bridge Co.*, *supra*; Sedgwick Stat. and Const. Law, 401; *Ward v. Severance*, 7 Cal. 126.) In Ohio it was held that an action for unpaid assessments on subscription for stock might be joined in an action on the statutory liability of stockholders. (*Warner v. Callender*, 20 Ohio St. 190.)

This action is not barred by the Statute of Limitations.

If the corporation can recover, the plaintiff can, because it is through the corporation that his equities are enforced. As long as the corporation is not barred by the statute, neither is the creditor. Our debts are in full force against the corporation. Plaintiff's judgment against it was recovered May 2, 1878, and the complaint in this action was filed August 30, 1878, the judgment being in full force. Our view of this case is fully sustained by the Supreme Court of Georgia, in the case of *Cherry v. Lamar*, 58 Ga. 541. In that case the same question as to the Statute of Limitations was raised as in the one at bar. The Supreme Court said: "When judgment creditors of a corporation who have exhausted their remedy against their debtor proceed by bill to subject debts equitably liable to the payment of their judgments, they are not barred if their judgments are not dormant and if the debts they seek to reach are not barred, as between the corporation and its debtors, in this case the stockholders who stand indebted on their subscriptions to the capital stock; * * * that an action on the bills would have been barred when the present cause was commenced is quite immaterial, the rights of the creditors, as against the bank, rest now, not upon the bills, but upon the judgments; and as against the subscribers to the stock, upon the contracts of subscription, by which the subscribers became bound to the bank. For the purposes of this proceeding, it is not necessary that the complainants should disclose the causes of action which they had against the bank, and on which their suits (commenced in December, 1869) were founded. It is enough that they produce the judgments which were rendered in those suits, and show that they are unsatisfied, and that satisfaction can not be obtained without resort to the fund now sought to be brought in." The discussion of the Statute of Limitations, therefore, limits itself to the question, whether the subscriptions are barred as between the corporation and the subscribers.

As appears from the complaint, the corporation, the City Paving Company, was organized and incorporated November 10, 1868, before the Codes were in effect. The law governing the incorporation will be found in the first volume of Hittell's General Laws, pp. 147 *et seq.* By Section 441 (Sec. 10), p. 148,

it is provided that "the trustees shall have power to call in and demand from the stockholders the sums by them subscribed, at such times and in such payments or installments as they may deem proper." The statute of New York on this subject provided that the directors might require the subscribers to pay the amounts subscribed in such manner and in such installments as they might deem proper. Charles Bouton sued the Dry Dock etc. Stage Company, a corporation organized under that statute, for goods sold. The Marine Court allowed the defendants to set off the par value of four shares of their capital stock, as money due them upon the plaintiff's subscription for such four shares. The judgment was reversed in the common pleas, on the ground that the statute clearly contemplated a resolution by the directors, fixing the manner and the installments required; that the plaintiff's subscription was subject to this provision, and he did not agree to pay, nor was he bound to pay, until so required; and it was held that the set-off ought not to have been allowed at all, without evidence that the subscription had become payable, under a proper call by the directors for payment. (*Bouton v. Dry Dock Co.*, 4 E. D. Smith, 420.)

It was held in *The Western R. R. Co. v. Avery*, 64 N. C. 491, that the Statute of Limitations against a subscriber commenced to run only from the call. In *Allibone v. Hager*, 46 Pa. St. 48, no call had been made for eleven years, and it was claimed that the Statute of Limitations would be a bar. The Court held that this by no means followed, that the delinquent stockholders might all the time have controlled the corporation, and yearly received profits, and it would be strange if they could, by a failure to call subscriptions from themselves, raise a bar in favor of themselves against the creditors of the corporation. See also Redfield on Railways, 163, where the author says: "A subscription for shares is justly regarded as equivalent to a promise to pay calls as they shall be legally made to the amount of the shares." Also same authority, p. 180, same volume. And to the same effect, *Mansfield etc. R. R. Co. v. Hall*, 26 Ohio St. 310. A party subscribing for stock of a corporation is not liable except for amounts of assessments duly levied. (*California Sugar Co. v. Schaefer*, 57 Cal. 398.) Even if the recovery of the subscription was

barred by limitation against the corporation, it would not be so against the plaintiff. (*Eyre v. Beebe*, 28 How. Pr. 335.) The corporation by its release to the subscriber could not relieve him from his liability to pay his subscription when called upon by a creditor. (*Upton v. Trebilcock*, 91 U. S. 45.) Neither can it do so indirectly by its laches. Whether the creditors of a mining corporation whose stockholders have entered into no conventional obligation to pay subscriptions would be liable to such an action as this, is a question not involved here. Judge Hoffman, of the District Court of the United States, has held not. (*In re The South Mountain Cons. M. Co.*, 7 P. C. L. J. 748.)

McAllister & Bergin, for Respondents.

In support of the judgment we beg to submit the following points:

As a suit based upon the statutory liability of a stockholder, the action is clearly barred by the Statute of Limitations. (*Stephen v. Ware*, 45 Cal. 111; *Davidson v. Rankin*, 34 id. 505; *Parrott v. Colby*, 11 Hun, N. Y., 56.) The original indebtedness accrued between May 8 and October 15, 1873. In actions upon stockholders' statutory liability, the doctrine of contribution does not obtain. (*United States v. Knox*, 102 U. S. 426.) The complaint is fatally defective as one based upon the individual liability of the stockholder.

The individual liability of a stockholder is direct and concurrent with that of the corporation of which he is a stockholder. A complaint, based upon such liability, must, therefore, aver all the facts, and with the like precision, averment of which would be necessary to establish legal liability against the corporation itself. (*Larrabee v. Baldwin*, 35 Cal. 168; *Young v. Rosenbaum*, 39 id. 646; *Neilson v. Crawford*, 52 id. 248.) The Court will observe that the complaint in this respect is radically insufficient. The averment that "the indebtedness upon which said judgment was recovered, and upon which the same is founded, was incurred by the City Pavement Company between the ninth of May, 1873, and the fifteenth of October, 1873, and that the said City Pavement Company was then, and ever since has been, and still is, wholly insolvent," utterly fails to allege any issuable fact. It

is simply an averment of a bald legal conclusion. Who were, then, the stockholders? what were the number of their respective shares of stock? what were the debts and liabilities of the company?—in fact, all and every of the elements necessary to support such an action are entirely wanting in this complaint. Nor is the action any the more tenable upon the ground of liability for unpaid subscription to capital stock. Such liability is several, separate, and distinct. There is, of course, no such thing as contribution between the respective subscribers to the capital stock of a corporation upon their respective subscriptions. The liability of each is separate and several, and not joint. Hence, there is clearly a misjoinder of parties defendant, as well as an utter absence of right to recover on the part of the plaintiff.

As observed by this Court in *The California Sugar Manufacturing Co. v. Schaefer*, 57 Cal. 398: "If the subscription paper was signed after the corporation was formed, and even if the subscription can be considered as the equivalent of a subscription for stock, plaintiff has no power to treat the subscribers differently from other stockholders, or to recover from them other than the amounts of assessment duly levied." The complaint in this case wholly fails to allege demand for levy of any assessment, and wholly fails to show any right in plaintiff to arrogate to himself assertion of rights which legally can only be asserted by the corporation. The liability of any of respondents for unpaid subscription is primarily and directly to the corporation. The corporation alone has the legal right to assert such liability. Creditors have neither the right nor the title to do so. Nor does the insolvency of the corporation in the least affect this rule.

Under the statute the Board of Directors are clothed with the powers of the corporation, and are alone entitled to assert its rights. (*Gashwiler v. Willis*, 33 Cal. 19; *Gorham v. Gilson*, 28 id. 484; *Smith v. Hurd*, 12 Metc. 385; *Allen v. Curtis*, 26 Conn. 456; *Greaves v. Gouge*, 16 Abb., N. S., 378; S. C., 69 N. Y. 154; *Abbott v. Merriam*, 8 Cush. 590.) Courts of equity do not undertake to administer the affairs of corporations in absence of some equitable ground, upon which exercise of its jurisdiction may be invoked. (*Oglesby v. Attrill*, 4 Morrison's Trans. 926.) They never interpose in

absence of some such equitable ground. (*Hawes v. Oakland*, 104 U. S. 450.) Neither creditors nor stockholders can ignore a corporation or its board of directors, and undertake to arrogate to themselves assertion of the rights of the corporation in absence of just cause therefor. (*Glenny v. Langdon*, 98 U. S. 29; *Bate v. Graham*, 1 Kern. 239.)

The complaint in this case utterly fails to show any equitable ground upon which a court of equity would interpose between the corporation and the stockholders. There is no pretense of any fraud, collusion, or improper conduct on the part of the board of directors of the corporation. As long as the corporation continues to exist, the board of directors are the legally appointed persons charged with the duty to assert the rights of the corporation, alike for the benefit of its stockholders as well as its creditors. This is, under the law, their right and their duty, and until it is made to appear that they have proved recreant to their trust, a court of equity has no jurisdiction to wrest from them exercise of their appropriate functions, or itself to undertake to perform duties specially enjoined upon them by law. As already observed in the aspect in which we now speak of the complaint it is manifestly open to the various objections to it taken in the demurrer, viz.: Misjoinder of parties plaintiff, misjoinder of parties defendant, and misjoinder of causes of action. We do not, however, deem it necessary to discuss, nor do we propose to concede the proposition with respect to liability of stockholders for unpaid subscription for stock. Upon that subject we beg to call the attention of the Court to the case of the *South Mountain Consolidated Mining Co.*, 7 P. C. L. J. 748.)

Liability to suit upon such subscriptions is barred by the Statute of Limitations. The averment is "that the indebtedness upon which the judgment was recovered, and upon which the same is founded, was incurred by the City Pavement Company, between the ninth of May, 1873, and the fifteenth day of October, 1873, and that the said City Pavement Company was then, and ever since has been, and still is, wholly insolvent," from which it is evident that this corporation, as early as May, 1873, ceased to be a going institution, and its creditors were put upon diligence to assert their

rights. Even as against liability upon subscriptions, the statute was then set in motion. If they can now sue, they could then sue, and having neglected to sue, they are barred. If they could not then sue, neither can they now sue. (*Gerry v. Woodward*, 53 Ala. 376; *McCully v. Pittsburg F. F. Co.*, 32 Pa. St. 25; 36 id. 77.) Moreover, a single creditor can not maintain such an action.

MORRISON, C. J.:

The complaint shows that the defendant, the "City Paving Company," is a corporation duly organized and formed under the laws of the State of California, on or about the tenth day of November, 1868, with a nominal capital stock of \$500,000, divided into 5,000 shares of \$100 each. It also avers that the defendants, respectively, at the times mentioned in the complaint, became the subscribers to shares of the capital stock of the corporation, setting forth the number of shares subscribed for by each of them. It further alleges that none of the defendants have ever paid into the corporation any portion of the capital stock subscribed for by them, and charges that the whole amount that each defendant subscribed remains due and unpaid. The complaint further charges that on the second day of May, 1878, the plaintiff recovered a judgment against the City Paving Company in the District Court of the Fourth Judicial District, for the sum of \$10,500, which judgment still remains in full force and effect, and wholly unsatisfied. That an execution was issued on such judgment against the property of the City Paving Company which was placed in the hands of the Sheriff of the City and County of San Francisco, and has been returned wholly unsatisfied. That the indebtedness upon which the aforesaid judgment was recovered accrued between the ninth day of May, 1873, and the fifteenth day of October of that year. There is a further averment in the complaint of the total insolvency of the City Paving Company, and that all of the subscriptions of the defendants to the capital stock of the corporation were made prior to the creation of the indebtedness to the plaintiff. To the complaint the defendants demurred, the demurrer was sustained by the District Court, and plaintiff has taken this appeal.

The questions involved in the case are somewhat new in this State, and have never before (within our knowledge) been presented to the Supreme Court for decision. An examination of the authorities shows, however, that a suit in equity by creditors of a corporation, to compel the subscribers to the capital stock to pay in their subscriptions, is a very common proceeding not only in England but also in this country. In *Ang. & Ames on Corporations*, § 602, we find the law thus stated: "It has been held that when the trustees, or other proper agents for that purpose, neglect to call in the debts due by the stockholders of a corporation for stock, so as to enable the company to pay its debts, a creditor, by a bill in chancery, can compel such agents to enforce contribution from the stockholders according to their subscriptions." In the case of *Henry v. The Vermillion Railroad Co. and other stockholders*, 17 Ohio, 189, the Court say: "These bills are filed under the act directing the mode of proceeding in chancery. They set forth judgments at law recovered against the Company; further, that after efforts made, they could not be collected on execution, and that the individual defendants are indebted to the Company as stockholders, upon their stock subscriptions. The principle has already been recognized by this Court, that a creditor's bill will lie against a stockholder of an incorporated company, to compel him to pay over to a judgment creditor the amount of his subscription, which had not before been paid to the company (*Miers et al. v. Zanesville etc. Turnpike Co.*, 11 Ohio 273; S. C., 13 id. 197), and the authority of these cases we find no reason to deny."

In the case of *Haskins v. Harding*, 2 Dill. C. C. 106, Dillon, Circuit Judge, uses the following language: "Without the aid of any statute, the unpaid subscriptions to the capital stock constitute a fund available to creditors who are unable to make their demands from the corporate debtor, and equity will lend its aid to enforce payment for the benefit of creditors." (Citing numerous authorities.) In the case of *Ogilvie et al. v. The Knox Insurance Co.*, 22 How. 380, the Supreme Court of the United States maintained the same principle in a case where the subscriptions were obtained by fraud. It is there said that, "in a bill by a judgment creditor against an incorporated insurance com-

pany and its stockholders, to compel the latter to pay up the balance due on their several subscriptions to the stock, they can not be allowed to defend themselves by an allegation that their subscriptions were obtained by fraud and misrepresentations of the agent of the company. It is too late, after the investment is found unprofitable and debts are incurred, for stockholders to withdraw their subscriptions under such a pretense or plea."

The case of *Adler et al. v. The Milwaukee Patent Brick Manufacturing Company et al.*, 13 Wis. 57, is a strong case to the same effect. The language of the Court is that "the stockholders, being in general free from personal responsibility, the capital stock constitutes the sole fund to which creditors look for the liquidation of their demands. It is the basis of the credit which is extended to the corporation by the public, and a substitute for the individual liability which exists in other cases. So far as the creditors are concerned, it is regarded in the law as a trust fund, pledged for the payment of the debts of the corporation. * * * If, therefore, by the willful or stubborn inaction of the directors or stockholders the company fails to meet its obligations and perform its duties, a court of equity will, on a proper application, afford the requisite relief."

In a very recent case — *South Mountain Con. Mining Co.*, 7 Sawy. 30 — Hoffman, J., says: "I do not question the power of the Court to compel contribution of unpaid subscriptions to the capital stock of an insolvent corporation for the purpose of paying its debts." The learned Judge cites numerous decisions of the Supreme Court of the United States in support of his view of the law.

It may be remarked that the case of the *South Mountain Consolidated Mining Company*, 7 Sawy. 30, was carried by writ of review to the Circuit Court, was there affirmed, and the opinion rendered by the learned Circuit Judge is relied upon by the defense in this case. But with due deference to the very able counsel, we must say that we do not think that it sustains defendants' position. Mr. Justice Sawyer there says: "Mining corporations in California are, in these particulars, *sui generis*. They are organized and carried on upon principles, in these respects, wholly different

from banking, railroad, insurance, and other like commercial corporations having a *subscribed* capital stock. There is no agreement, express or implied, to pay up any particular amount of stock, and no one understands that there is. Certainly none is intended by the parties. If there is a contract to pay up the full nominal amount of the stock, it could be called in from time to time without regard to the liabilities or needs of the corporation. There being no such agreement, there is no contract or agreement to pay up capital stock, which can constitute assets of the corporation. There is a mere power of assessment under the statute and by-laws — not a contract to pay in installments upon call; but this mere power to assess, independent of any contract, express or implied, to pay up the nominal amount of capital stock in installments, is not assets of the corporation.”

The distinction between the case there considered, which involved the liability of a stockholder in a *mining corporation*, and the liability of a *subscriber to the capital stock* of a banking, railroad, insurance, or other commercial corporation, such as we are dealing with in this case, is clearly marked out in the opinion of Mr. Justice Hoffman. He says: “These principles apply to all cases where an obligation has been created or incurred on the part of a stockholder to pay to the corporation a certain sum, being the par value of the capital stock subscribed for or transferred to him. The liability thus created grows out of contract, express or implied, and the creditors of the corporation may avail themselves of it, as of any other *choses in action* or equitable assets of the corporation, on well-settled and familiar principles.”

Other authorities might be cited in support of the views above presented, but we think we have sufficiently shown that when a stockholder has *contracted* with the corporation to pay in a certain amount of the capital stock, he is bound by such contract, and a court of equity will enforce it for the benefit of creditors of the insolvent corporation.

But it is claimed that the rule above stated has been changed in this State. In the first place, our attention has been called to Section 2, Article xii. of the new Constitution, which provides that “dues from corporations shall be secured by such individual liability of the corporators and other

means as may be prescribed by law;" and also to Section 3 of the same article, which declares that "each stockholder of a corporation, or joint stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association." But the above provisions of the new Constitution do not apply to this case, as the liability of the stockholders accrued before the new Constitution was adopted. The provisions of the old Constitution on this subject, however, were substantially the same. By Section 32, Article iv. (Const. of 1863), it is provided: "Dues from corporations shall be secured by such individual liability of the corporators, and other means, as may be prescribed by law." And Section 36 of the same article reads as follows: "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for his proportion of all its debts and liabilities."

We are also referred to Section 322 of the Civil Code, respecting the liability of stockholders. But is the right of the creditors of the corporation to pursue the subscribers in equity, as has been attempted in this case, taken away by the provisions of the Constitution or the Act of the Legislature? We think not; and will endeavor to show that it is not, by reference to the authorities.

Thompson, in his recent work on the Liability of Stockholders, says (§ 266): "The general rule is, that, although a creditor has a concurrent remedy against a shareholder at law, this does not oust the jurisdiction of the courts of equity." "Section 266. The rule obtaining in some of the States, in case of a statutory liability, is that the creditor has a concurrent remedy at law." "It has been held, under a statute of individual liability, that where a suit in equity has been instituted for such a purpose (the benefit of all the creditors), no creditor can institute a separate suit for the enforcement of such liability in his own behalf." (§ 275.)

The case of *The Bank of the United States v. Dallam et al.*, 4 Dana, 575, is an authority on this subject. That was a suit in chancery against the shareholders in a corporation called

the Fayette Paper Manufacturing Company, the charter of which contained the following clause: "Provided, however, that the estate and property of every individual shareholder, who holds or possesses stock in said corporation, shall at all times be liable and subject in law, in proportion to his or her interest therein, to pay and satisfy all debts and demands contracted by said corporation during the time he or they held stock therein, upon a failure of the corporate funds to discharge the same." The plaintiff had recovered a judgment against the corporation, and failing to collect the money from it, prosecuted his suit on the equity side of the Court against the shareholders, and the Court there says: "As the judgment and return on the execution thereon entitled the bank to demand the amount of its debt from stockholders in their personal right, and as they are liable, not *in solido*, but only distributively, in the ratio of their several interests, and are moreover multitudinous, we have no doubt that the Circuit Court, *sitting in equity*, had jurisdiction over a joint bill filed against all of them, concurrently with a court of law, over separate actions against each of them, upon his sole and several liability."

The case of *Matthews et al. v. Murray et al.*, 24 Md. 527, was a suit in equity against the stockholders in a company incorporated under an Act containing the following provision: "The stockholders shall be severally and individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company," and the bill was entertained by the Court. In the later case of *Norris v. Johnson*, 34 id. 489, the Court uses the following language: "In such case (against the stockholders) it is unanimously conceded the creditors may have relief in equity, but the controverted question is, Have they not also the right to sue at law?" In Massachusetts it has been held, that the creditor *must* pursue his remedy against the shareholders in a court of equity. In the case of *Harris v. The First Parish in Dorchester*, 23 Pick. 112, the Court holds that "an action at common law does not lie in favor of a bank, against a stockholder, to enforce the provision in Revised Statutes, c. 26, sec. 30, that if any loss or deficiency

of the capital stock in any bank shall arise from the official mismanagement of the directors, the stockholders shall, in their individual capacities, be liable to pay the same; but the remedy is by bill in equity." The case of *Perry et al. v. Turner et al.*, 55 Mo. 418, is an authority sustaining the jurisdiction of a court of equity in a proceeding against the stockholders; and the cases of *Pollard v. Bailey*, 20 Wall. 520, and *Hatch v. Dana*, 101 U. S. 205, are authorities in support of the proposition we have been considering.

It appears to us to be well settled, that a suit such as was instituted by the plaintiff properly lies in a court of equity, unaffected by any remedy the creditor may have under the provisions of the Constitution and the statute. Indeed, it may be that the constitutional and statutory remedy is a broader one than that arising upon the contract of subscription, for in a suit upon the latter the recovery can not extend beyond the amount of the subscription, whereas the liability created by the law, independent of any contract, is for the stockholder's proportion of all the debts contracted or incurred during the time he was such stockholder.

There is but one other question in the case, and that relates to the Statute of Limitations. The indebtedness upon which the judgment was recovered accrued between the ninth of May and the fifteenth of October, 1873; the date of the judgment is May 2, 1878, and the complaint in this case was filed August 30, 1878; and it is claimed, on behalf of the defendants, that the Statute of Limitations has run in their favor. An examination of the authorities, however, will show that the point is not well taken. Referring again to Thompson on the Liability of Stockholders, we find the law thus stated: "Where the liability is for unpaid balances on stock subscriptions, there is authority for the position that the statute does not begin to run (if at all) before a notorious disbandment of the company and cessor of business; and there is good sense in this view. However, this may be, it is clear of doubt that, in case of a company which continued to transact business, and which has been a 'going company,' without interruption, from the time of the subscription of the stockholder until the commencement of the suit for calls, the statute would not commence to run until a call made by the stockholder to pay

it; and, for stronger reasons, it would not begin to run until that time, if the controversy were between a creditor of the corporation and a shareholder." (§ 291.) In the case of *Curry v. Woodward*, 53 Ala. 376, the Court say: "Until the call was made, or there was an evident disbandment of the company and a relinquishment of business, the Statute of Limitations would not begin to run." To the same effect is the case of *Cherry et al. v. Lamar et al.*, 58 Ga. 541, in which a bill was filed by the creditors of a corporation to subject to the payment of their judgment against it certain unpaid stock subscribed by the defendants.

A defendant can not avail himself of the Statute of Limitations, by demurrer to the complaint, unless it affirmatively appears therefrom that the action is barred by a provision of that statute; and in this case there is no averment of the existence of any fact that would put the statute in motion. No disbandment of the company, no cesser of business, no call upon the subscribers to pay, is averred in or appears from any fair construction of the complaint. We are of opinion that the complaint sets forth a good cause of action against the defendants, and the demurrer should have been overruled.

Judgment reversed.

MYRIOK and THORNTON, JJ., concurred.

[No. 10,798. — Department One.]
December 28, 1882.

EX PARTE GEORGE L. JORDAN.

POLICE COURT NO. 2 OF SAN FRANCISCO — CONSTITUTIONAL LAW — LOCAL OR SPECIAL JURISDICTION. — The Act of March 7, 1881, creating an additional Court in the City and County of San Francisco, known as Police Judge's Court No. 2, is not in contravention of Art. iv., Sec. 25, Subds. 1, 2, 3, and 4, or Subds. 28 and 29 of the Constitution.

APPLICATION for discharge on writ of *habeas corpus*.

John M. Lucas, for Petitioner.

The Court:

Under the Consolidation Act of the City and County of San Francisco, there is a Police Judge's Court, and a Judge thereof. March 7, 1881, the Legislature passed an Act creating an additional Police Judge's Court in the said city and county, to be known as "Police Judge's Court Number Two" (Stats. 1881, p. 74), and declared that it "shall have concurrent jurisdiction of all preliminary examinations of persons charged with felony, and of all misdemeanors and violations of city and county ordinances, and all other offenses of which the Police Judge's Court of said city and county now has jurisdiction." The Act provided for the distribution of the business between the two Courts, and declared that "the mode of examination, trial, and procedure in the Police Judge's Court Number Two shall, in all cases, be governed by the same rules prescribed by law for other Police Courts in similar cases."

It is urged that this Act is in violation of Article iv., Section 25, Subdivisions 1, 2, 3, and 4 of the Constitution of 1879, which forbid the Legislature from passing a local or special law regulating the jurisdiction and duties of Police Judges, for the punishment of crimes and misdemeanors, and regulating the practice of courts of justice. We do not think the Act in question is in violation of those provisions. By Section 1 of Article vi., the judicial power is vested in certain Courts named, "and such inferior Courts as the Legislature may establish," etc. The Legislature had power to create the Court. To say that the Court, thus created, shall have concurrent jurisdiction with another Court already in existence, and shall be governed by the same rules prescribed by law for other Police Courts in similar cases, is in no sense local or special legislation within the meaning of the inhibitions. It is simply making applicable to the new creation that which already existed as to former tribunals. Nor is the Act in violation of Subdivisions 28 and 29 of Section 25 above named. Those subdivisions must be read in connection with Section 1 of Article vi. The view contended for by petitioner would render the latter section nugatory, for, in that case, the Legislature might create a court, without (if such a

thing, be possible) a judge or other officer, or conferring any jurisdiction upon it.

The warrant having been issued by a competent tribunal having jurisdiction of the subject-matter, and being valid on its face, the petitioner is remanded.

[No. 8,319. — In Bank.]

December 28, 1882.

THOMAS H. SMITH v. LU WHEAT SMITH.

DIVORCE — CRUELTY. — The only fact of alleged cruelty expressly found is, that defendant deserted her husband and children, and went to Germany, for the purpose of perfecting herself in the art of painting, and was abroad about three months.

Held: This act did not, of itself, constitute such cruelty as entitled the plaintiff to a divorce.

ID. — ID. — FINDING. — The finding "that the repeated acts of cruelty, as established by the evidence, upon the part of said defendant towards her said husband and children during the last several years, have inflicted upon the plaintiff grievous mental suffering," is but a conclusion of law, and does not find any fact in issue in the case.

APPEAL from a judgment for the plaintiff in the Superior Court of Los Angeles County. HINES, J.

Thom & Stephens and *F. H. Howard*, for Appellant.

The finding, "that for several years past the defendant has been guilty of repeated acts of extreme cruelty to plaintiff and their children," is not of a fact, but a conclusion of law. (*Wells v. McPike*, 21 Cal. 219; *Frisch v. Caler*, id. 71; *Lightner v. Menzel*, 35 id. 452; *People v. Board of Supervisors*, 27 id. 674; *Polhemus v. Carpenter*, 42 id. 375.) The findings must state the facts expressly and specially, not generally. The true test is, would they be good as a special verdict? (*Breeze v. Doyle*, 19 id. 105; *Phoenix Water Co. v. Fletcher*, 23 id. 488; *Garfield v. K. F. & T. M. Co.*, 17 id. 510.) In action for divorce based on cruelty, specific facts must be alleged, and the general allegation of cruelty is insufficient. (*Harrison v. Harrison*, 7 Ired. 484; *Lewis v. Lewis*, 5 Mo. 278; *Hill v. Hill*, 10 Ala. 527; *Wright v. Wright*, 3 Tex. 168; *Wilson v. Wilson*, 2 Dev. & Bat. 377; *Brown v. Brown*, 2

R. L. 381; *Fellows v. Fellows*, 8 N. H. 160; *Ward v. Ward*, 1 Tenn. Ch. 262; *Horne v. Horne*, id. 259; *Smith v. Smith*, 43 N. H. 234.)

Brunson & Wells and *George S. Hupp*, for Respondent.

As to the sufficiency of findings the test is, would they be sufficient if presented by a jury as a special verdict? (*Breeze v. Doyle*, 19 Cal. 101.) The Court should find the ultimate facts, not state the evidence. (*Jones v. Clark*, 42 id. 180; *Coveny v. Hale*, 49 id. 556; *Mathews v. Kinsell*, 41 id. 514; *Hiln v. Peck*, 30 id. 286.) "Extreme cruelty" is a term defined by Section 94 Civil Code, and is as follows: "Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage." The acts of defendant produced this effect. Those acts constitute the ultimate fact expressed in the term "extreme cruelty." Extreme cruelty is a fact which by no assertion or sophistry can be tortured into a conclusion of law. It is torture itself. Extreme cruelty is grievous mental suffering. It is a state of being, and not a conclusion of law. It is an ultimate condition of mind or body produced by successive acts, and not a legal and logical conclusion drawn from a major and a minor premise.

The COURT:

Plaintiff sued defendant for a divorce on the ground of extreme cruelty, alleging in his complaint various acts claimed to constitute cruelty, all of which are denied in the defendant's answer. A decree of divorce was entered in the Court below, and one of the errors assigned on this appeal is that the findings are insufficient to support the judgment. The following are the findings on the question of extreme cruelty:

"5. That the conduct of the defendant toward the plaintiff and her treatment of her children during the last several years, has, upon repeated occasions, been extremely cruel, and that in the month of June, 1880, without the consent or knowledge of the plaintiff, she deserted her husband and children, and went to Dusseldorf, in Germany, for the purpose, as she now claims, of perfecting herself in the art of painting, and remained absent from her said husband and children until the seventeenth day

of September thence next ensuing, upon which day she returned to Los Angeles City.

"6. That the repeated acts of cruelty, as established by the evidence, upon the part of said defendant toward her said husband and children during the last several years, have inflicted upon the plaintiff grievous mental suffering."

It will be observed that the only fact of alleged cruelty expressly found is that the defendant deserted her husband and children and went to Dusseldorf, in Germany, for the purpose of perfecting herself in the art of painting, and was abroad from June until September, 1880. This act did not of itself constitute such cruelty as entitled the plaintiff to a divorce. (1 Bish. on Marriage and Divorce, § 738.) The sixth finding is but a conclusion of law, and does not find any fact in issue in the case. (*Polhemus v. Carpenter*, 42 Cal. 386.)

Judgment reversed and cause remanded.

[No. 10,780. — In Bank.]

December 20, 1882.

THE PEOPLE v. ISAAC TAMKIN.

MURDER — JUSTIFICATION — THREATS. — Threats made by the deceased against a defendant charged with homicide are admissible for the purpose of illustrating or determining the question as to who was the assailant in the fatal encounter, and are also admissible when they have been communicated to the defendant, for the purpose of determining whether the threats, in connection with the other facts and circumstances of the case, were sufficient to excite reasonable fears in the mind of the defendant. The previous threats alone, however, unless coupled at the time with an apparent design then and there to carry them into effect, will not justify a deadly assault by the other party. There must be such a demonstration of an immediate intention to execute the threat as to induce a reasonable belief that the party threatened will lose his life or suffer serious bodily injury unless he immediately defends himself against the attack of his adversary.

Id. — Id. — Id. — On a trial for murder the facts of the homicide were thus stated by one witness, whose testimony was substantially corroborated by the others: "Tamkin (the defendant) and I were walking down the street, when McClellan (the deceased) hailed Tamkin from behind; we turned around and McClellan stood there, facing us; he said to Tamkin, 'I suppose you are as well heeled as you were last night;' Tamkin replied, 'I am not heeled;' McClellan then said, 'Go and heel yourself, for I am fixed;' Tamkin said, 'Where shall I go to get fixed?' McClellan said, 'Go where you d——d please, it makes no difference to me; what did you

do to me last night?" Tamkin said, "I really don't know;" McClellan raised his hat and showed a scar, and said, "That is what you did, you d——d son of a ——;" Tamkin replied, "I am very sorry for it;" McClellan said, "Yes, I guess you are; I can lick you any place in the world, you d——d son of a ——, go and heel yourself; I don't want to take any advantage of you;" he turned and walked away, I should judge, fifteen feet from Tamkin, when Tamkin drew a pistol from his right-hand pocket and said, "Yes, I am heeled, you d——d son of a ——; what do you want?" and fired his pistol." Other shots were fired by both parties; but the evidence shows that it was the first shot that inflicted the mortal wound.

Held: There is no principle of the law that will justify a homicide committed under such circumstances.

Id.—Id.—The Court instructed the jury: "If the killing was intentional it was unlawful, and there was no justification, unless the killing was in necessary self-defense, as defined in these instructions."

Held: The Court elsewhere correctly charged the jury upon the law of self-defense, and, taking the charge as a whole, the law upon this branch of the case was correctly given, conceding (which is not conceded) that the evidence tended to make out a case of self-defense or justifiable homicide.

Id.—Id.—THREATS.—The Court instructed the jury: "If the question as to who commenced or brought on the conflict in which the deceased lost his life is in doubt, threats made by the deceased against the defendant are admitted in evidence solely to enable the jury to determine as to who was the aggressor in the fatal encounter."

Held: The objection as to the word "solely" in the foregoing instruction, admitting that the instruction in a proper case should not contain such a limitation, the evidence having failed to show a case of self-defense, no injury could have resulted to the defendant from the instruction as given.

Id.—Id.—INSULTING LANGUAGE.—The Court refused to permit the defendant to ask a witness the question, if such language as was used by the deceased to the defendant the night before the homicide "was not considered fighting language at Truckee?" **Held:** The objection was properly sustained.

APPEAL from a judgment of conviction, and from an order denying a new trial in the Superior Court of Nevada County.
CALDWELL, J.

Dibble & Kitts and C. W. Cross, for Appellant.

A. L. Hart, Attorney General, for Respondent.

MORRISON, C. J.:

The defendant was prosecuted by information for the crime of murder, and was convicted of manslaughter. The facts disclosed by the evidence in the case clearly establish the killing, and the only defense relied upon is that of justifica-

tion. A difficulty occurred between the defendant and the deceased the night before the homicide, in the course of which the deceased received a severe blow on the head from a pistol in the hands of the defendant, and from that time down to a few seconds before the shooting the deceased, at short intervals, uttered threats against the life of the defendant, at the same time using violent language and opprobrious epithets respecting him.

We have no doubt of the correctness of the position taken by the learned counsel for the defense, that threats are admissible for the purpose of illustrating or determining the question as to who was the assailant in the fatal encounter, and that they are also admissible when they have been communicated to the defendant, for the purpose of determining whether the threats, in connection with the other facts and circumstances of the case, were sufficient to excite reasonable fears in the mind of the defendant. "A person whose life has been threatened by another whom he knows or has reason to believe has armed himself with a deadly weapon for the avowed purpose of taking his life or inflicting a great personal injury upon him, may reasonably infer, when a hostile meeting occurs, that his adversary intends to carry his threats into execution. The previous threats alone, however, unless coupled at the time with an apparent design then and there to carry them into effect, will not justify a deadly assault by the other party. There must be such a demonstration of an immediate intention to execute the threat as to induce a reasonable belief that the party threatened will lose his life or suffer serious bodily injury unless he immediately defends himself against the attack of his adversary." (*People v. Scoggins*, 37 Cal. 683; see also *People v. Travis*, 56 id. 251; *Stokes v. The People*, 53 N. Y. 174.)

We will now examine the evidence for the purpose of determining how far the principles above stated apply to the present case. That the deceased threatened to kill the defendant, that he armed himself with the avowed purpose of carrying such threats into execution, and that all these matters were fully communicated to the defendant, clearly appears from the evidence. But the next inquiry is, whether the conduct of the deceased was such, at the time of the

shooting, as to justify or excuse the killing. Did the circumstances occurring at the time of the homicide show an apparent design, on the part of the deceased, to carry his threats into execution? Was there any demonstration made by the deceased showing an immediate intention to execute the threats? Was there any ground for a reasonable belief that the party threatened was about to lose his life, or to suffer serious bodily injury, unless he immediately defended himself against the attack of his adversary? The following is, in substance, the evidence touching upon the matter: The witness Lovern says: "Tamkin and I were walking down street, when McClellan (the deceased) hailed Tamkin from behind. We turned around, and McClellan stood there facing us. He said to Tamkin, 'I suppose you are as well heeled as you were last night?' Tamkin replied, 'I am not heeled.' McClellan then said, 'Go and heel yourself, for I am fixed.' Tamkin said, 'Where shall I go to get fixed?' McClellan said, 'Go where you d——d please, it makes no difference to me.' 'What did you do to me last night?' Tamkin said 'I really don't know.' McClellan raised his hat, showed a scar, and said, 'That is what you did, you d——d son of a ——.' Tamkin replied, 'I am very sorry for it.' McClellan said, 'Yes, I guess you are; I can lick you any place in the world, you d——n, etc.; go and heel yourself; I don't want to take any advantage of you.' He turned and walked away, I should judge fifteen feet from Tamkin, when Tamkin drew a pistol from his right-hand pocket and said, 'Yes, I am heeled, you d——n son of a ——; what do you want?' and fired his pistol. McClellan partly stooped, drew his pistol from his right-hand coat pocket as he stooped, staggered, and fired a shot at Tamkin." Other shots were fired by both parties, but the evidence shows that it was the first shot that inflicted the mortal wound upon the body of McClellan. The ball penetrated the side of McClellan, and the shot was fired before the deceased had turned his face to the defendant. Several witnesses gave an account of the circumstances attending the shooting, and although differing somewhat in some of the minor and unimportant details of the homicide, there is, upon the important and substantial facts, no material difference. It is but natural that several persons, witnessing such

an occurrence, should differ somewhat in the details of the transaction; and nothing more than a natural discrepancy is found in the evidence in this case.

The witness Jaques testified that "McClellan said: 'I won't take any advantage of you, but you go and heel yourself,' and then turned square around and started to walk away." There is no conflicting evidence upon the point, that, after the hostile demonstration was made by McClellan, he declared his unwillingness to take any advantage of an unarmed man, such as he believed the defendant to be, and then turned his back upon the defendant and began to walk away. It was while the deceased was in this position with reference to the defendant, with his back to him, and in the act of walking away from him, that the defendant drew his pistol and almost immediately thereafter discharged it, with fatal effect, upon the person of deceased. Will the law justify or excuse him under such a state of facts? We think not. The defendant was in no immediate danger at the time, and there was no necessity, real or apparent, for the deadly assault. The deceased could easily have executed his threat, if it was really his intention to take the life of the defendant; but after the defendant had falsely stated to him that he was unarmed, and, after all present and immediate danger had passed, the deceased having turned around to move away, the defendant drew his pistol and fired the fatal shot. We are not familiar with any principle of law that would justify a homicide committed under such circumstances. (See *People v. Campbell*, 8 P. C. L. J. 293, and authorities therein cited.)

2. The next point made on behalf of the defendant is that the Court erroneously charged the jury as follows: "If the killing was intentional it was unlawful, and there was no justification unless the killing was in necessary self-defense, as defined in these instructions." The Court correctly charged the jury upon the law of self-defense, and, taking the charge as a whole, the law upon this branch of the case was correctly given to the jury, conceding (which we do not) that the evidence tended to make out a case of self-defense or justifiable homicide.

3. The Court also instructed the jury as follows: "If the question as to who commenced or brought on the conflict in

which the deceased lost his life is in doubt, threats made by the deceased against the defendant are admitted in evidence solely to enable the jury to determine as to who was the aggressor in the fatal encounter." The objection is to the word "solely" in the foregoing instruction; and it may be that the instruction in a proper case should not contain such a limitation. But having held that the evidence failed to establish a case of self-defense, no injury could have resulted to the defendant from the instruction as given.

4. Witnesses were asked if such language as was used by the deceased to the defendant the night before the homicide "was not considered fighting language at Truckee?" The question was objected to, and the objection was sustained by the Court. It is sufficient to say that in the eye of the law, insulting language is no excuse for a deadly assault, and this is so, even at "Truckee."

After a review of the whole case, we find no error in the proceedings sufficient to warrant a reversal of the judgment. The law was given to the jury as favorably for the defendant as the circumstances of the case warranted, and the erroneous rulings, if any there were, did not injure the defendant in any of his substantial rights.

Judgment and order affirmed.

ROSS, MYRICK, McKEE, and THORNTON, JJ., concurred.

[No. 8,572.— Department Two.]
December 20, 1882.

JO HAMILTON v. WILLIS JONES ET AL.

RECOVERY OF TAXES PAID BY MORTGAGES — FORECLOSURE OF MORTGAGE — CALCULATION OF INTEREST.

APPEAL by defendant J. S. Carmichael, from the judgment of the Superior Court of the County of Placer. MYRES, J.

Action of foreclosure of mortgage. The action was brought against the defendants Willis Jones and Michael Dougherty, as the mortgagors, and against J. S. Carmichael and others, as claimants of some interest, subject to the plaintiff's mortgage—the defendant Carmichael being a junior mortgagee.

The indenture between the parties plaintiff and defendants Jones and Dougherty, as it appears in the transcript and as a part of the complaint, is as follows:

This indenture, made this first day of February, A. D. 1876, by and between Jo Hamilton of the first part, and Willis Jones and Michael Dougherty of the second part, both of the County of Placer and State of California, witnesseth that, whereas, heretofore, A. Bruce, of Placer County, California, has held the property hereinafter described in trust for the payment of certain sums of money due from the said Willis Jones and Michael Dougherty, by deeds absolute on their face, but which were only intended as mortgages to secure the money; and whereas, the said Jo Hamilton has this day paid to the said A. Bruce all the moneys owing to him by the said Willis Jones and Michael Dougherty, to wit, the sum of twenty-six thousand (\$26,000) dollars, in gold coin; and whereas, the said Willis Jones was also indebted to the said Jo Hamilton in the sum of one thousand seven hundred and twenty-seven dollars and seventy-eight cents (\$1,727.78) in gold coin, which he is desirous of securing to him; and whereas, on the payment to him by the said Jo Hamilton of the said sum of twenty-six thousand (\$26,000) dollars, owing to him by the said Willis Jones and Michael Dougherty, which is done before the en-sealing of these presents, the said A. Bruce has, with the full consent of the said Willis Jones and Michael Dougherty, deeded all of the said property to the said Jo Hamilton, by deed of conveyance duly executed to him this day.

Now, in consideration of the said sums so paid by the said Jo Hamilton, and the said sums owing him by the said Willis Jones, the said Willis Jones and Michael Dougherty hereby acknowledge themselves to be indebted to the said Jo Hamilton in the sum of twenty-seven thousand seven hundred and twenty-seven dollars and seventy-eight cents (\$27,727.78); that is to say: Jo Hamilton, who holds the deed absolute of the said property, holds it subject to the right of the said Willis Jones and Michael Dougherty to repurchase the said property at any time within the period of one year and six months from this date, upon paying to the said Jo Hamilton the said sum of twenty-seven thousand seven hundred and twenty-seven dollars and seventy-eight cents (\$27,727.78), together

with one and one half per cent. per month by way of interest. When the same is fully paid, then said Jo Hamilton shall re-deed all of the said property to them or their assigns, or such part as shall remain after such money shall be paid. The said payments shall be made as follows: First, as often as any of the said property may be sold (if any be sold), the proceeds shall go first to pay the said Jo Hamilton all the interest due him to that date on the said sum of twenty-seven thousand seven hundred and twenty-seven dollars and seventy-eight cents (\$27,727.78). Second, to pay so much of the principal as shall remain, and as the parties herein now have other dealings and transactions together, which do not have any concern or connection with this contract, it is hereby stipulated and expressly agreed that nothing shall be considered or treated as a payment on this contract by the said Willis Jones and Michael Dougherty from any source whatever, unless the same is at the time of such payment indorsed plainly upon the copy of this contract kept by the said Willis Jones and Michael Dougherty, and signed by the said Jo Hamilton or his assigns as a credit on said contract. The said Willis Jones and Michael Dougherty shall have the full control and management of all of the said property and the revenues thereof, and from time to time as the said revenues arising from the said property shall exceed the expenses of working and running the same, such net proceeds shall be paid by them to the said Jo Hamilton, and shall be applied first to the payment of the interest due at the time of the payment, and secondly to pay so much of the said principal sum as shall remain.

It is further expressly agreed and understood, that if the said Willis Jones and Michael Dougherty shall fail or neglect to carefully manage the said property so as to make it yield the proper revenue and income which it reasonably and properly may yield, or should fail or refuse after demand to pay over the net proceeds and revenues thereof, then the said Jo Hamilton may elect to foreclose this contract as herein provided; and should he so elect to foreclose, his election so to do shall be final and conclusive upon the said matter of default on the part of the said Willis Jones and Michael Dougherty, who shall be bound thereby; said foreclosure shall be upon the terms hereinafter set out, and subject to the same

conditions only. The taxes on said property and all expenses connected therewith shall be borne by the said Willis Jones and Michael Dougherty, who shall promptly pay the same when due; and if they do not do so, then the said Jo Hamilton may pay the same, and for such sums of money so paid by him he shall be allowed to charge and collect two per cent. per month by way of interest thereon. Whenever the said sum of money is paid, and all the interest thereon, so much of the property as remains in the hands of Jo Hamilton shall be redeeded to the said Jones and Michael Dougherty, or to their assignees. Should it become desirable to sell any of the said property, the same shall not be sold without the consent of the said Jo Hamilton, and the conveyance shall be signed by both the said Willis Jones and Michael Dougherty and said Jo Hamilton. Should the said Willis Jones and Michael Dougherty not pay the said money and interest as herein provided, or should they make any default as herein provided, then the said Jo Hamilton may, at his election, at any time foreclose all the interest of the said Willis Jones and Michael Dougherty in the said property, by a bill filed for that purpose, and shall sell all of the said property in the manner provided by law, the proceeds thereof to go, first, to pay all costs and expenses of the said foreclosure, including attorneys' fees, not to be less than — per cent. of the sums due him from the said Willis Jones and Michael Dougherty; and third, such sums as shall remain shall be paid to the said Willis Jones and Michael Dougherty. This contract is assignable by either party, and the assign of either shall be clothed with the same rights as the principals.

Here follows a description of the property mortgaged, and the signatures of the parties. The complaint, after setting forth the mortgage and breaches of its covenants, contained the following allegations as to the payment of taxes by the plaintiff, and the payments on the indebtedness of mortgagees: "On the twenty-second day of January, 1877, the taxes not having been paid by the said Jones and Dougherty on said property, and the same being then delinquent, plaintiff was forced to pay the same, to wit, the sum of five hundred and ninety-two dollars and sixty-three cents (\$592.63), which became a further lien upon the said property, as by the terms

of the said contract, and bore interest at the rate of two per cent. per month. The only payments which have been made upon the said contract are as follows: July 1, 1876, \$2,888.25, being the amount of a certain judgment credited, less the costs; July 1, 1876, check, \$600; November 1, 1876, cash, \$2,000; June 1, 1877, check, \$4,000; January 4, 1878, check, \$10,000; January 1, 1880, note, \$5,000. None of these credits are indorsed on the contract kept by Jones and Dougherty, but receipts for these amounts are given and should be credited on said contract. The balance of the said contract remains due and unpaid."

The defendant Carmichael demurred to the complaint on the grounds: 1. That it does not state facts sufficient. 2. It is ambiguous, in that it does not appear whether the plaintiff has a mortgage on the property described in the complaint, or a deed of trust.

Judgment was given by the Court below for the sum of twenty-four thousand three hundred and forty-seven dollars and ninety-eight cents besides costs, and for the foreclosure. For the other facts reference is made to the opinion of the Court.

Henley, Whipple & Oates, for Appellant.

The decree is several thousand dollars in excess of the amount due the respondent Hamilton, as shown by the verified complaint, upon the most favorable calculation for him, allowing him one and a half per cent. per month interest from the date of his contract to the entry of the decree, and also the whole amount of taxes and interest thereon claimed by him in his complaint. But appellant claims that the amount of taxes so paid and the interest thereon do not constitute a lien upon the premises under the contract sued on, and therefore can not be entered as a part of the judgment, to be a prior lien to appellant's mortgage. Appellant further claims, that under the terms of the contract sued upon, interest upon the amount due at the rate of one and a half per cent. per month for only eighteen months, to wit, during the life of said contract, can be allowed. This would make a further difference of several thousand dollars in the amount of the decree.

Hamilton & Dunlap and Burt & Hamilton, for Respondent.

We are only now (November 20, 1882) served with appellants' brief, although the transcript on the appeal, taken nearly at the last day in the year for the appeal, was filed in this Court on the seventh day of August, 1882. We are satisfied that the appeal is frivolous, and we are surprised at the declaration of appellants that the decree is for several thousand dollars more than it should be. We are equally surprised at the several other erroneous positions taken, none of which are supported either by authority or common fairness. They contravene every rule of law, and we think are wholly untenable.

For the convenience of the Court, and to lessen its labors, we hereto append a calculation, which, disregarding the fractions of days and time, all of which are given appellants, show that the decree is correct:

\$27,727 78	
2,079 58	— Interest to July 1, 1876.
<u>\$29,807 36</u>	
3,489 25	
<u>\$26,318 11</u>	
1,579 08	— Interest to November 1, 1876.
<u>\$27,897 19</u>	
2,000 00	
<u>\$25,897 19</u>	
2,720 81	— Interest to June 1, 1877.
<u>\$28,618 00</u>	
4,000 00	
<u>\$24,618 00</u>	
2,621 96	— Interest to January 14, 1878.
<u>\$27,239 96</u>	
10,000 00	
<u>\$17,239 96</u>	
10,878 40	— Interest to July 6, 1881.
<u>\$28,118 36</u>	
5,000 00	— Cr. January 1, 1880.
<u>\$23,118 36</u>	— Balance July 6, 1881.
1,232 72	— Added, taxes and interest.
<u>\$24,451 08</u>	

The COURT:

This is a proceeding to foreclose a mortgage. There was a demurrer to the complaint, which was overruled by the Court, and no answer being filed, a decree of foreclosure was entered. There is no error apparent in the case, and the judgment of the Court below is affirmed.

[No. 6,980.— In Bank.]

October 19, 1880.

L. HUERSTAL v. HUGH MUIR.

JUDGMENT FOR CONTEMPT — APPEAL — CASE LIMITED.— An appeal will not be entertained from a judgment of contempt in any case differing in its circumstances from that in *People v. O'Neill*, 47 Cal. 109, or not limited by the conditions therein considered as material.

Id.— Id.— ALIAS WRIT OF RESTITUTION.— Upon a judgment for contempt for re-entering upon land from which defendant had been ejected, the Court has no discretion to refuse an *alias* writ of restitution. That portion of the judgment is merely incidental; and if the appeal can not be sustained as to the whole judgment, it must fall as to every part.

APPEAL from an order of the Fifteenth District Court in and for the County of Contra Costa. DWINELLE, J.

A. H. Griffith, for Appellant.

Temple Emmet, for Respondent.

McKINSTRY, J.:

This is an appeal from an order of the late Fifteenth Judicial District Court, adjudging the defendant, Hugh Muir, guilty of contempt, for that, after having been removed from certain premises upon process duly served and issued upon a judgment in an action of ejectment, the said Muir had, without right, re-entered; and also directing that "an *alias* writ of execution and restitution issue." Respondent has moved that the appeal be dismissed.

It has been suggested that the portion of the order directing that an *alias* writ issue may be separated from the rest, and an appeal be entertained from such portion. But that

portion of the order is based upon the adjudication with respect to the contempt, and is merely incidental to such adjudication. The order is a whole, and if the appeal can not be sustained as to the whole, it must fail as to every part. The Court below, having found defendant guilty of the contempt, had no discretion to refuse the writ. (C. C. P., § 1210.)

The order is entitled, "In the District Court of the Fifteenth Judicial District, in and for the City and County of San Francisco," and was filed with the Clerk of the District Court of said city and county. The action was pending in the Fifteenth District Court in and for the County of Contra Costa. It may be assumed that the order has never taken effect as a valid order, because not entered by or filed with the Clerk of the Court for Contra Costa, as required by the Act creating the judicial district. (Stats. 1863-4, p. 479.) Nevertheless, it must be treated as being what it purports to be — an order of the Fifteenth District Court of San Francisco.

It is claimed by appellant that the order is void; but appeals have often been entertained from judgments and orders void in law.

This brings us to the question, whether the order adjudging the party guilty of contempt is appealable. In *People v. O'Neil*, 47 Cal. 109, it was held: "An appeal may be taken from a judgment for contempt, when the fine is for \$300, and the Court below has exceeded its jurisdiction, and there are facts *dehors* the record, which can only be brought up on a statement on appeal." We are not inclined to extend the authority of that decision so as that it shall include any case differing in its circumstances, or not limited by the conditions therein considered as material. In the case now before us, no fine of \$300 was imposed by the Court below; neither does it appear that there are facts *dehors* the record which could only be brought up by statement or bill of exceptions. It may be remarked, also, that the affidavits and papers found in the transcript are in no way identified as having been used at the trial of the alleged contempt.

The question, then, is, whether on a record which shows that an order adjudging a party guilty of contempt, by a Court which had no power to make an operative order in the

manner in which this order was made, can be reviewed on appeal.

Persons committed for contempt by the District Court have been discharged in *habeas corpus*, on the ground that, in the particular circumstances, the Court had no jurisdiction to adjudge the contempts. (*Ex parte Cohen*, 4 Cal. 318; *id.* 319; *Ex parte Rowe*, 7 *id.* 181.) But these cases do not strengthen the argument in favor of hearing appeals from contempt, judgments, and orders.

Section 1222 of the Code of Civil Procedure provides: "The judgments and orders of the Court or Judge made in cases of contempt are final and conclusive." This section is not intended to declare the absurdity that such judgments, when rendered without jurisdiction, may not be annulled by a proper proceeding. To give effect to its language, judgments and orders in cases of contempt must be held to be "final and conclusive," in the sense that they are not appealable.

In *People v. Wright*, 27 Cal. 151, a writ of prohibition issued to arrest the proceedings of a County Judge, who was about to try and punish a recalcitrant party for disobedience of an order of the District Court. In *Batchelder v. Moore*, 42 *id.* 413, a contempt order of the County Court was annulled by *certiorari*; and it must be remembered that *certiorari* can be resorted to only where there is no appeal.

It appears, therefore, that if a judicial officer is about to exceed his jurisdiction by trying for a contempt without legal power to do so, the party threatened may stay the proceeding by prohibition; if he actually adjudges one guilty of contempt without jurisdiction, his judgment may be annulled by *certiorari*; and if the judgment imposes an imprisonment, the prisoner may be discharged on *habeas corpus*. The remedy of the party injured in each case is ample, by resort to a common-law or a statutory writ.

We find no authority for the position, that an order adjudging one guilty of contempt may be appealed from simply on the ground that the record shows want of jurisdiction to render the judgment. It is admitted, on all sides, that if the lower Court has jurisdiction, such an order is not appealable.

The appellate jurisdiction of this Court can not depend upon the presence or absence of jurisdiction in the Court below. We have jurisdiction to hear appeals in all cases of contempt judgments — when the question presented by the record is simply as to the jurisdiction of the lower Court — or in none; since in all such cases, when we pass upon the jurisdiction of the Court below, we pass upon the merits of the appeal.

Motion granted.

ROSS, THORNTON, MYRICK, and SHARPSTEIN, JJ., concurred.

[No. 10,561.— Department One.]

October 20, 1880.

THE PEOPLE v. HENRY F. GRIGSBY.

APPEAL — FILING OF NOTICE — WAIVER.— Notice of appeal was dated September 6, and filed September 7, 1880, but by written indorsement due service was acknowledged by the District Attorney.

Held: If the law requires the service to be made *after* the notice was filed (a question not decided), here is an admission of due service, which must be construed *service after the filing*.

MURDER IN THE FIRST DEGREE — DEFINITION — MALICE — INSTRUCTION.— The Court charged the jury, that if they found from the evidence that the defendant did, on the day specified in the indictment, with malice aforethought, unlawfully kill the deceased, then they should find the defendant guilty of murder in the first degree. **Held, erroneous.**

APPEAL from a judgment of conviction in the Superior Court of San Luis Obispo County. McMURTRY, J.

Dillard & Venable, for Appellant.

Graves & Graves, for Respondent.

McKINSTRY, J.:

The Attorney General moves to dismiss the appeal, on the ground that the transcript shows the notice of appeal to have been served before it was filed.

The Penal Code, Section 1240, provides: "An appeal is taken by filing with the Clerk of the Court in which the judgment and order appealed from is entered or filed, a

notice, stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party."

The notice of appeal, as appears from the record before us, is dated September 6, 1880, and was filed September 7, 1880.

On the notice filed is an acceptance of service in words following: "I hereby acknowledge due service upon me of a copy of the above notice. (Signed) Ernest Graves, District Attorney."

If the law requires the service to be made *after* the notice is filed (a question we do not decide in this case), here is an admission of "due service," which must be construed service after the filing.

The motion to dismiss the appeal is denied.

Ross and McKee, JJ., concurred.

McKINSTRY, J.:

The court charged the jury: "If you find from the evidence beyond a reasonable doubt that the defendant did, on the twenty-eighth of February, 1880, with malice aforethought, unlawfully kill Vivian Torres, then you will find the defendant guilty of murder in the *first degree*."

If the instruction is correct, *murder* of the second degree is the unlawful killing of a human being *without malice*. But the Attorney General properly admitted the instruction to be erroneous.

Judgment and order reversed, and cause remanded for a new trial.

Ross and McKee, JJ., concurred.

[No. 6,648.—Department Two.]
October 25, 1880.

C. D. SHUFFLETON v. ROBERT C. HILL ET AL.

LOGGER'S LIEN LAW — CONSTRUCTION OF STATUTE.—The Act of March 30, 1878, giving a lien to loggers, etc., does not apply to contracts entered into prior to the date of that act.

APPEAL from a judgment for the plaintiff in the Eighth District Court in and for the County of Humboldt. HAINES, J.

James Hanna and W. H. Brumfield, for Appellants.

S. M. Buck, E. W. Wilson, and J. D. H. Chamberlin, for Respondent.

The COURT:

The contract under which the logs in question in this suit were cut was made April 10, 1876, by which Greenlaw was to cut and deliver logs at certain specified times and places, receiving compensation at specified rates and times, as logs were delivered. The act under which plaintiff claims a lien as a laborer upon the logs was passed March 30, 1878. The terms of that contract can not be considered as changed by that act. Plaintiff certainly has no more rights as to what money was due than Greenlaw, or his assignee would have had; and if, by the terms of that contract, no money was payable to Greenlaw at the time the liens were filed, plaintiff had no lien to be enforced.

Judgment and order reversed, and cause remanded for a new trial.

[No. 6,515.— In Bank.]
December 22, 1880.

THOMAS FESSENDEN v. J. H. SUMMERS ET AL.

PROMISSORY NOTE — INDORSEMENT BY THIRD PERSON BEFORE DELIVERY.— Under Section 3117, Civil Code, a person not a party to a note, who indorses the same in blank before delivery, is to be regarded not as a guarantor, but as an indorser, and as such is entitled to notice of non-payment before he can be charged.

APPEAL by defendant D. W. Thompson from a judgment for the plaintiff in the First District Court of the County of Santa Barbara. SEPULVEDA, J.

Charles E. Huse, for Appellant.

Thompson was an indorser of the note, and was entitled to notice of the demand for payment at the maturity of the

note, and that it had not been paid. (*Jones v. Goodwin*, 39 Cal. 493; C. C., § 3117.)

Hall & Hatch, for Respondent.

Thompson was a guarantor on the note sued upon. (*Riggs v. Waldo*, 2 Cal. 485; *Ford v. Hendricks*, 34 id. 673; *Pierce v. Kennedy*, 5 id. 138; *Brady v. Reynolds*, 13 id. 31; *Geiger v. Clark*, id. 579; C. C., §§ 2787, 2806, 2807, 3117; Brandt on Suretyship and Guaranty, § 170.)

Ross, J.:

The action is upon a promissory note signed by the defendant Summers, made payable to the plaintiff or order, and indorsed in blank by the defendant Thompson before delivery to the payee. Thompson indorsed for the purpose of adding credit to the note, and plaintiff made the loan upon the strength of the indorsement. The note not having been paid, the plaintiff, after its maturity, commenced the present action against Summers and Thompson to recover the amount due upon it. Summers suffered default, but Thompson appeared and demurred to the complaint. The demurrer was overruled, and Thompson answered. A trial being had, the Court below found the facts to be as stated.

In the complaint, however, there is no averment, nor is there any finding, that notice was given to Thompson of the non-payment by Summers of the note when it became due; and this constitutes the ground of the appeal, which is taken by Thompson from the judgment.

Whether or not he was entitled to notice depends upon the nature of the obligation assumed by him.

The decisions of this Court upon the question, prior to the adoption of the Codes, as well as of the Courts of other States, are numerous and conflicting. Thus in *Ford v. Hendricks*, 34 Cal. 673, where the note in suit was signed by Hendricks and indorsed by Reed before its delivery to the payee, who was the plaintiff in the action, the Court said: "As to the relation of Reed—whether it be that of maker, indorser, or guarantor—there is much conflict of authority; but under the settled rule in this State, he must be regarded as a guarantor." In support of this, the Court cited the cases of *Riggs v. Waldo*,

2 Cal. 485; *Pierce v. Kennedy*, 5 id. 138; *Brady v. Reynolds*, 13 id. 31; *Geiger v. Clark*, id. 579.

In the subsequent case of *Jones v. Goodwin*, 39 Cal. 493, where the defendant Wilcox had signed his name in blank upon the back of the note in suit before its delivery, the Court said: "A great diversity of opinion exists as to the nature of the liability of one not being a party who indorses his name in blank upon a note before delivery. In England he is held to be a guarantor, and his contract is, that the maker of a note will pay at maturity, or if he does not, the guarantor will. No demand or notice is considered necessary as a condition precedent to fixing the liability of the guarantor, or to the commencement of the action; but a failure to make demand and give notice, together with proof of injury, is *pro tanto* a defense.

"In some States, as in Massachusetts, Vermont, and Louisiana, he is regarded as a surety, or joint maker, of the note, and unconditionally liable.

"In some States he is held to be a guarantor, and various effects have been given in these States to the contract of guaranty, sometimes it being held to be conditional, at other times absolute, and very frequently parol evidence is admitted to explain what the contract really was. In other States, as in New York, Tennessee, Iowa, and, we may add, California, he is held as an indorser. * * *. The decisions in this State are substantially in accord with those which hold that one who, not being a party to a negotiable bill, indorses it in blank for the purpose of adding to its credit, is an indorser, and in view of the diversity of opinion on the subject, we should not now feel inclined to disturb the doctrine, even if it did not meet our approval."

It will thus be seen that in *Ford v. Hendricks*, it was said that it is the settled rule in this State, that a party signing under the circumstances stated is to be held as a guarantor, while in the subsequent case of *Jones v. Goodwin*, without referring in terms to *Ford v. Hendricks*, it was said that the rule here is that he is to be held as an indorser. In this condition of the decisions, the Legislature, in adopting the Codes, undertook to deal with the subject. Their provisions, however, like the decisions, are not entirely free from conflict.

By Section 2787 of the title of the Civil Code upon the subject of guaranty, it is declared that "a guaranty is a promise to answer for the debt, default, or miscarriage of another person." And by Section 2807, it is provided that "a guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice." This last section, it will be observed, changed the rule theretofore prevailing in this State respecting demand and notice.

The provisions of Section 2787, *supra*, are, perhaps, broad enough to include the facts of the case under consideration. But however this may be, the case clearly comes within the express letter and meaning of the subsequent Sections 3108 and 3117 of the title of the same Code upon the subject of negotiable instruments. Section 3108 is as follows:

"One who writes his name upon a negotiable instrument otherwise than as a maker or acceptor, and delivers it with his name thereon to another person, is called an indorser, and his act is called indorsement."

And Section 3117: "One who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon as an indorser." This was the exact position of the appellant; and whatever conflict there may be between the sections quoted from the title on the subject of negotiable instruments, and those quoted from the title on the subject of guaranty, the former must control the determination of this cause by virtue of Section 4481 of the Political Code in relation to the effect of the Codes, which reads thus: "If the provisions of any title conflict with or contravene with the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title."

It may be that Section 2787 was intended only to apply to a case where a party in terms contracts as a guarantor, in which event he would, under Section 2807, be liable immediately upon default of the principal, without demand or notice. But whether this be so or not, we think the rights of the parties must be determined by the rule declared by Sections 3108 and 3117.

Thus tested, Thompson must be held to be an indorser, and

as such, upon well-settled principles, entitled to notice of non-payment.

Demand upon Summers and notice to Thompson of his non-payment being necessary to charge the latter, it follows that it is essential that the complaint should aver those facts.

Judgment reversed and cause remanded, with instructions to the Court below to sustain the demurrer to the complaint.

THORNTON, MYRICK, SHARPSTEIN, and MCKINSTRY, JJ., concurred.

[No. 7,200.— In Bank.]

December 22, 1880.

GEORGE S. KELLER v. ALFRED E. BERRY.

FRAUD — EJECTMENT — PATENT.— R. being in possession of land under a State patent, mortgaged the same, but afterwards delivered possession to his son, who, after the commencement of an action to foreclose (to which he was not made a party), abandoned the possession to the defendant, who proceeded to enter the land under the homestead laws of the United States.

Held: Courts would cease to be courts of justice if such proceedings were countenanced. The defendant is not entitled to withhold the possession from the plaintiff.

APPEAL from a judgment for the plaintiff in the Superior Court of the County of Los Angeles. HOWARD, J.

Glassell, Smith & Smith, and F. H. Howard, for Appellants.

Bicknell & White, for Respondent.

ROSS, J.:

Ejectment to recover possession of a certain portion of a sixteenth section. It appears from the record that prior to the year 1872, one José Rubio settled on the land with his family, and proceeded, together with his son, Andres Rubio, who was of age, to cultivate and improve it. Improvements consisting of a dwelling-house, orchards, and vineyards, were put upon the land, mainly by Andres. On the twentieth of March, 1868, José made an application to the State of California to purchase the land. His application was accepted by

the State Locating Agent, May 1, 1868, and was filed in the State Land Office on the twentieth of June, of the same year. The State officers issued to him a certificate of purchase for the land on the tenth of April, 1872, and a patent therefor, regular in form, on the third day of January, 1874. It is claimed on behalf of the appellant that by these proceedings, and others incidental to them, José Rubio acquired no title to the premises.

In the view we take of the case, it is unnecessary to determine whether he did or not; for the record further shows, that in February, 1877, he borrowed of the plaintiff the sum of six thousand dollars, and as security therefor executed to the plaintiff a mortgage on the property in question, together with an adjoining tract of about twelve acres — which mortgage was duly recorded at the time, in the records of the proper county.

In the month of February, 1878, José, in the language of the findings, “considering his title under the State to be void, abandoned his claim to the premises in controversy, and delivered possession thereof to said Andres Rubio, who from thenceforward took possession and claimed the same as his own, until the — day of May, 1879, when he abandoned the same to the defendant herein, and allowed him to take possession of the same, together with the improvements.”

In the mean time, the plaintiff had commenced an action to foreclose his mortgage, in which both José and Andres Rubio were made parties defendant, and in May, 1879, a decree of foreclosure was duly entered in the action in favor of the plaintiff. Under this decree the Sheriff of the county, on the sixth day of June, 1879, sold the premises in controversy to the plaintiff for the sum of \$8,542, and on the same day executed to the plaintiff a certificate of sale therefor. No redemption having been made, the Sheriff, on December 8, 1879, executed to the plaintiff a deed for the property.

Thus it will be seen, that José Rubio, on the strength of his possession of the land and the improvements thereon, if not of title, got six thousand dollars of the plaintiff's money, gave him a mortgage on the land and improvements to secure its repayment, and then surrendered the possession thereof to his son, who thereupon took possession of the property and claimed the same as his own, until shortly before its sale by

the Sheriff under the plaintiff's decree of foreclosure, when he (the son) turned the possession of the land and improvements over to the defendant. On the possession so obtained, defendant proceeded to enter the land under the homestead laws of the United States, the entry, however, being afterwards suspended by order of the Commissioner of the General Land Office.

It is this sort of circumvention that we are asked to sanction. Courts would cease to be courts of justice if such proceedings were countenanced. It is not necessary to the disposition of this case for us to say whether, under the doctrine of the cases of *Hosmer v. Wallace*, 97 U. S. 579; *Trenouth v. San Francisco*, 100 id. 251; and *Atherton v. Fowler*, 96 id. 515, a title to government land ever could be acquired by virtue of a possession acquired as was the possession of the defendant. The question here is, whether upon the facts stated, the defendant is entitled to withhold the possession of the premises from the plaintiff; and we are clearly of the opinion that he is not.

Judgment affirmed.

SHARPSTEIN, MYRICK, and THORNTON, JJ., concurred.

[No. 10,586.—In Bank.]

January 4, 1881.

EX PARTE WILLIAM CLARKE.

CHANGE OF ATTORNEYS IN CRIMINAL CASES — APPEAL.— Sections 284 and 285, Code of Civil Procedure, have no application to criminal cases: a notice of appeal may be signed by any attorney of the Court authorized by the defendant.

APPLICATION for writ of *habeas corpus*.

McKissick & Rankin, for Plaintiff.

MORRISON, C. J.:

The petitioner has been brought before us on a writ of *habeas corpus*, and his petition for a discharge having been denied, he now applies for admission to bail. The application

is opposed on behalf of the people, on the ground that no appeal has been taken in the case.

The petitioner was tried and convicted in the Superior Court of Monterey County of the crime of libel. On the trial of the case, T. Beeman, Esq., appeared as counsel for defendant, and the notice of appeal is signed by Charles W. Quilby, Esq. It was admitted, on the hearing of this application, that the person by whom the notice of appeal was signed was an attorney of the Court, and was authorized by the defendant to take the appeal. It is claimed, however, that no change of attorney was made in conformity to Sections 284 and 285 of the Code of Civil Procedure, and therefore, it is argued that the notice of appeal should be disregarded.

In our opinion, the sections above referred to have no application to criminal cases, in which the defendant has a right to defend in person and with counsel. (Art. i., § 13, Const.)

Section 283 of the same Code provides that an attorney and counselor shall have authority "to bind his client in any of the steps of an action or proceeding, by his agreement filed with the Clerk or entered upon the minutes of the Court."

It will not be pretended for a moment, that this section has any application in a criminal case; for in all cases of felony the defendant must appear and plead in person. In our opinion, the notice of appeal was sufficient, and indeed, it was so treated by the District Attorney, who admitted service of a copy of it upon him.

The judgment in the case simply imposed a fine, and the petitioner is entitled to be admitted to bail as a matter of right. (P. C., § 1272.)

Let him be admitted to bail in the sum of one thousand dollars, the bail bond to be approved by the Judge of the Superior Court of Monterey County.

SHARPSTEIN, THORNTON, and MYRIK, JJ., concurred.

[No. 7,234.— Department Two.]

January 6, 1881.

ELVIRA MORGAN v. J. M. MILLER.

SALE OF CATTLE — DELIVERY AND CHANGE OF POSSESSION — FRAUD AS TO CREDITORS.— H., having cattle running at large with those of D., his tenant, sold them to the plaintiff, and the cattle were driven up into a corral, where H. said to the plaintiff, "Here are your cows that you bought;" thereupon the plaintiff requested B. to take care of the cattle, and pasture them for her, and B. agreeing to do so, the cattle were turned back into the pasture.

Held, that there was an immediate delivery and actual change of possession, and that the sale was not void as to creditors.

APPEAL from a judgment for the plaintiff in the First District Court in and for the County of Ventura, FAWCETT, J.; and from an order denying a new trial in the Superior Court of said county. HINKS, J.

S. A. Sheppard, for Appellants.

Williams & Williams, for Respondent.

THORNTON, J.:

This action was brought to recover damages for an unlawful conversion of plaintiff's cattle. On the trial, the jury returned a verdict for the plaintiff. Defendants moved for a new trial, which was denied, and they appealed from the judgment and the order denying a new trial. Appellants urge that they are entitled to a new trial, on the ground that the verdict is not sustained by the evidence.

It appears from the testimony that the plaintiff purchased the cattle sued for from one Higgins. The defendant, Miller, was Sheriff of the County of Ventura, and, as such Sheriff, levied upon the cattle in controversy by virtue of a writ of execution issued upon a judgment recovered against Higgins by Daly and Rogers, in the District Court of Ventura County. It is contended on behalf of appellants that the evidence shows that the sale to the plaintiff was void as to Daly and Rogers, for the reason that it was not accompanied by an immediate delivery, and followed by an actual and continued change of possession — that, therefore, the verdict is

not sustained by the evidence, and it should be set aside and a new trial granted. We have examined the testimony, and are of opinion that it sustains the verdict, and that there was no error in the ruling of the court below.

Judgment and order affirmed.

SHARPSTEIN and MYRICK, JJ., concurred.

[No. 10,589.—In Bank.]

January 14, 1881.

PEOPLE v. AH FOOK.

OFFER TO BRIBE OFFICER.—Under Section 67, Penal Code, the crime of offering to bribe an executive officer is complete without the tender or production of the money.

APPEAL from a judgment of conviction, and from an order denying a new trial, in the Superior Court of the County of Sonoma. **PRESSLEY, J.**

W. A. Cornwall, for Appellant.

A. L. Hart, Attorney General, for Respondent.

MORRISON, C. J.:

The defendant was prosecuted, by information, in the Superior Court of Sonoma County, and was found guilty of the crime of offering a bribe to an executive officer. The prosecution was under Section 67 of the Penal Code, which provides that "every person who gives or offers any bribe to any executive officer of this State, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in the State prison not less than one nor more than fourteen years;" and the charge was that "Ah Fook, on the first day of September, 1880, at the County of Sonoma, etc., to one W. H. Mead, then and there being an executive officer of the State of California, to wit, Deputy Constable, etc., a bribe, to wit, the sum of two hundred dollars, willfully, maliciously, and feloniously did offer, with intent, willfully and feloniously,

to influence said W. H. Mead in his action as such Deputy Constable, to wit, with intent, willfully and feloniously, to influence said W. H. Mead to discharge Me Youk, then and there held by said W. H. Mead, as Deputy Constable, under a warrant of arrest, issued, etc., which warrant charged Me Youk with the crime of grand larceny," etc. To this information a demurrer was filed, which was properly overruled by the Court.

The evidence shows that W. H. Mead was a Deputy Constable in the township of Santa Rosa, and as such, had in his custody, under a warrant of arrest, a Chinawoman named Me Youk, and the defendant had full knowledge of the above facts. For the purpose of getting the accused out of custody, the defendant said to the officer: "You catch him Chinawoman for me; get him out where I can get him in the buggy, I give you two hundred dollars." No money was tendered, and none exhibited. It is, therefore, claimed on behalf of the defense, that the proof failed to establish an offense under Section 67 of the Penal Code.

That section makes it a crime to offer a bribe to an executive officer, and the question here presented is, Was the crime complete without the tender or production of the money? Bouvier, in his Law Dictionary, defines an offer to be "a proposition to do a thing;" and Mr. Webster says an offer is "to bring to or before; to hold out; to present for acceptance or objection; to exhibit; to present in words; to proffer; to make a proposal to." The case of Worrall is in point. The defendant was indicted for offering a bribe to a Commissioner of the Revenue; and the evidence of his guilt was found in a letter written by him, containing the following language: "If I should be so happy in your recommendation of this work, I should think myself very ungrateful if I did not offer you one half of the profits as above stated; and I would deposit in your hand, at receiving the first payment, £350, and the other £350 at the last payment, when the work is finished and completed." The offer was made to an officer of the United States, for the purpose of obtaining a contract for building a light-house at Cape Hatteras, and upon it the defendant was tried and convicted. (*The United States v. Worrall*, 2 Dall. 384.)

"The latter commentators, supported, as I think, by the adjudged cases, however, maintain the broader doctrine, that any attempt to influence an officer in his official conduct, whether in the executive, legislative, or judicial department, by the offer of any reward or pecuniary consideration, is an indictable common-law misdemeanor." (*The State v. Ellis*, 33 N. J. L. 102; 1 Bishop's Cr. Law, § 689.) "Why is the mere unsuccessful attempt to bribe a criminal? The officer refuses to take the offered reward, and his integrity is untouched — his conduct uninfluenced by it. The reason for the law is plain. The offer is a sore temptation to the weak or the depraved. It tends to corrupt, and as the law abhors the least tendency to corruption, it punishes the act which is calculated to debase, and which may effect prejudicially the morals of the community." (*Walsh v. The People*, 65 Ill. 60.)

We are of the opinion that the evidence brought the case within the letter and spirit of Section 67 of the Penal Code.

2. The next point in the case is an exception to the ruling of the Court excluding evidence offered on behalf of the defense. An attempt was made to show that it is the practice among the Chinese of San Francisco to buy and sell women of their country. We do not see in what aspect of the case such evidence was competent, and are of the opinion that the Court below ruled correctly in excluding it.

3. The law was correctly given by the Court to the jury, and there was no error in refusing to give the second instruction asked for by the defendant.

4. The last point is, that the verdict was not sustained by the evidence. A careful examination of the bill of exceptions satisfied us, however, that there was sufficient evidence of guilt to justify the verdict.

We find no error in the case, and the judgment and order are affirmed.

ROSS, MYRICK, SHARPSTEIN, MCKEE, THORNTON, and MCKINSTY, JJ., concurred.

[No. 6,912.— Department One.]
January 17, 1881.

JOHN H BOSTWICK v. P. H. McEVOY ET AL.

DELIVERY OF NOTE — ESCROW.—The delivery of an instrument in escrow during the life-time of a party becomes absolute upon the happening of the condition after his death.

JOINT PROMISSORY NOTE — JOINDER OF PARTIES.—An action is maintainable in this State upon a joint promissory note against a surviving maker and the personal representative of a deceased maker.

AMENDMENT OF RECORD — CLERICAL ERROR.—A judgment may be amended after the adjournment of the term, where the record furnishes the data.

FORECLOSURE OF MORTGAGE — NOTE COMING DUE AFTER COMMENCEMENT OF SUIT.—In a suit for the foreclosure of a mortgage given to secure several promissory notes, some of which were not due at the commencement of the suit, the Court has jurisdiction — under § 728, C. C. P.—to decree a foreclosure of the mortgage to satisfy all of them.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, and from an order modifying said judgment, in the Third District Court of the City and County of San Francisco. THORNTON, J.

A petition for hearing in bank was filed in this case after judgment, and denied.

J. C. Bates, for Appellants.

F. C. M. Du Brutz, for Respondent.

McKEE, J.:

On the fourth day of November, 1873, one Kimbell and others sold and conveyed to the defendant, P. H. McEvoy, the tract of land in controversy in this case, for the sum of \$9,393.80. To secure payment of the purchase money, John McEvoy joined the defendant P. H. in the execution of four promissory notes, three of them for the sum of \$2,398.45 each, and the fourth for the sum of \$2,198.45. The first was payable one year, the second two years, the third three years, and the fourth four years, after date; and P. H. McEvoy secured their payment by giving a mortgage upon the land.

But the notes were not absolutely delivered, because at the time of the transaction of purchase the land was one of sev-

eral tracts of land which were embraced in a deed of trust, given on the seventeenth of April, 1872, by the vendors—then the owners of the land—to certain persons in trust to sell and convey for the purpose of paying off a large sum of money which the trustors had borrowed from the San Francisco Savings Union—a corporation existing under the laws of the State and doing business in the city of San Francisco. And when the defendant, P. H., purchased the land it was incumbered by this deed of trust, and he bought with full knowledge of its existence and subject to it. But to secure himself against it, he and Kimbell, the payee of the notes, entered into the following agreement in writing:

“WEBB’S *LANDING*, February 23, 1874.

“It is hereby agreed, that four certain notes and the mortgage to secure the payment of the same, the said notes being three for \$2,398.45 and one for \$2,198.45, one payable on November 4, 1874, second on November 4, 1875, third on November 4, 1876, and fourth, for \$2,198.45, payable on November 4, 1877, and bearing interest at ten per cent. per annum, shall be left in the hands of W. H. Glasscock until the payee, A. G. Kimbell, shall relieve from any and all incumbrances up to the fourth of November, 1873, certain premises described in a certain deed, dated November 4, 1873, and made by said Kimbell, George D. Roberts, and William S. McMurthy, to the said P. H. McEvoy.

“In duplicate.

A. G. KIMBELL.
“P. H. McEVoy.”

Under this stipulation P. H. McEvoy placed the notes in the hands of the depositary, to be held as escrows. Kimbell delivered to him the deed, and the mortgage to Kimbell was recorded in the recorder’s office of Contra Costa County—the county where the land was situated—by whom, does not appear from the record of the case. But the mortgagor went into the immediate possession of the land under the deed which he had obtained from the mortgagee and others, and has since continued in the undisturbed possession of the same.

In March, 1875, while the promissory notes were held as escrows, John McEvoy died. Letters of administration of his estate were granted to P. H. McEvoy, who has since con-

tinued to act as administrator. On the fourteenth of August, 1876, Kimbell presented the notes, verified according to law, to the administrator as a claim against the estate. The claim was rejected by the administrator, and properly so, because at that time the condition upon which the notes had been delivered as escrows had not been fulfilled; and no liability attached to the estate upon them. But on the twenty-sixth day of November, 1876, P. H. McEvoy had accepted a conveyance of the land from one who, under an agreement between himself and one of the vendors, had acquired the title to the land at the sale of it by the trustees under the deed of trust; and the depository of the notes, upon the conveyance being made to McEvoy, delivered the notes to Kimbell, who, after P. H. McEvoy had accepted the conveyance of the title under the trust deed, presented the notes to the administrator for allowance as a claim against the estate, but the administrator again indorsed them rejected, and the question arises, whether any liability attaches to the estate of John McEvoy upon the notes. It is contended that the estate is not liable, because there was no delivery of the notes by John McEvoy, either absolutely or as escrows.

As a general rule, a negotiable promissory note, like any other written contract, has no legal inception or valid existence until it has been delivered in accordance with the purpose or intent of the parties. Delivery is an essential part of the making or execution of the note; and if this be subsequent to the date, it takes effect from the delivery and not from the date; but the promise to pay relates to the date if referred to, and becomes binding and operative when the note is delivered. An operative delivery must be unconditional, and not a delivery as a mere escrow; but a delivery as an escrow becomes absolute when the condition on which it was made transpires.

Now, the notes in controversy were the joint notes of P. H. and John McEvoy. After they were signed they were left in the hands of the former for delivery. He did deliver them as escrows, and although the latter was not himself personally present at the delivery, yet his assent to it must be inferred. For when one of two or more makers of a joint promissory note delivers it as an escrow, or absolutely, he is presumably

the constituted agent of his co-makers for that purpose, and the delivery made by him is the act of all. Besides, it is alleged in the complaint, and not denied in the answer, that both the makers of the notes agreed with the payee that the notes were to be delivered as escrows, and that they were, pursuant to that agreement, actually delivered by one of them to the person selected by all as custodian of the notes. This agreement, it is true, was reduced to writing in the form of the memorandum which was signed only by one of them. Yet that did not change the existing verbal agreement between all the parties as to the delivery of the notes, nor affect the delivery, as the act of both, made by the one who signed the written agreement.

But John McEvoy died before the condition on which the notes were delivered had transpired, and the question arises whether there was an absolute delivery by or in his behalf which will bind his estate.

An original delivery can not be made by or on behalf of a dead man. But when the condition on which an original delivery made in the life-time of a party transpires, the conditional delivery becomes absolute and the absolute delivery takes effect against the contracting parties from the date of the delivery of the contracts as escrows, notwithstanding the death of one of the contractors before the happening of the condition. "If a man delivers a bond as an escrow to be delivered on condition performed, before which the obligor or obligee dies, and the condition is afterwards performed, here there could be no second delivery, yet it is the deed of the obligor from the first delivery, although it was only inchoate, but it shall be deemed consummated by the performance of the condition." (Parsons, C. J., in *Wheelright v. Wheelright*, 2 Mass. 454; S. C., 3 Am. Dec. 66; *Hatch v. Hatch*, 9 id. 310; S. C., 6 Am. Dec. 67; *Bodwell v. Webster*, 13 Pick. 414, 415.) So, says Coke: "If the grantee dies between the first delivery and the deed becoming absolute, the deed is good, for there was *traditio inchoata* in the life of the parties, *sed postea consummata existens* by the performance of the condition takes its effect by force of the first delivery, without any new delivery." (*Perryman's Case*, 5 Co. 84 b; *Peck v. Goodwin*, Kirby, 64.)

Upon the happening of the condition upon which the notes were to be delivered, the delivery then became absolute, notwithstanding the death of one of the makers of the notes before the fulfillment of the condition, and the notes became operative and valid as legal subsisting claims against his estate. Being presented to the administrator and rejected on the twenty-sixth of November, 1876, this suit was brought within time, and the claims are not barred.

As to the defendant P. H. McEvoy, it is claimed that the deed of trust transferred the title to the land, and that the trustors, at the time of the sale and conveyance to the defendant, had no title in the land to convey, and the notes were therefore without consideration and void.

Of course, in an action on a mortgage by an assignee who received the notes secured for it, for value, after they became due, this defense may be made. Any defenses open to the maker in a suit on the notes may be made use of in the action upon the mortgage; for the debt is the principal thing and the mortgage the incident; and the legal rights and remedies upon the debt become fixed upon the incident. If, therefore, the notes were given without consideration, they are void in the hands of the plaintiff, who received them after they became due. But promissory notes given for a legal or equitable title to land are not void for want of consideration, especially where, as in this case, the defendant purchased the land knowing that it was subject to the deed of trust given by his grantors, and against which he protected himself by a written stipulation for the discharge of the trust, and, at the same time, delivered the notes to be held as escrows until the trust was discharged. It is true, that the deed of trust transferred the title to the land, yet it was held by the trustees only to secure payment of the debt due by the trustees to the beneficiaries, and, in this respect, the trust deed resembled a mortgage. But it was also a conveyance, and a mortgage is not, until foreclosure and sale; yet, as a conveyance, it does not enable either the trustees or the beneficiaries to recover possession of the land, for a trustor, like a mortgagor, is entitled to the possession of the land until a sale and conveyance of it in pursuance of the terms of the trust. Therefore, one who merely holds the title in

trust, as security for debt, can not maintain ejectment against the trustor or his assigns to recover the land. (*Tyler v. Granger*, 48 Cal. 259.) And if the trust shall be satisfied, before a sale and conveyance under the deed, it is the duty of the trustee to reconvey the title. If he fails or refuses, equity will compel him; or it will, in any case, undertake the supervision of the execution of the trust.

As therefore the equitable title to the land was in the trustors at the time of the purchase, the defendant, in purchasing it, acquired the title of his vendors, subject to the condition that the deed of trust should be satisfied by them. The condition was fulfilled by the sale and conveyance by the trustees and the transfer of the title to the defendant by the purchaser at that sale; for if the trust had been satisfied before a sale and conveyance, pursuant to its terms, and the trustees had reconveyed the title to the trustors, the condition upon which the notes were to be delivered would have been fulfilled, and the defendant, by his original deed, would have obtained the title of his grantors, which he bargained for; and the same result follows where title passes by a sale and conveyance under the trust deed directly to the defendant who accepted the deed. By acceptance, he received the land free and clear of the incumbrance which was upon it at the time he purchased it, and against which he protected himself by the agreement between him and his vendors. Whatever implied covenants were contained in his original deed were satisfied by the conveyance to him of the trust title, which he accepted. Time was not of the essence of the contract between him and his vendors; and any delay in the fulfillment of the condition upon which he delivered his notes for the purchase money as escrows, he himself overlooked when he accepted the deed transferring to him the title under the deed of trust, without objections. Nor can any inquiry be made in this suit as to the title of the land itself. It is sufficient that he mortgaged whatever estate he acquired, as security for payment of the notes given for the purchase money; and he subsequently acquired the title which he bargained for, and this title inures to the benefit of his mortgagee. The object of this suit is to obtain a sale of his estate in the land, and the application of the proceeds

of the sale to the satisfaction of his notes. (*San Francisco v. Lawton*, 18 Cal. 473.) In such an action it is not proper to try questions relating to the title of the land.

In the foreclosure proceedings we discover no error. The findings are sustained by the evidence. It was not error to allow counsel fees. The mortgage provided for them, and the Court had authority under the statute to allow them against the mortgagor. It is true, John McEvoy was not a party to the mortgage, and his estate is not liable for such fees; but no judgment for them was rendered against the administrator. The decree provides for a judgment against the mortgagor and the administrator for any deficiency which might remain after applying the proceeds of the sale of the mortgaged premises to the satisfaction of the amount due upon the notes and costs, including the counsel fees fixed by the Court against the mortgagor. The estate is thus relieved from the payment of counsel fees.

It is urged that the estate of a deceased maker of a joint promissory note executed by two or more, can not be joined as defendant with the surviving debtor or debtors in an action on the note. But there was no demurrer to the complaint on the ground of misjoinder. Such an action, however, is maintainable in this state, but any judgment recovered against the administrator must be made payable *de bonis testatoris*. (*Bank of Stockton v. Howland*, 42 Cal. 129.) In this case the judgment was not so entered in the first instance, but the Court below, upon suggestion, modified the judgment against the administrator by making it payable out of the estate of the deceased, in due course of administration. It is objected that this was done after the adjournment of the term, but the Court had power to make the amendment notwithstanding the adjournment of the term. A court, while it has physical control of its records, may amend its judgments or orders where the record furnishes the data by which to amend. (*Hegeler v. Henckell*, 27 id. 495.) In this case the necessity for the amendment was apparent upon the record.

It is also objected that one of the notes was not due at the commencement of the action. But it became due before the trial of the case and the rendition of judgment, and under Section 728, C. C. P., the Court had jurisdiction to decree a

foreclosure of the mortgage to satisfy all of them. (*Hawkins v. Hill*, 15 Cal. 500.)

Lastly, it is argued that John McEvoy signed the notes as a surety only, and that his death released him from all liability thereon. But the assumed relation does not appear upon the face of the notes, or from anything in the case. The point was not urged in the Court below. It is made here for the first time, without any basis of fact; for the answer of the defendants contains no such defense. If the relation existed and could be shown under Section 2832, C. C., as against the plaintiff, who received the notes upon the apparent character of each of the makers of the notes as a principal, it must be pleaded as a defense to entitle it to consideration.

Judgment and orders affirmed.

McKINSTREY and ROSS, JJ., concurred.

[No. 10,573.—In Bank.]

January 18, 1881.

THE PEOPLE v. AH LUCK ET AL.

MURDER — CAUSE OF DEATH — EVIDENCE — INSTRUCTION.— Upon the trial of an indictment for murder, the evidence showed that the deceased was shot and cut by some sharp instrument upon a bridge crossing the Truckee River, and thrown into the river; and a physician testified that certain of the wounds would necessarily produce death; but whether the deceased was dead when he was thrown into the river, or that his death was not caused by drowning, he could not state. Upon this evidence the Court instructed the jury, that "if from the evidence the jury find that the mediate cause of the death of Ah Gow was the wounds inflicted upon him by the defendants, then the fact that he was thrown into the water after the infliction of such wounds is of no consequence;" and it was claimed that this instruction conflicted with other instructions given to the jury, to the effect that if the jury were in doubt as to whether the death was caused by the wounds, or by injuries received in the fall from the bridge, or by drowning, they should acquit; that to convict, even if the wounds inflicted while on the bridge were mortal, they must still be satisfied beyond all doubt that his death was not caused either by drowning or by the fall from the bridge; and unless so satisfied they should acquit.

Held: The evidence justified the jury in finding the defendants guilty as charged; and there was no substantial conflict in the instructions to their prejudice, whatever criticism may arise from the use of the word "mediate."

APPEAL from a judgment of conviction, and from an order denying a new trial, in the Superior Court of the County of Nevada. CALDWELL, J.

George S. Hupp and H. V. Reardon, for Appellants.

A. L. Hart, Attorney General, for Respondent.

MYRICK, J.:

The defendants were indicted for the murder of one Ah Gow; and the defendants Ah Luck, On Gue, and Ah Sing were convicted of murder in the first degree, the punishment of the first being death, and of the others of imprisonment for life.

1. The defendants allege that the evidence was not sufficient to justify the verdict, in that the evidence does not show that death resulted from wounds inflicted by the defendants, but might have been from drowning. The circumstances were, that deceased was shot, and was cut by some sharp instrument, upon a bridge crossing the Truckee River, at Truckee, and the body, alive or dead, thrown into the river. Dr. Curless, a physician called for the prosecution, testified that certain of the wounds found by him upon the body of Ah Gow would necessarily produce death; but whether Ah Gow was dead when he was thrown into the river, or that his death was not caused by drowning, he could not state, for the reason that in the *post mortem* examination made by him he did not open the body, and therefore could not have examined the heart and lungs, which was necessary to do in order to ascertain with any degree of certainty whether death did or did not result from drowning.

2. It is also urged that the Court erred in giving the following instruction, viz.: "If from the evidence the jury find that the mediate cause of the death of Ah Gow was the wounds inflicted upon him by the defendants, then the fact that he was thrown into the water after the infliction of such wounds is of no consequence; it being claimed to conflict with and nullify other instructions given, in substance, as follows: If the jury believe that cuts were inflicted upon deceased by defendants, and he was then thrown into the

river where he was found dead, and are yet in doubt as to whether the death was caused by the wounds or by injuries received in the fall from the bridge, or by drowning, they should find a verdict of not guilty; that to convict they must be satisfied beyond all doubt that the deceased came to his death by wounds and injuries inflicted upon him by the defendants before he was thrown into the river; that if the wounds inflicted while on the bridge were mortal, they must still be satisfied beyond all doubt that his death was not caused either by drowning or by the fall from the bridge, and unless they are so satisfied they should find a verdict of not guilty; that in order to convict the defendants, the jury must be as well satisfied that the deceased did not come to his death by the fall or by drowning as they are that he was found dead.

There was evidence tending to show that the deceased came to his death from the wounds inflicted by the defendants, and that evidence was plainly submitted to the jury under instructions as favorable to the defendants as they had the right to ask — perhaps more favorable. There was no substantial conflict in the instructions to the prejudice of defendants, whatever criticism may arise from the use of the word "mediate." It is true, as urged by counsel, that people can not conjecture as to the mode of death, on the trial of a capital case; but we apprehend from the testimony in this case, that the jury were not practically called upon to rely upon conjecture or indulge in fanciful suppositions as to the cause of the death of the deceased. We think the evidence fully justified the jury in finding the defendants guilty as charged.

Judgments and orders affirmed.

SHARPSTEIN, ROSS, and MCKINSTRY, JJ., concurred.

[No. 5,815.— Department One.]
January 21, 1881.

THE PEOPLE EX REL. COMMISSIONERS OF TRANSPORTATION v. THE CENTRAL PACIFIC RAILROAD COMPANY.

MANDAMUS — DEFAULT — COMMISSIONERS OF TRANSPORTATION — ABATEMENT OF ACTION.— In a proceeding for *mandamus* to compel the defendant, under the Act of April 3, 1876 (Stats. 1875-6, p. 783), to furnish to the Commissioners of Transportation, created by that Act, certain information, the default of the defendant was entered, and a peremptory writ issued.

Held: The writ of *mandamus* can not be granted by default; and held, further, the Act having been repealed, that the proceeding should be dismissed.

APPEAL from a judgment and order for the issuance of a peremptory writ of mandate in favor of plaintiff, in the Third District Court of the City and County of San Francisco.
McKEE, J.

S. W. Sanderson, McAllister & Bergin, and S. M. Wilson,
for Appellant.

H. H. Haight, and Stephen H. Phillips & J. D. Murphy,
for Respondents.

McKINSTRY, J.:

The action is by *mandamus*, to compel the defendant, under the Act of April 3, 1876, to furnish to the Commissioners of Transportation, created by that Act, certain information. (Stats. 1875-6, p. 783.)

The judgment appealed from is as follows: "In this action, the plaintiff's demurrer to the defendants' answers having been by this Court sustained, and the said defendants having failed to appear and amend their answers within the time allowed by law, therefore it is ordered that the default of the defendants, the Central Pacific Railroad Company, be entered for failure to amend their answers, and that a peremptory writ of *mandamus* issue."

The Code of Civil Procedure (Section 1088) provided,
• • • "The writ [of mandate] can not be granted by

default. The case must be heard by the Court, whether the adverse party appear or not." The judgment must therefore be reversed.

The Act of April 3, 1876, was repealed (without exception or reservation) by the tenth section of the third chapter of the Act of April 1, 1878 (Stats. 1877-8, p. 986); and, from the date last mentioned, the Commissioners of Transportation—to whom the judgment of the District Court commanded defendant to report—ceased to exist. It follows that the proceeding should be dismissed.

Judgment reversed, and Court below directed to dismiss the action.

McKee and Ross, J. J., concurred.

[No. 5,814.— Department One.]

January 21, 1881.

THE PEOPLE *EX REL.* COMMISSIONERS OF TRANSPORTATION *v.* THE SOUTHERN PACIFIC RAILROAD COMPANY.

[No. 5,813.— Department One.]

January 21, 1881.

THE PEOPLE *EX REL.* COMMISSIONERS OF TRANSPORTATION *v.* STOCKTON AND COPPEROPOLIS RAILROAD COMPANY.

[No. 5,812.— Department One.]

January 21, 1881.

THE PEOPLE *EX REL.* COMMISSIONERS OF TRANSPORTATION *v.* THE CENTRAL PACIFIC RAILROAD COMPANY.

The Court:

Upon the authority of *People ex rel. Commissioners of Transportation v. The Central Pacific Railroad Company, supra*, judgment reversed, and Court below directed to dismiss the action.

[No. 7,549.— Department Two.]

January 24, 1881.

THE PEOPLE EX REL. I. DANIELWITZ v. EDWARD E.
HARVEY.

PROCEEDING TO TRY TITLE TO OFFICE — JURISDICTION OF THE SUPREME COURT.—

The Supreme Court has no original jurisdiction of a proceeding to try the title to an office.

APPLICATION for writ of *mandamus*.

McElrath & Ells, and *J. Rothchild*, for Plaintiff.

McClure, *Dwinelle*, and *Plaisance*, for Defendant.

The COURT:

This is a proceeding commenced in this Court to try the title to an office. The Court has no original jurisdiction in such a case. The order to show cause is therefore discharged, and the proceedings dismissed.

[No. 10,575.— In Bank.]

January 29, 1881.

EX PARTE THOMAS K. FOLEY.

CRIMINAL COMPLAINT.—The petitioner was convicted under Section 415 of the Penal Code, upon a complaint charging that at a time and place specified "the said T. K. Foley * * * did use vulgar and indecent language within the hearing of children, in a loud and boisterous manner, willfully and unlawfully, all of which is contrary to the form of the statute," etc.; and upon an application for a discharge upon *habeas corpus*, it was urged that the judgment was void, because the language alleged to be profane and obscene was not recited in the complaint, and also that the offense which the complaint attempts to charge can only be committed on the public streets of an "unincorporated town." *Held*: That neither objection was tenable.

APPLICATION for writ of *habeas corpus*.

Julius Lee and *J. M. Lesser*, for Petitioner.

McKINSTRY, J.:

The petitioner was brought before the Court in Bank, upon

habeas corpus, and after hearing was remanded to custody. He prayed to be discharged on the ground that the judgment under which he was held was invalid, for the reason that the complaint on which he was tried charged no offense.

The complaint charges that "defendant [petitioner], on the nineteenth day of October, 1880, at Watsonville, in the County of Santa Cruz, State of California, committed a misdemeanor, as follows, to wit: The said T. K. Foley, at the time and place aforesaid, did use vulgar and indecent language within the hearing of children, in a loud and boisterous manner, willfully and unlawfully, all of which is contrary to the form of the statute," etc.

Section 415 of the Penal Code is as follows: "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse-race, either for a wager or amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction, shall be punished by a fine not exceeding \$200, or by imprisonment in the county jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court."

It was urged at the argument that the judgment was void because the language alleged to be profane and obscene was not recited in the complaint. It was also urged that the *locus* is a material element in the offense created by the statute; that the offense which the complaint attempts to charge can only be committed on the public streets of an "unincorporated town." Counsel for petitioner relied on *Ex parte Kearney*, 55 Cal. 212, as authority for both these positions.

In *Ex parte Kearney*, 55 Cal. 212, this Court (after suggesting objections to the validity of a certain ordinance) held that the petitioner was entitled to his discharge, because it affirmatively appeared upon the record of the Police Court that he

had been tried and sentenced to be imprisoned for doing an act which was neither a violation of the ordinance nor of any law or statute of the state. He was not tried for a violation of an ordinance prohibiting the use of bawdy, lewd, obscene, or profane words. That charge had been made against him, but it was expressly dismissed in the Police Court. He was tried for having violated an ordinance which made it a misdemeanor for one to "address to another, or utter in the presence of another, words, language, or expressions having a tendency to create a breach of the peace." The complaint not only failed to show that the person was present of whom the words were spoken, or that they were addressed to him, but showed affirmatively that the words were not addressed to such person, and that he was not present. No like objection can be made to the complaint on which the present petitioner was tried and convicted. An offense is distinctly charged in the complaint, and is described in the language of the statute — which is ordinarily sufficient. (1 Bish. Cr. Prac. 359, and cases cited.) Even if it should be admitted — and we do not admit it — that it would have been better pleading to have recited the words, the objection to the omission should have been specially taken, and the failure to recite the words did not render the judgment void.

But we do not understand Section 415 of the Penal Code to provide for the punishment of "vulgar, profane, or indecent language, within the presence or hearing of women or children, in a loud and boisterous manner," only where such language is thus used "on the streets of an unincorporated town."

The statute enumerates several different acts, some of which are declared to be misdemeanors if done in an unincorporated town, and the rest of which are made misdemeanors if done anywhere. Each of the acts made a misdemeanor in case only it is committed within an unincorporated town, is specifically declared to be a misdemeanor if done in such town. Thus: * * * "Or who, on the public streets of any unincorporated town, or upon the public highways of such unincorporated town, run any horse-race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town." The other offenses defined in the section are not di-

rectly connected with the words "unincorporated town," and the definition of such other offense is complete without the element of locality. The purpose of the statute is made still more apparent by the very nature of the acts prohibited in a "town," or (the sense in which the word is used in the statute) collection of dwellings such as constitutes a village (unincorporated). There seems sufficient reason why a horse-race "for amusement," or the firing of a gun or pistol, should be made a criminal offense in such an assemblage of houses and inhabitants, while, in the absence of unmistakable language to that effect, it will not be presumed that it was the intention of the Legislature to subject a citizen who shall discharge a fire-arm anywhere within the borders of the State to imprisonment in the county jail for "firing a gun." The same section very wisely, however, makes it a violation of the criminal law "to fight," or "to use vulgar, profane, or indecent language in the presence of women and children, in a loud and boisterous manner," within and without a "town."

MORRISON, C. J., and ROSS, THORNTON, and SHARPSTEIN, JJ., concurred.

MYRICK, J., concurred in the judgment.

[No. 6,599.— Department Two.]
January 31, 1881.

D. HARNEY v. GEORGE H. PORTER ET AL.

SUFFICIENCY OF ANSWER — WAIVER OF VERIFICATION.— Service of an answer to a verified complaint consisting of a general denial only, was admitted by plaintiff's attorney and "verification thereof waived."

Held: The waiver of verification did not admit the sufficiency of the answer or dispense with the necessity of a specific denial.

APPEAL from a judgment for the defendants, in the District Court of the Third Judicial District in and for the City and County of San Francisco. THORNTON, J.

J. M. Wood, for Appellant.

William Leviston, for Respondent.

The COURT:

The complaint in this case was verified. The answer was a general denial only. Service of the answer was admitted by plaintiff's attorney, and "verification thereof waived." The Court below held the answer sufficient. It is here contended that there was a waiver of the effect of the verification of the complaint, and that the answer need not contain any specific denial.

We think the answer was insufficient.

Judgment reversed and cause remanded.

[No. 7,507.— Department One.]

February 2, 1881.

B. F. MEYERS v. D. M. KENFIELD.

SALARY OF JUDGE — CONSTITUTIONAL LAW.—There is nothing in the provision of Section 24, Article vi., of the Constitution, which indicates the intention that a forfeiture of salary should be the result of a failure of a judge to decide all cases within ninety days; but the purpose of the provision was to prohibit the Judge from receiving his monthly salary until all cases submitted for ninety days should be decided.

APPLICATION for writ of *mandamus*.

A. C. Freeman, for Plaintiff.

MORRISON, C. J.:

This is an application for a peremptory writ of *mandamus*. The plaintiff is the Superior Judge in and for the County of Placer, and the defendant is the Controller of the State of California.

The petition sets forth "that on the twelfth day of October, 1880, there was due this affiant from the State the sum of \$250, his salary as such Judge aforesaid, payable by the State, for the months of August and September, 1880. That on said twelfth day of October, 1880, he applied to said Controller for said salary (meaning for his warrant upon the Treasurer of State for said sum of money due him as aforesaid), and accompanied said application with his affidavit * * * to the

effect that no cause in his Court remained undecided that had been submitted to him for decision for the period of ninety days; that thereupon said Controller gave him his warrant for \$125, but refused his warrant for the remaining \$125.

The answer of defendant is as follows: "That on the thirty-first day of August, 1880, the warrant for the petitioner's salary for the month of August, 1880, was prepared by respondent for delivery to said petitioner; that said warrant still remains in the office of respondent undelivered; that petitioner has not at any time presented to respondent, or filed in the office of Controller of State, any affidavit showing that on the thirty-first day of August, 1880, no cause in petitioner's Court remained undecided that had been submitted to him for decision for the period of ninety days. To this answer the plaintiff interposed a demurrer, and the only question for us to determine is, Does the answer set up any defense?

The ground taken by the Controller is, that to entitle the plaintiff to his salary for the month of August it must appear that on the thirty-first day of that month no case remained undecided that had been submitted for ninety days. The position taken by the Controller is, in plain language, simply this: That if a Judge allows any cause to remain undecided for the period of ninety days, he forfeits the salary for the month immediately preceding the expiration of such term of ninety days.

The provision of the Constitution is that "no Judge of a Superior Court nor of the Supreme Court shall, after the first day of July, 1880, be allowed to draw or receive any monthly salary unless he shall take and subscribe an affidavit, before an officer entitled to administer oaths, that no cause in his Court remains undecided that has been submitted for decision for the period of ninety days."

There is nothing in the foregoing constitutional provision which indicates the intention that a forfeiture of salary should be the result of a failure to decide all cases within ninety days. But the purpose of the provision was, to prohibit the Judge from receiving his monthly salary until all cases that had been submitted for ninety days were decided. If, for instance, there were cases pending undecided on the thirty-

first day of August, which had been submitted for ninety days, the Judge was not entitled at that time to his salary for that month; but if such cases were decided on the first of September, he would then have a right to demand immediately a warrant for his salary for August. We find no difficulty in holding that such is the meaning of the clause in the Constitution (Article vi., Section 24). Demurrer sustained.

Let the writ issue as prayed for.

ROSS and THORNTON, JJ., concurred.

[No. 5,817.— Department Two.]
February 5, 1881.

HENRY P. WAKELEE v. ERWIN DAVIS.

VACATION OF JUDGMENT — JURISDICTION.— An order vacating a judgment entered more than three years previously reversed on the authority of *Bell v. Thompson*, 19 Cal. 706, and other cases.

APPEAL from an order in the Fifteenth District Court of the City and County of San Francisco.

A petition for hearing in Bank was filed in this case after judgment, and denied.

W. H. L. Barnes, for Appellant.

C. Dorsey, for Respondent.

THE COURT:

This is an appeal from an order made July 10, 1877, granting defendant's motion to the extent of vacating and setting aside a judgment against him, and allowing him to plead his final discharge in bankruptcy. The judgment was recorded November 18, 1873, and the notice of the motion was given April 12, 1877. On the authority of *Bell v. Thompson*, 19 Cal. 706; *Casement v. Ringgold*, 28 id. 335; *Sanchez v. Carriaga*, 31 id. 170, and *Murdock v. De Vries*, 37 id. 527, the order is reversed.

[No. 5,822.— Department Two.]
February 5, 1881.

CORNWALL v. DAVIS.

[No. 5,816.— Department Two.]
February 5, 1881.

McPHERSON v. DAVIS.

The Court:

On the authority of *Wakelee v. Davis, supra*, and cases there cited, the order is reversed.

[No. 6,775.— Department Two.]
February 21, 1881.

FREDERICK ROEDING v. GEOBATTO PERASSO.

DEFECTIVE FINDINGS — VARIANCE.— Judgment reversed for failure of the Court to find upon the issues presented by the pleadings.

APPEAL from a decree in favor of plaintiff, and from an order refusing to modify said decree, in the Fifteenth District Court in and for the City and County of San Francisco.
DWINELLE, J.

Action to abate a dam erected on the land of a lower riparian proprietor, by which, it was alleged, the land of the plaintiff was overflowed. The defendant, besides denying the allegations of the complaint, pleaded that the cause of action was barred by the provisions of Sections 319, 338, and 343 of the Code of Civil Procedure. There was no finding upon the issue raised by this allegation.

Edward J. Pringle, for Appellant.

S. Rosenbaum, for Respondent.

The COURT:

The findings in this case do not respond to the issues presented by the pleadings. The judgment and order are therefore reversed, and the cause remanded for a new trial. And by consent of parties in open Court, it is ordered that the remittitur issue forthwith.

[No. 7,591.— Department Two.]
March 21, 1881.

**DAVID HEWES v. CARVILLE MANUFACTURING
COMPANY.**

APPEAL — HOW TAKEN.—A notice of appeal from a judgment entered May 6, 1880, and a subsequent order denying a new trial, was served on respondent August 30th, and filed September 18th, and the undertaking on appeal was filed September 4th.

Held (under § 940, C. C. P.), that the appeal was well taken.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Superior Court of the City and County of San Francisco. **EVANS, J.**

A petition for hearing in Bank was filed in this case after judgment, and denied.

John C. Hall, for Appellant.

Charles P. Eells, for Respondent.

MORRISON, C. J.:

Respondent moves to dismiss the appeal in this case on the following facts:

On the sixth day of May, 1880, judgment in favor of plaintiff was entered in the Superior Court of the City and County of San Francisco, and on the thirteenth day of August of the same year an order was made denying defendant's motion for a new trial. On the thirtieth day of August notice of appeal to the Supreme Court was served on the respondent, and on the eighteenth day of September

the notice was filed in the office of the Clerk of the Superior Court. On the fourth day of September the undertaking required by the Code was duly filed by the Clerk.

It is claimed, on behalf of the respondent, that the appeal was not taken in the manner required by law, and in support of this proposition the Court is referred to the case of *Buckholder v. Byers*, 10 Cal. 481, which holds that the filing of a notice of appeal must precede the filing of the undertaking, because until an appeal is taken there is nothing to give effect to the undertaking. That decision was made when Section 337 of the Practice Act was in force, which provided that "the appeal shall be made by filing with the Clerk of the Court, with whom the judgment or order appealed from is entered, a notice, stating the appeal from the same or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney," and under that section it was held that the filing of the notice of appeal must precede or be contemporaneous with the service of a copy thereof on the adverse party. (*Buffendeau v. Edmonson*, 24 id. 94; *Boston v. Haynes*, 31 id. 107.)

But the foregoing section of the Practice Act has been materially changed by the Code of Civil Procedure. The law in force at the time the proceedings in this case were had was Section 940, Code of Civil Procedure, which provides that "an appeal is taken by filing with the Clerk of the Court in which the judgment or order appealed from is entered, a notice, stating the appeal from the same or some specific part thereof, and serving a similar notice on the adverse party or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose, unless, within five days after service of the notice of the appeal, an undertaking be filed or a deposit of money be made with the Clerk as hereinafter provided," etc.

It will be observed that the new section has changed the rule previously in force respecting appeals, and has rendered inapplicable the decisions above referred to. As the law now stands, the notice of appeal may be filed with the Clerk on a day subsequent to that upon which the service is made, upon the respondent or his attorney, and the undertaking may be filed before the notice of appeal is filed with

the Clerk. It must be filed, however, within five days after service of the notice of appeal, and that was done in this case.

The motion to dismiss the appeal must be denied. So ordered.

SHARPSTEIN and MYRIOK, JJ., concurred.

[No. 10,603.— Department Two.]

April 19, 1881.

THE PEOPLE v. WILLIAM NICHOLS.

RECORDING VERDICT — READING VERDICT — OBJECTION.— Upon a trial for burglary, when the jury came into the Court, and their names were called, the Court asked the jury if they had agreed upon a verdict, and the foreman answered that they had, and handed a paper to the Court; and the Court looked at the paper and handed it to the Clerk, saying: "Mr. Clerk, record the verdict." The defendant asked that the verdict be read before it was recorded, the Court refused the request, and the defendant excepted. The Clerk copied the verdict into the permanent minutes of the Court, read it to the jury, and asked: "Gentlemen of the jury, is this your verdict?" Some of the jurors answered "Yes," and none expressed any dissent. The Court then directed the Clerk to poll the jury. The Clerk thereupon asked each juror: "Is this your verdict?" and each answered in the affirmative, and the jury were then discharged.

Held: There was, in the course pursued by the Court, a palpable irregularity which would never have occurred if the provisions of the Penal Code had been looked to by the Court; but the defendant has not been prejudiced in any substantial right. His exception was simply on the order of procedure, no reference being made to any substantial right claimed by the defendant, of which he might be deprived by the action of the Court. The counsel for the defendant should have put his objections in a form distinctly challenging the attention of the Court to the fact that the course pursued would take away from defendant the timely right of having the jury polled; and not having done so at that time, he can not now be heard to maintain that this Court should pay any attention to it on this appeal.

EVIDENCE — INSTRUCTION AS TO CREDIBILITY OF DEFENDANT AS WITNESS.—

The instruction upon this point, referred to in *People v. Cronin*, 34 Cal. 204, approved.

APPEAL from a judgment of conviction, and from an order denying a new trial, in the Superior Court of the County of San Joaquin.

A petition for hearing in Bank was filed in this case after judgment, and denied.

J. H. Budd and L. C. Terry, for Appellant.

A. L. Hart, Attorney General, for Respondent.

THORNTON, J.:

The defendant was, upon information and trial, convicted of burglary in the first degree, and sentenced to one year's imprisonment. From the judgment defendant appealed. He also moved for a new trial, which was denied, and from the order denying his motion he also appealed.

The cause was submitted to the jury, and they retired for deliberation. As appears from the bill of exceptions, they deliberated two hours and a half before agreeing; and having agreed, they were conducted into the Court by the Sheriff, when their names were called by the Court, and all answered. The Court asked the jury if they had agreed upon a verdict, and the foreman answered that they had, and handed a paper to the Court. The Court looked at the paper, and handed it to the Clerk, saying: "Mr. Clerk, record the verdict." The defendant asked that the verdict be read before it was recorded. The Court refused the request, and defendant excepted. The bill of exceptions further shows that the Clerk copied the verdict from said paper into the permanent minutes of the Court, read it to the jury, and asked: "Gentlemen of the jury, is this your verdict?" Some of the jurors answered "Yea," and none expressed any dissent. The Court then directed the Clerk to poll the jury. The Clerk thereupon asked each juror: "Is this your verdict?" and each answered in the affirmative. The jury were then discharged.

It is provided in the Penal Code that when the jury have agreed upon their verdict, they must be conducted into Court by the officer having them in charge. Their names must then be called, etc. (P. C., § 1147.) When the jury appear, they must be asked by the Court or Clerk whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same. (P. C., § 1149.) When a verdict is rendered, and before it is

recorded, the jury may be polled, at the request of either party, in which case they must be severally asked whether it is their verdict, and if any one answers in the negative, the jury must be sent out for further deliberation. (P. C. § 1163.)

It is urged upon us that the defendant was injured by the course taken by the Court in this case, in ordering the verdict to be recorded before it was read or declared. There was in the course pursued by the Court a palpable irregularity, which would never have occurred if the provisions of the Penal Code had been looked to by the Court. But has the defendant been prejudiced in any substantial right? For by the statute this Court is commanded, after hearing an appeal, to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. (P. C., § 1258.) And a further command is laid upon us by Section 1404 of the same Code, in these words: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

The case of *The People v. Rodondo*, 44 Cal. 541, which occurred under the Criminal Practice Act, containing provisions identical with Section 1404, Penal Code, above cited (Crim. Prac. Act, § 601), in force before the adoption of the Code, the jury, having agreed on their verdict, were conducted into Court, and, without their names having been called, the Court received the verdict. On appeal it was claimed that the Court erred in receiving the verdict without first calling the names of the jurors. At that time the statute required, as it does now, that, when a jury agreed as to their verdict, they shall be conducted into Court, and "their names must then be called; and if all do not appear, the rest shall be discharged without giving a verdict." (Crim. Prac. Act, § 414; P. C., § 1147.)

The Court held that this was undoubtedly an irregularity in thus receiving the verdict, but, under the provisions of the section of the Criminal Practice Act above referred to, it refused to disturb the verdict, and affirmed the judgment,

holding that the irregularity complained of "in no way prejudiced the defendant."

An application of the section (P. C., § 1404) will be seen in *The People v. Sprague*, 53 Cal. 494, as also in *People v. Gilbert*, 60 Cal. 108, a decision of this Court in bank, opinion filed January 4, 1881. In both of these cases the Court refused to reverse where there was an irregularity, holding that no substantial right of the defendant had been prejudiced.

In the case under consideration the jury were actually polled by the Court, and each juror answered that the verdict was his. It seems to us that the right of polling was in effect and substantially accorded to the defendant.

In this case it is argued that there is a circumstance which makes it to differ from the cases just cited — that is, that the defendant entered an objection and reserved an exception to the ruling. This is so, and the point will be examined.

On referring to the facts as above stated, taken from the bill of exceptions, it will be seen that the objection made by the defendant was to the recording of the verdict before it was read. The defendant asked that the verdict be read before it was recorded. The Court refused the request, and defendant excepted. The exception was not put, on the ground that the defendant was deprived of the right of polling the jury. It was put simply on the order of procedure, no reference being made to any substantial right claimed by the defendant, of which he might be deprived by the action of the Court. The counsel for the defendant, in our opinion, should have put his objections in a form distinctly challenging the attention of the Court to the fact that the course pursued would take away from defendant the timely right of having the jury polled; and not having done so at that time, he can not now be heard to maintain that this Court should pay any attention to it on this appeal. (*Martin v. Travers*, 12 Cal. 243; *Dreux v. Domec*, 18 id. 89; *Mahoney v. Van Winkle*, 21 id. 576; *Leet v. Wilson*, 24 id. 402.) We think that the judgment or order should neither be reversed on this point.

The instruction excepted to by defendant (the fourth requested by the prosecution) is a copy of one given in *The*

People v. Cronin, 34 Cal. 195, 196, which was held not to be error in that case. (Id. 204.) The opinion in that case disposes of all the points made by defendant's counsel as regards this instruction. With the judgment there announced we are satisfied, and dismiss the point without further remark.

The point that the verdict is contrary to the evidence is not well taken.

In reference to the course of procedure adopted in this case by the Court below in receiving the verdict this Court desires to say that they are surprised at the irregularity which was permitted to occur in the matter referred to when the statutory provisions on the subject are so plain and unambiguous. Frequently criminal cases come to this Court on appeal, for the reason that the Court below has neglected to observe the plain provisions of the Penal Code in regard to procedure.

Thus much valuable time is lost by this Court in considering appeals which would never come here if the Judge of the Court below, in directing the trial, would open the Code, place it before him, and observe its requirements; and we suggest to the Superior Courts, in trying all cases, whether civil or criminal, to place before them the statute book, look carefully to its provisions in regard to procedure, and observe them strictly. We know that many Judges do pursue this course, but it is evident to us that some do not. This Court has frequently admonished the trial Courts in regard to these matters. (See *People v. Perdue*, 49 Cal. 427; Remarks of Court in *People v. Ah Gow*, 53 id. 628, citing 2 Bish. Cr. Pr., § 831.) And in our opinion it would be well that such admonitions were heeded.

Judgment and order affirmed.

MYRICK and SHARPSTEIN, JJ., concurred.

[No. 10,617.— In Bank.]

April 22, 1881.

PEOPLE v. THOMAS DYE.

MISCONDUCT OF JURY — CONFLICTING AFFIDAVITS.— Where affidavits as to the misconduct of the jury are conflicting, the ruling of the Court below will not be disturbed.

BILL OF EXCEPTIONS — APPEAL.— Upon an appeal from a judgment of conviction, the bill of exceptions stated merely that each party "introduced evidence to sustain the issue on their respective parts."

Held: This was enough without any further setting out of the testimony. If the defendant desired to have a more particular statement of the testimony, he was at liberty to have had it done by setting it forth in the bill.

With this statement and none other, the objection that the verdict is contrary to the evidence is untenable.

Id.— Id.— CASES DISTINGUISHED.— *People v. Fisher*, 51 Cal. 319; *People v. English*, 52 Id. 211, distinguished.

APPEAL from a judgment of conviction, and from an order denying a new trial, in the Superior Court of the County of Lake. HUDSON, J.

S. M. White, for Appellant.

A. L. Hart, Attorney General, for Respondent.

The Court:

The affidavits and counter-affidavits of the jurors were contradictory. The counter-affidavits denied the statements in the affidavits of the moving party, and showed that the jurors, on a full and fair deliberation, arrived at a verdict. This was the conclusion of the Court below, and we ought not, under the circumstances, to disturb that ruling. That Court held that there was no misconduct of the jury, and we are of the same opinion. We do not intend to admit by what is said above that the affidavits referred to were admissible to impeach the verdict.

The bill of exceptions shows that evidence was before the jury on the issues on which it had to pass. It is stated in the bill that each party "introduced evidence to sustain the issue on their respective parts" — which signifies, in our judgment, that each party offered evidence *in order to*, or for the purpose of, sustaining the issues on his part. This was

enough without any further setting forth of the testimony. The evidence on the material issues was before the jury, as appears from the statement referred to, and on such evidence a verdict of guilty was reached. We see nothing erroneous in this. If the defendant desired to have a more particular insertion of the testimony, he was at liberty to have it done by setting it forth in the bill. The general statement made in the bill was insufficient to show that there was no evidence before the jury on which to base a verdict. That it was so is an entire misconception on the part of defendant's counsel. With this statement and none other in the bill of exceptions in regard to the evidence introduced, we can not see that the objection that the verdict is contrary to the evidence is at all tenable.

What is said above, in our view, is in entire accord with what is held in *People v. Fisher*, 31 Cal. 319, and *People v. English*, 52 id. 211.

Judgment and order affirmed.

[No. 10,610.— Department One.]

April 23, 1881.

EX PARTE FREDERICK BERNERT.

LICENSE — MUNICIPALITY — REPEAL OF STATUTE.— Assuming, without deciding, that the Act of March 29, 1878 (Stats. 1877-8, p. 442), relates to municipal as well as State licenses, it simply enumerates certain businesses and occupations, and declares what shall be paid for licenses by each of those specified. It does not operate a repeal of the Act of March 30, 1872 (Stats. 1871-2, p. 737), which authorizes the Board of Supervisors to fix the sum to be paid by different trades, occupations, and businesses or employments carried on or conducted within the limits of the municipality, except to the extent of the particular businesses, etc., specified in the act. Neither does the act expressly or impliedly repeal the first section of the Act of 1872, which limits the punishment of those found guilty of refusing to take out a license as required by any lawful order of the Board of Supervisors.

ID.— ORDINANCE — MISDEMEANOR — PENALTY — JURISDICTION.— The petitioner was convicted in the Police Court of San Francisco, and adjudged to pay a fine of \$20, and in default of payment to be imprisoned in the county jail for the period of ten days, for the offense of violating an ordinance entitled "Order No. 1589," portions of which are as follows: "Sec. 1. Any person who shall violate any of the provisions of the above order

shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than six months, or by both." "Sec. 10, subd. 43. Each proprietor of a billiard-table and pool-table, not kept exclusively for family use, shall pay a license of six dollars a quarter, and for a bowling-alley six dollars a quarter, and for each additional alley five dollars a quarter." By the first section of the Act of March 30, 1872 — under which the authority to enact the ordinance in question was derived — it is provided that any person carrying on any business within the limits of a city which is or shall be required to be licensed, without having first obtained the license therefor, as required by the laws of the State, "or by the lawful orders of the Board of Supervisors of such city and county," shall be deemed guilty of a misdemeanor, and, on conviction thereof, "shall be punished by a fine of not less than one hundred dollars or by imprisonment for a period not exceeding thirty days in case the fine is not paid.

Held: By the ordinance and act referred to it is, in effect, provided that the Police Court shall have power to fine only in the sum of one hundred dollars, or a greater sum not exceeding one thousand dollars, and that the imprisonment shall be inflicted only in case the fine of one hundred dollars or more is not satisfied by payment. In rendering the judgment, therefore, the Police Court transcended its jurisdiction.

Id.— Id.— Id.— Id.— POOL-TABLE — GAMING.— The letting to hire of a pool-table does not necessarily involve gaming for money or value.

Id.— Id.— Id.— Id.— The ordinance only requires those who make a "business calling, or employment" of keeping a pool-table to pay a license, and it is therefore not open to the objection that it imposes a license upon the proprietor of a pool-table not kept for hire.

Id.— Id.— Id.— Id.— APPEAL.— Upon an appeal from a void judgment of the Police Court this Court might remand the case, with directions that defendant be sentenced; but in a proceeding by *habeas corpus* it can not command the entry of a judgment in the lower Court, and therefore ought not to permit the petitioner to remain in jail upon the conjecture that the Court which pronounced the judgment may become convinced of its invalidity, and then proceed to enter a different judgment.

APPLICATION for release on writ of *habeas corpus*.

H. G. Sieberst, for Petitioner.

The statute of 1878 embraces the provisions of the statute of 1872, and fixes licenses, and operates as a repeal of all antecedent enactments. (*Commonwealth v. Kelliher*, 12 Allen, 480; *Bartlett v. King*, 12 Mass. 537; *Commonwealth v. Cooley*, 10 Pick. 39; *Nichols v. Squire*, 5 Id. 168; *Daviess v. Fairbairn*, 3 How. (U. S.) 636.)

D. L. Smoot, District Attorney, and *W. C. Graves*, contra.

McKINSTRY, J.:

The petitioner was convicted in the Police Court of San Francisco (and adjudged to pay a fine of \$20, and, in default of payment thereof, to be imprisoned in the county jail for the period of ten days) of the offense of violating an ordinance entitled "Order No. 1589," portions of which are as follows:

"Section 1. Every person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than six months, or by both."

"Section 10, subdivision 43. Each proprietor of a billiard-table and pool-table, not kept exclusively for family use, shall pay a license of six dollars a quarter, and for a bowling-alley six dollars a quarter, and for each additional alley, five dollars per quarter."

The authority of the Board of Supervisors to enact the ordinance is derived, as is claimed, from the third section of the Act of March 30, 1872 (Stats. 1871-2, p. 737), wherein it is provided that the Board shall have power, by ordinance, "to license and regulate all such callings, trades, and employments as the public good may require to be licensed and regulated, and as are not prohibited by law."

The first section of the same act provides that if any person shall be engaged in carrying on, pursuing, etc., within the limits of the city and county, any business, etc., which is or shall be required to be licensed, without having first obtained the license therefor, as required by the laws of this State, "or by the lawful orders of the Board of Supervisors of said city and county," he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars, or by imprisonment for a period not exceeding thirty days in case the fine is not paid."

The first question to be considered is whether Order 1589, which provides that any person who shall violate any of the provisions of the order "shall be punished by a fine of not more than one thousand dollars, or by imprisonment of not more

than six months, or by both," authorized the sentence which was imposed upon the petitioner. The third section of the Act of March 30, 1872, empowered the municipal government to establish a reasonable penalty for a violation of any license ordinance it might pass, with the condition and limitation (found in Section 1 of the same act) that the penalty should in no case be a fine of less than one hundred dollars, with an imprisonment of not exceeding thirty days in case the fine should not be paid. The first section of Order 1589, therefore, if it be read in the light of the Act of 1872, did not authorize a fine of *twenty* dollars, or any imprisonment as an alternative. If, however, the order could be read as authorizing a fine of less than \$100, the order to that extent would be invalid, since by reason of the first section of the law of 1872, the Supervisors had no power to provide as a punishment a fine of less than \$100. But this would not affect the rest of the ordinance.

Counsel for petitioner claims that the Act of 1872 has been repealed by the Act of March 23, 1878 (Stats. 1877-8, p. 442). Assuming, without deciding, that the act of 1878 relates to *municipal* as well as State licenses, it simply enumerates certain businesses and occupations, and declares what shall be paid for license by each of those specified. It does not operate a repeal of the provisions of the Act of 1872, which authorizes the Board of Supervisors to fix the sum to be paid by different trades, occupations, businesses, or employments carried on or conducted within the limits of the municipality, *except* to the extent of the particular businesses, trades, professions, occupations, or employments "specified" in the act. Neither does the Act of 1878 expressly or impliedly repeal the first section of the Act of 1872, which limits the punishment of those found guilty of refusing to take out a license as required by any lawful order of the Board of Supervisors.

The power of the Police Court of San Francisco to sentence one guilty of a violation of the ordinance comes from the first section of the Act of 1872, which provides that the party convicted shall be punished by a fine of not less than one hundred dollars, or by imprisonment for a period not exceeding thirty days in case the fine is not paid, and from the ordinance—1589—which fixes the maximum of fine at \$1,000. The

language employed is, in effect, a declaration that the Police Court shall have power to fine only in the sum of one hundred dollars, or a greater sum not exceeding one thousand dollars, and that the imprisonment shall be inflicted only in case the fine of one hundred dollars or more is not satisfied by payment. It is prohibitive of a sentence to pay less than one hundred dollars. If the judgment as to the fine be invalid, so is the judgment as to the imprisonment—since the latter is only alternative.

It is urged that petitioner can not be heard to object to a judgment which imposes a less penalty than that prescribed by law, and—if the action of the court was merely erroneous—it is undoubtedly correct to say that we ought not to listen to his complaint. Although when error is shown injury will be presumed, this court will not, on appeal, reverse a judgment for error, unless the defendant appealing has been prejudiced. (*People v. Turley*, 50 Cal. 469; *People v. Ybarra*, 17 Cal. 171.)

Of the cases cited by the District Attorney to the point that a defendant can not have a judgment reversed which is more favorable to himself than is authorized, it may be remarked that nearly all of them were *appeals*. There can be no doubt of the correctness of the proposition wherever the lower Court had *jurisdiction* to render the judgment appealed from. In *Ooton v. The State*, 5 Ala. 464, the question of the jurisdiction of the lower Court was not considered by the Supreme Court, nor called to its attention. In *Barada v. The State*, 13 Mo. 94, there was an intimation that the Court below *had* jurisdiction, in a proper case, to enter the judgment appealed from. In *Logan's Case*, 5 Gratt. 692, a prisoner had been adjudged to be confined in the penitentiary for two years. The law authorized an imprisonment of not less than five years. On suggestion of error on the face of the record, the Court which had tried the prisoner adjudged him to be confined *three years* in addition to the two years. A *writ of error* was refused by the Supreme Court of Virginia.

It is said by Hurd, in his work on *Habeas Corpus*, p. 334: "Where a prisoner was sentenced to the penitentiary, on conviction for horse-stealing, for one year, the law requiring a sentence for such offense for a period not less than three years, the error was held to be no ground for discharge on *habeas*

corpus." The case referred to by Mr. Hurd — *Ex parte Shaw*, 7 Ohio St. 81 — would seem fully to support his statement. But an examination of the case will show the decision to have turned upon the assumption that the judgment was not void, because the Court had jurisdiction over the person of the defendant, and over the offense and its punishment—a test which has been held not infallible by the Supreme Court of the United States.

With respect to the case now before us, it is indeed true that the Police Court had jurisdiction over the person of the petitioner and of the offense for which he was tried. "It by no means follows that these two facts make valid, however erroneous it may be, any judgment the Court may render in such case. If a Justice of the Peace, having jurisdiction to fine a defendant for a misdemeanor, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a Court of general jurisdiction should, on an indictment for libel, render a judgment of death or confiscation of property, it would, for the same reason, be void. Or if on an indictment for treason the Court should render a judgment of attainder, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the Court be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the Court, and forbidden by the Constitution." (*Ex parte Lange*, 18 Wall. 176.)

In *Bigelow v. Forrest*, 9 Wall. 339, it was held that a decree under confiscation acts, which in terms ordered *all* the estate of the defendant (a *fee simple*) to be sold, was not simply erroneous, but void. The Supreme Court of the United States said: "Doubtless, a decree of a Court having jurisdiction to make the decree can not be impeached collaterally, *but under the Act of Congress the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest.*"

In the case of the present petitioner, the Police Court had no power to impose a fine of less than one hundred dollars, or any imprisonment except as an alternative or substitute for a fine of one hundred dollars or more. In rendering the

judgment, it transcended its jurisdiction. The petitioner can not be deprived of his liberty by means of a void judgment.

It might be admitted that where the law authorizes either one of two distinct kinds of punishment, and a judgment imposes both, the defendant may, by satisfying one of the punishments, relieve himself of the other; and that he will be protected by the constitutional principle, "no man shall be twice punished for the same offense," from any subsequent attempt of the same Court to render the judgment which would originally have been the proper judgment. (*Ex parte Lange*, 18 Wall. 176.) But it would not necessarily follow, from this admission, that if an inferior Court should enter a judgment of imprisonment for a longer term, or fine in a larger sum, than it had power or jurisdiction to impose the judgment, as against the objection of defendant, would be valid *pro tanto*. In Michigan, a Justice of the Peace entered a judgment: "The defendant is fined eight dollars, to pay costs, etc., * * and to stand committed until paid." The Supreme Court, after referring to the statute, said: "The Justice can fine or imprison, or can in his discretion do both, within the limits fixed by the statute; but he can not imprison for an indefinite period of time. The period must be determined and fixed by him judicially, and that, under the statute, can not exceed a period of *three months*." True, that was an appeal, but the judgment was held to be erroneous, *because* the Justice had no power to pronounce it. It was, therefore, void. The case was so understood by Mr. Hurd. (See Hurd on *Habeas Corpus*, 334.)

Gurney v. Tufts, 37 Me. 130, was presented to the Supreme Court of Maine on a return to a writ *de homine replegiando*. The statute authorized a magistrate to sentence the owner, etc. of liquors, "to stand committed for thirty days in default of payment" (of a fine). A municipal judge had sentenced a defendant to pay a fine of twenty dollars, and that the keeper of the jail keep him, etc., "until he perform said sentence or be otherwise discharged in due course of law." The Supreme Court said: "The magistrate had clearly no authority * * * to impose any such sentence, or to commit for a failure to comply therewith." And the petitioner (the subject of the sentence) was discharged. It is hardly necessary to add that

if the judgment is one which the court has no *power* to pronounce, the constable or other executive officer of the Court can not use it as an *ægis* for his protection. *Robinson v. Spenceley* was an action of *trespass* against a magistrate, which was only maintainable in case his judgment was *void*. (3 Barn. & Cress. 658.) It was said by Abbott, C. J.: "I am of opinion that the warrant in this case was illegal, not being such as the Justice had *authority* to make. It was his duty to have pursued the words of the statute. If he had so done, it would have given the party committed the option either of paying the money, or of staying three months in prison and being thereby altogether discharged from the payment. This warrant is for his imprisonment until he shall pay the money, etc. *People v. Riley*, 48 Cal. 549, was an appeal. The offense for which the defendant was tried was punishable by imprisonment for a term not exceeding five years. The Court below adjudged the defendant to suffer imprisonment for a term of ten years. This Court reversed the judgment and remanded the cause, with directions to the lower Court "to proceed to judgment." In none of these cases was it suggested that the sentence was good *for the statutory term*. Nor, if an inferior Court has exceeded the fine it is authorized to impose by law, would it seem that the judgment is valid to the extent of the fine authorized. To justify under a judgment, it must appear that the Court had power to render the judgment *when it was rendered*. Its validity cannot depend upon the happening of a subsequent event, as that the defendant shall subject himself to *part of a single punishment*.

But it is not necessary here to decide whether a fine in a *greater sum* than that authorized by statute or ordinance would render a judgment absolutely void. The judgment of the Police Court in the case before us is certainly void, because it is not one which *includes* any judgment which that Court has jurisdiction to render in such a case.

It has been suggested that the letting to hire of a *pool-table* is the carrying on of a species of gambling or immoral pursuit; while the statute only permits the Board to license callings, etc.—"not prohibited by law." We do not take judicial notice that "pool" necessarily involves gaming for money or value; indeed, are able to discover no reason why it should. Even

if the expression "not prohibited by law" means more than *statutory* law, we know that no statute prohibits a game not played for value, and are equally certain that such game violates no common-law prohibition.

It has been suggested, further, that the Board of Supervisors — authorized to license "callings, trades and employment" only — had no power to impose a license tax upon the proprietor of a pool-table simply because he did not keep it exclusively for "family use," but permitted persons visiting his saloon to use it without cost; that the ordinance is invalid because it does not require, as a condition to a license, that the table shall be kept as a *calling* or *employment*; that it was let to hire or made a means of profit. But that the ordinance only requires those who make a "business, calling, or employment" of keeping a pool-table to pay a license, is sufficiently apparent from its language. As much would seem to be implied from the very exception "not kept exclusively for family use." The second section of Order 1589, however, makes the meaning manifest. It provides: "It shall be unlawful for any person to engage in or carry on any *business, trade, profession, or calling* * * * without first taking out or procuring the license," etc. The *tenth* section contains a schedule of the rates of license to be paid by persons carrying on certain businesses, trades, professions, or callings — among whom are the proprietors of pool-tables not kept for family use, the keepers of "common ball-rooms," "shooting-galleries," etc. In several instances no reference is made to the circumstance that the "business" specified must be conducted for profit. But from the nature of the subject, the purpose — to secure revenue from trades, etc. — for which the ordinance was adopted, from the very definition of the word "license," as well as from the language of the second section in connection with the enumeration of callings, etc., in the *tenth*, it is apparent that the prohibition (except license is paid) relates to and includes only the businesses, trades, professions, or callings carried on for profit. Indeed, that not conducted with a view to its profit, real or expected, would *hardly* be a business, trade, profession, or calling.

To conclude: while we hold the ordinance to be valid, we decide the judgment of the Police Court *void*.

It may perhaps be suggested that petitioner should have been remanded to the custody of the Sheriff, to be by him held under the warrant of arrest issued upon the complaint. The record shows no warrant or service, nor, if there was any warrant, that it was served by the Sheriff. The warrant, if any, may have been served by an officer of the municipal police, and petitioner may have been in his hands until delivered to the Sheriff after judgment. But if it appeared that he was originally arrested by a Sheriff's officer, this circumstance ought not to be determinative of the question. The Sheriff now has the body of petitioner as jailer, not in his capacity as arresting officer. This is not a case in which a party is held under illegal restraint, and another person, or the same in a distinct capacity, is legally entitled to his custody. Here the warrant (if any was issued) has discharged its function. Its office was to give to the Court, by its officer unless bail was given, the control of the defendant arrested, that he might be tried and be present for judgment and execution. When a judgment was pronounced, the Court took the defendant from the sureties, or Sheriff, as the case might be, and placed him in jail. As the sureties on the bail bond would be discharged when a judgment was rendered — although not such a judgment as would authorize the jailer to keep the defendant in prison — because the law does not intend that the liability of the sureties shall depend upon the validity or invalidity of the judgment; so the arresting officer, as arresting officer, is fully protected by a judgment of the Court of which he is the minister — whether the Court regularly pursues its jurisdiction in rendering the judgment or not — from the time that he surrenders the person of his prisoner in accordance with the terms of the judgment.

If this were an *appeal* from the judgment of the Police Court, and this Court had jurisdiction of the appeal, we might remand the cause, with direction that defendant be sentenced — the judgment appealed from being *void*. (*People v. Riley, supra.*) We may suggest that judgment may be pronounced upon petitioner (who has been tried and convicted by a Court of competent jurisdiction but never sentenced), *unless*, by reason of lapse of time, it would be error now to sentence him. (P. C., § 1449.) But, as we can not com-

mand such action, we ought not to permit the petitioner to remain in jail upon the *conjecture* that the Court which pronounced the judgment (believing that it had power to pronounce it) may become convinced of its invalidity — perhaps after the expiration of the period of illegal imprisonment — and then proceed to fine or imprison him a second time for the same offense.

We are strengthened in our conviction by the circumstance that never, so far as the reported cases are known to us, has it been held, where the return has shown the petitioner to be confined under a void judgment of a Court which had jurisdiction to try him, that he was or could be legally restrained of his liberty under the warrant issued at the commencement of the proceedings against him.

The petitioner is discharged from custody.

McKEE and Ross, JJ., concurred.

[No. 10,622.— In Bank.]

May 2, 1881.

EX PARTE JAMES L. CRITTENDEN.

CONTEMPT — FINE — IMPRISONMENT.— Upon a judgment imposing a fine for contempt, it is competent for the Court to direct that the party stand committed until the fine be paid.

APPLICATION for writ of *habeas corpus*.

M. T. Moses, for Plaintiff.

D. L. Smoot, for Defendant.

The COURT:

The petitioner was adjudged guilty of contempt by the Superior Court of San Francisco County, and was ordered to pay a fine of \$100, and to stand committed to the county jail for a period of one day for every two dollars of the unpaid portion of the fine. The order of the Court sets forth the facts constituting the contempt, and we are of the opinion that the facts show a case of contempt under the provisions of the Code of Civil Procedure.

But it is claimed that it was not competent for the Court to imprison the petitioner under an order or judgment simply imposing a fine. In the case of *New Orleans v. Steamship Company*, 20 Wall. 392, the Supreme Court of the United States says: "Contempt of Court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. * * In *Crosby's Case*, 3 Wils. 188, Mr. Justice Blackstone said: 'The sole adjudication for contempt, and the punishment thereof, belongs exclusively and without interfering to each respective Court.'"

The question of contempt of Court, and the punishment thereof, has recently undergone a thorough examination in the case of *Fischer v. Hayes*, 7 Fed. Rep. 96. In that case Blatchford, J., says: "It is suggested that Section 725 provides for the punishment of a contempt by a fine or imprisonment, and that, therefore, a commitment for non-payment of the fine is unlawful, because such commitment is 'imprisonment.' There is, however, no commitment or imprisonment if the fine be paid. There is no commitment *and* fine. The punishment by a fine is fully inflicted, under the terms of the order, if the fine be paid as the order directs, and in such case there can be no commitment. So, if there be a commitment for non-payment of the fine, there must be a discharge as soon as the fine is paid. The payment of the fine is the punishment. The awarding or infliction of the fine is no punishment. The commitment is an incident of the fine. It is not, in any manner, the 'imprisonment' allowed by the statute. The payment of the fine, and a commitment for not paying it, can not co-exist. The commitment is not a separate punishment or imprisonment added to the payment of a fine. It is in view that it has always been held that where a statute authorizes or prescribes the infliction of a fine as a punishment, either for a contempt of Court or for a defined offense, it is lawful for the Court inflicting the fine to direct that the party stand committed until the fine be paid, although there be no specific affirmative grant of power in the statute to make such direction.

The learned Judge then proceeds to cite numerous cases in support of his view of the law.

We are of opinion that it was competent for the Superior Court to make the order complained of in this case, and therefore the writ is dismissed and the petitioner remanded.

(No. 7,481.— Department Two.)

May 14, 1881.

EDWARD ROYON ET AL. v. NICHOLAS GUILLÉE ET AL.

CROSS-COMPLAINT — FINDINGS.— In an action by plaintiffs for money lent defendants jointly, the defendants, by way of cross-complaint, alleged that one of the plaintiffs obtained by undue influence from one of the defendants an instrument in writing, for the payment of certain moneys, which the defendants asked to have adjudged void; but it did not appear from the complaint that the plaintiffs sought to recover upon the instrument referred to in the cross-complaint, nor was there anything in the record to show that the instrument was introduced in evidence.

Held: It does not appear that the allegations of the cross-complaint with respect to said instrument were at all relevant to the case, and therefore no answer was required, and there being no issue upon it, no findings were necessary.

APPEAL from a judgment for plaintiffs in the Superior Court of the City and County of San Francisco. **WHEELER, J.**

Sidney V. Smith, for Appellants.

R. M. Swain, for Respondent.

The COURT:

This action was brought to recover money alleged to have been lent by the plaintiffs jointly to the defendants jointly. The defendants denied all the material allegations of the complaint, and by way of cross-complaint alleged that one of the defendants lent to one of the plaintiffs sums of money; and that one of the plaintiffs obtained by undue influence from one of the defendants an instrument in writing for the payment of certain moneys, which the defendants asked to have adjudged void, and to have plaintiffs enjoined from seeking to enforce it. The findings are full upon all the issues raised

by the complaint and answer, but there are no finding as to the allegations of the cross-complaint, which was not answered by the plaintiffs.

The only question is, whether the allegations of the cross-complaint are sufficient to entitle defendants to any relief in this action. The transaction to which it refers is alleged to have been between one of the plaintiffs and one of the defendants only; and it does not appear from the complaint that the plaintiffs sought to recover, upon the instrument referred to in the cross-complaint. We have nothing but the judgment roll before us, and there is nothing to show that said instrument was introduced in evidence. It is therefore impossible for us to see that the allegations of the cross-complaint, with respect to said instrument, were at all relevant to the case, and therefore no answer to them was required; and there being no issue upon it, no findings were necessary.

Judgment affirmed.

[No. 10,640.— Department Two.]

May 16, 1881.

THE PEOPLE v. N. K. SPECHT.

APPEALABLE ORDER.— An order, made upon sustaining a demurrer to the indictment, that the District Attorney filed an information against the defendant, is not appealable.

APPEAL from an order of the Superior Court of the County of Colusa. **HATCH, J.**

E. K. Bridgport and Jackson Hatch, for Appellant.

A. L. Hart, Attorney General, for Respondent.

The Court:

After the order sustaining the demurrer to the indictment, the Court made an order that the District Attorney file an information against the defendant. The appeal is from this order. The order is not an appealable one.

Appeal dismissed.

[No. 10,627.]

May 25, 1881.

EX PARTE STEFANO CASINELLO.

ORDINANCE OF MUNICIPAL CORPORATION — POLICE POWER — NUISANCE. — The petitioner was convicted of a violation of Section 47 of an order of the Board of Supervisors of the City and County of San Francisco, passed July 18, 1880, which reads as follows: "No person shall throw into or deposit upon any public street, highway, or grounds, or upon any private premises, or anywhere except in such place as may be designated for that purpose by the Superintendent of Public Streets and Highways, any glass, broken ware, dirt, rubbish, garbage, or filth." The complaint charged that the petitioner "did willfully and unlawfully throw into and deposit upon certain lands at Channel and Fifth Streets, in said city and county, a large quantity of broken ware, dirt, rubbish, garbage, and filth; the said place where the same was thrown and deposited not being a place designated for that purpose by the Superintendent of Public Streets and Highways."

Held: The authority to pass the order now under consideration was vested in the Board of Supervisors by the Act of April 25, 1863; but if there were any room for doubt, the power is clearly conferred by Section 11, Article xl., Constitution; and,

Held, further, that the complaint was sufficient.

APPLICATION for writ of *habeas corpus*.

A. D. Spivalo and M. Mullany, for Plaintiff.

D. L. Smoot, for Defendant.

MORRISON, C. J.:

On the eighteenth of July, 1880, the Board of Supervisors of the City and County of San Francisco passed the following order:

"Section 47. No person shall throw into or deposit upon any public street, highway, or grounds, or upon any private premises, or anywhere except in such a place as may be designated for that purpose by the Superintendent of Public Streets and Highways, any glass, broken ware, dirt, rubbish, garbage, or filth." And the penalty prescribed for a violation of the order was a fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or both such fine and imprisonment.

In pursuance of the above order, the Superintendent of

Public Streets and Highways designated the line of Sixth street, south of Channel, as a "dumping place," or place of deposit.

On the second day of February, 1881, a complaint was filed in the Police Judge's Court of said city and county, charging that the petitioner "did willfully and unlawfully throw into and deposit upon certain lands at Channel and Fifth Streets, in said city and county, a large quantity of broken ware, dirt, rubbish, garbage, and filth; the said place where the same was thrown and deposited not being a place designated for that purpose by the Superintendent of Public Streets and Highways of said city and county." On this complaint there was a trial and conviction.

It is claimed, in the first place, that the foregoing complaint is insufficient, and that it charges no offense. To my mind, it is very clear, however, that the complaint charges the petitioner with a violation of the order of the Board of Supervisors referred to above; and the only remaining inquiry relates to the validity of that order. Numerous objections are made to it, such as that it is oppressive, unjust, unreasonable, and also that it is unconstitutional.

The provisions of the Constitution, which, it is claimed, are violated by the order, are Sections 1 and 21 of Article i. But I am unable to discover any application which the constitutional provisions referred to have to the order in question.

The objections that the order is oppressive, unjust, and unreasonable are, in my opinion, not well taken. That dirt, rubbish, garbage, and filth are in their nature nuisances, is too plain to admit of controversy; and that glass and broken ware can be very easily converted into nuisances if thrown about promiscuously, is equally plain.

By the Act approved April 25, 1863, power is conferred upon the Board of Supervisors "to authorize and direct the summary abatement of nuisances; to make all regulations which may be necessary or expedient for the preservation of the public health and the prevention of contagious diseases; to provide by regulation for the prevention and summary removal of all nuisances and obstructions in the streets,

alleys, highways, and public grounds of said city and county," etc.

But the delegation of police power to the Board of Supervisors by the Constitution also is in very large and general terms. Section 11 of Article xi. is as follows: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." No reference has been made to any *general law* on the subject, and I am not aware of the existence of any statute which attempts to regulate the matter now under consideration, except the Act of 1863.

Speaking of the police power, in the case of *Commonwealth v. Alger*, 7 Cush. 85, Shaw, J., says: "The power we allude to is rather the police power—the power vested in the Legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise."

And Redfield, C. J., delivering the opinion of the Supreme Court of Vermont, in the case of *Thorpe v. The Rutland and Burlington Railroad Company*, 27 Vt. 149, says: "The police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State."

The Supreme Court of the United States, in the *Slaughter House Cases*, 16 Wall. 62, uses the following language: "The power here exercised by the Legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, conceded to belong to the States, however it may now be questioned in some of its details. * * * The power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizens, the comfort of an existence in a thickly populated community, the enjoyment of private

and social life, and the beneficial use of property." The learned Judge was here speaking of the Act of the Legislature of the State of Louisiana, passed March 8, 1869, concerning and regulating slaughter-houses.

I will content myself with a reference to one additional authority on this subject, and that is the case of *Ex parte Shrader, on habeas corpus*, reported in 33 Cal. 279. In that case the petitioner was convicted, in the Police Court of the City and County of San Francisco, of keeping and maintaining a slaughter-house within certain limits, in violation of an order of the Board of Supervisors. The order was framed in pursuance of the Act of 1863, already referred to. The Court there say: "By its first section the Board of Supervisors of the City and County of San Francisco is authorized, among other things, 'to make all regulations which may be necessary or expedient for the preservation of the public health and the prevention of contagious diseases.'

* * * It is apparent that the Legislature could confer power upon the Board to pass the order if it could have enacted it directly in the form of a statute in the first instance. The real question to be determined, then, is, whether the power of the Legislature to legislate concerning the public health is so narrowed by constitutional restraints, that it can not regulate the business of slaughtering cattle in populous towns by limiting its prosecution to particular localities or quarters therein. We must hold in favor of the power, unless its unconstitutionality is clear. (*Bourland v. Hildreth*, 26 Cal. 162.)" The order was sustained by the Court, and the prisoner was remanded.

It is very clear to me that the authority to pass the order now under consideration was vested in the Board of Supervisors by the Act of April 25, 1863; but if there were any room for doubt, the clause in the Constitution (Section 11 of Article xi.) is too plain to admit of more than one construction: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Here we have the authority clearly and expressly conferred by the organic law of the State, and that it is wisely conferred will admit of no doubt.

The regulation in this case, instead of being arbitrary, unreasonable, or unjust, was a wise and salutary one, calculated to promote the welfare and best interests of the city, and was, in its nature and purpose, a salutary police regulation, designed to protect the safety and health of the inhabitants of the City of San Francisco.

The writ is dismissed and the petitioner remanded.

[No 10,636.— Department Two.]

May 26, 1881.

THE PEOPLE v. JOHN GOLDEN.

MAYHEM — DEFINITION.—The biting off the ear of a human being is mayhem.

APPEAL from an order sustaining defendant's demurrer to an indictment in the Superior Court of the County of Colusa. **HATCH, J.**

A. L. Hart, Attorney General, for Appellant.

Jackson Hatch, for Respondent.

The COURT:

The indictment charges that the defendant committed the crime of mayhem, by biting off with his teeth a portion of the left ear of one M., and thereby disabled and disfigured said ear.

The Penal Code, § 203, makes the disabling or disfiguring of a member of the body of a human being mayhem. It is alleged in this indictment that the said M. is a human being, and that his left ear is a member of his body. We think that the allegations of the indictment are sufficient to constitute the crime of mayhem, and that the demurrer was improperly sustained.

Order reversed, with direction to the Superior Court of Colusa County to overrule said demurrer.

[No 7,649.— Department One.]

June 16, 1881.

GEORGE D. BLISS v. SUPERIOR COURT OF SANTA CLARA COUNTY.

STAY OF PROCEEDINGS — APPEAL — INJUNCTION.—Application for writ of prohibition to forbid the Superior Court from proceeding further in an action, until the determination of an appeal from an order in the action refusing to dissolve a temporary injunction.

Held: It is only of orders or judgments which command or permit some act to be done that a stay of proceedings can be had. The order appealed from in this case is not of that character, hence the stay of proceedings has not the legal effect of suspending the jurisdiction of the Court over so much of the action as is not affected by the order.

APPLICATION for writ of *certiorari*.

M. Lynch, for Plaintiff.

Burt & Pfister, for Defendant.

McKEE, J.:

This is an application for a writ of prohibition to forbid the Superior Court of Santa Clara County from proceeding further in an action against the petitioner and another defendant, until the determination by this Court of an appeal from an order made by the Court below refusing to dissolve a temporary injunction issued in the action.

The action was brought to have the defendants to it interplead with each other, as to their respective rights to a sum of money, which the plaintiffs in the action admitted that they owed to one or other of them. For the purpose of having the rights of the defendants to the money adjudged by the Court, they brought the money into Court, and had a temporary injunction issued to restrain the defendants from commencing or prosecuting any suit against them on account of the money. The action was tried and the plaintiffs had judgment, but, on appeal, this Court, at the September session, 1880, reversed the judgment. (See *Pfister v. Wade*, 56 Cal. 43.) When the remittitur was filed in the lower Court, the petitioner, as one of the defendants, moved to dissolve the

injunction, which was denied, and he appealed from the order to this Court, where the appeal is now pending.

In contemplation of law, the injunction does not injure the petitioner, because his rights to the money in controversy between him and his co-defendant in the action are secured by the injunction bond. (*Merced Mining Company v. Fremont*, 7 Cal. 130.) Yet it is contended on his behalf, that, as he obtained a stay of proceedings by giving an appeal bond of \$1,000, on his appeal from the order refusing to dissolve the injunction, the stay, by operation of law, suspends all proceedings in the lower Court until the determination of the appeal, and that the Court below is exceeding its jurisdiction in attempting to try the case. But it is only of orders or judgments which command or permit some act to be done that a stay of proceedings can be had. (*Hicks v. Michael*, 15 id. 109; *Merced Mining Company v. Fremont*, *supra*.) The order from which the appeal has been taken is not of that character. Hence, the stay of proceedings has not the legal effect of suspending the jurisdiction of the Court over so much of the action as is not affected by the order. A Court has power to proceed upon any matter in an action not affected by the order appealed from. (C. C. P., § 496.)

Although the Court has in this instance denied a motion to dissolve the temporary injunction issued in the action before it, it may, on a final hearing of the case, decide that the plaintiffs were not entitled to it. But if it should ultimately decide otherwise and make the injunction perpetual, the petitioner, as defendant, will be entitled to his motion for a new trial, or to an appeal; so he can not be injured. We can not suppose that the Court below in its proceedings will disregard the opinion of this Court already rendered in the case. At all events, in the proceedings taken by the Court below, in allowing the plaintiffs to file an amended complaint, and requiring the defendants to answer it, we see no excess of jurisdiction.

Writ denied.

ROSS and MCKINSTY, JJ., concurred.

[No. 7,668.— Department One.]

June 15, 1881.

SAMUEL NEWMAN v. THE SUPERIOR COURT OF
SAN FRANCISCO.

CERTIORARI — APPEAL.— When an appeal may be taken a party is not entitled to a writ of certiorari.

APPLICATION for writ of *certiorari* to the Superior Court of the City and County of San Francisco.

E. B. Drake, for Plaintiff.

C. E. Royce, for Defendant.

The COURT:

The order of the Superior Court of San Francisco, which the petitioner asks to have reviewed upon a writ of *certiorari*, is a special order, made after final judgment, in the case of *Mohle v. Tschirtch*, from which an appeal is allowed by Subd. 3, Section 939, C. C. P. When an appeal may be taken, a party is not entitled to a writ of *certiorari*.

Application for writ denied.

[No. 4,707.— In Bank.]

June 15, 1881.

F. HOKE v. W. H. PERDUE ET AL.

SWAMP LAND DISTRICT — PUBLIC CORPORATION — INJUNCTION.— A swamp land district, organized by the Board of Supervisors under the Act of March 25, 1868 (Stats. 1867-8, p. 316), is a public corporation, and the validity of its corporate existence can not be collaterally attacked or questioned.

IN.— ASSESSMENT.— The fact that a large quantity of the land lying within the district and subject to taxation or assessment has been voluntarily omitted from the assessment-list by the commissioners — though perhaps a good ground for enjoining the collection of the assessment — is not sufficient to enjoin the reconstruction or repair of the levee; none consists but there is a sufficient fund already collected to defray the expenses of such reconstruction and repair.

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Id.—The fact that the levee was originally constructed without the previous adoption of a plan for the protection of the district, as provided for in Section 10 of the Act, constitutes no good reason why the levee, after having been constructed, should not be repaired in places where broken or washed away.

Id.—An allegation in the complaint, that the effect of repairing the levee "will be to dam up the waters and increase the same in volume, until said levee will break and permit said waters to flow down to and upon plaintiff's land and destroy the fences and trees thereon," is in the very nature of things a simple expression of opinion on the part of the plaintiff, and can not be accepted as the statement of a positive existing fact. The mere opinion of the plaintiff that the scheme is impracticable affords no reason in law for arresting the work by injunction.

APPEAL from a judgment for defendants in the Tenth District Court in and for the County of Sutter. KEYSER, J.

J. L. Wilbur, Creed Haymond, and A. L. Hart, for Appellants.

S. J. Stabler and J. S. Belcher, for Respondents.

MORRISON, C. J.:

Plaintiff filed his complaint in the late District Court of Sutter County, against defendants, who then constituted the Board of Supervisors of that county, and prayed "that the defendants be forever restrained and enjoined from reconstructing or repairing said levees, or any of them, or from in any manner damming up or obstructing the natural flow of waters into and through the said Butte Creek Slough, and from damming up or obstructing in any manner the natural channels through which the waters that flow into and upon said district and are drained therefrom." We have given the prayer of the complaint, because it illustrates the object and purpose of the suit. The complaint is very long and comprehensive, containing as it does something of a history of Levee District No. 5, in and for the county of Sutter. The first allegation in the complaint which we will consider is, that the district was not legally established, for the reason that the petition to the Board of Supervisors was not signed by more than one half of the land-owners within the district, as was required by Section 21 of the Act of March 25, 1868. (See Laws of 1867-8, p. 816.) It was held in *Dean v. Davis*, 51 Cal. 406, that the district organized by the Board of Super-

visors under the foregoing statute became a public corporation, and that the validity of its corporate existence can not be collaterally attacked or questioned. The complaint also contains an averment that a large quantity of the land lying within the district and subject to taxation or assessment has been voluntarily omitted from the assessment list filed by the Commissioners in the office of the County Clerk of Sutter County. If this were a proceeding to enjoin the collection of the tax, we are not prepared to say that the omission complained of would not constitute good ground for enjoining the collection of the assessment. (See *Levee District No. 1 v. Huber*, 57 Cal. 41.) But, as has already been shown, this is not a proceeding to enjoin the collection of the tax, but is simply intended to stop the reconstruction or repair of the levee; *non constat* but there is a sufficient fund already collected to defray the expenses of such reconstruction and repair.

The allegation that the levee was originally constructed without the previous adoption of a plan for the protection of the district, as provided for in Section 10 of the Act, constitutes no good reason why the levee, after having been constructed, should not be repaired in places where broken or washed away. But we are not to be understood as saying that the adoption of a plan was at any time essential; for Section 3 of the Act provides that "the County Surveyor of the County of Sutter shall be *ex officio* engineer of all such levee districts in the county, and shall make such surveys, levels, and estimates, superintend all works, and shall give general direction for all their construction, *subject to the control of said Board of Supervisors.*"

The only remaining point in this case which we deem it necessary to notice is, that the effect of repairing the levee, as is claimed by plaintiff, "will be to dam up the waters and increase the same in volume, until said levee will break and permit said waters to flow down to and upon plaintiff's land and wash away and destroy the fences and trees thereon." This averment is, and can be, in the very nature of things, a simple expression of opinion on the part of the plaintiff, and can not be accepted as the statement of a positive existing fact. The intention of the statute, in authorizing the forma-

tion of the district, was to adopt a plan and scheme for the *protection* of the lands within the district from the encroachment of the waters; and the mere opinion of the plaintiff that the scheme is impracticable, affords no reason in law for arresting the work by injunction.

Judgment affirmed.

MYRICK, SHARPSTEIN, ROSS, and MCKINSTY, JJ., concurred.

MCKEE and THORNTON, JJ., concurred in the judgment.

[No. 5,792.—Department Two.]

June 16, 1881.

PEOPLE EX REL. S. C. HASTINGS v. A. P. JACKSON,
ET AL.

LOCATION OF SCHOOL-LAND WARRANT ON UNSURVEYED LAND — ACTION TO SET ASIDE PATENT — LAW OF THE CASE.—In June, 1853, a school-land warrant issued under the Act of May 3, 1852, was located by the relator's predecessor in interest upon the land in controversy, then unsurveyed. October 1st of the same year the land was surveyed. December 24th of the same year the location was presented to the Register of the United States Land Office of the district wherein the land was located, and was by him accepted and approved. In February, 1857, the defendant located two school-land warrants upon the land, and obtained a patent for it from the State in March, 1863. The land was not listed by the United States until February, 1870. This action was brought to set aside the patent.

Held: It does not appear that anything has transpired since the commencement of the action of *Hastings v. Jackson*, 46 Cal. 234, to change the relation which then existed between the parties, or to materially affect their rights in the premises. The grounds upon which the plaintiff in that case claimed relief are those upon which the plaintiff in this case claims relief, and the Court in that case passed upon all the questions involved in this, except that he declined to consider whether the State could avoid its conveyance to Jackson. It must be admitted that the patent to Jackson was prematurely issued, and that until after the certification of the land over to the State, the patent could not convey the title. Still, upon a valid location made after survey and before certification, the locator was in a position to demand and compel the issuance of a patent whenever the land so located should be certified over to the State. The State, therefore, can not avoid the patent on the ground that it was prematurely issued. Nor was the validity of the location affected by failure to publish a notice of the locator's application to the Register for a certificate

of location. The State certainly was in no way prejudiced by the failure to publish such notice; and no one can take advantage of the omission without showing that he was in some way prejudiced by it.

Id.—Id.—Id.—ACT OF JULY 23, 1860, "TO QUIET LAND TITLES IN CALIFORNIA."—The Act of Congress above referred to can not be so construed as to affect a valid location made prior to its passage. It would cure the invalidity of the first location if no intervening right had accrued in the mean time; but a valid location was afterwards made before the passage of the Act, which it was clearly not the intention of Congress to interfere with.

APPEAL from a judgment for the defendant in the Seventh District Court in and for the County of Solano.

The validity of the respective titles involved in this case were before the Court in *The People ex rel. Hastings v. Jackson et al.*, 24 Cal. 630; *Hastings v. Devlin*, 40 id. 358; and *Hastings v. Jackson*, 46 id. 234. The present case is an action to set aside the patent issued to Jackson, and judgment went for the defendant on a demurrer to the complaint.

Cope & Boyd, for Appellants.

It is the settled doctrine of this Court that title to the lands embraced in the five-hundred-thousand-acre grant of September 4, 1841, does not pass to the State until the particular parcel thereof has been listed to the State by the Commissioner of the General Land Office of the United States. (*Chant v. Reynolds*, 49 Cal. 217, and cases cited; 5 U. S. Stats. at Large, 455, § 8; 10 id. 346; *Hastings v. Jackson*, 46 Cal. 243; *Toland v. Mandell*, 38 id. 42.)

Having no title to the lands at the time of the making of her patent to Jackson, she could not confer any title thereto upon him.

The patent was the act of officers of the State, acting without authority of law. Those officers were only authorized to issue patents for lands in the cases provided by law. The patent having been issued without authority, it is invalid, and should be set aside. (*The People v. John Carrick*, 51 Cal. 328; *Chant v. Reynolds*, 49 id. 218.)

The location made by Thomas was made in strict conformity with the requirements of the Act of 1852, and was made in the year 1858. The location by defendant Jackson was

made in the year 1857, nearly four years subsequently. Neither location was sufficient to invest the locator with the title to the lands.

On the twenty-third day of July, 1866, Congress passed an Act entitled "An Act to quiet land titles in California." (14 U. S. Stats. at Large, p. 218.) Thomas was a purchaser in good faith, under the laws of the State, within the meaning of the first section of the Act. He paid value for his land warrant. He paid the Surveyor and County Clerk's fees. (*Bludworth v. Lake*, 33 Cal. 262; *Hodapp v. Sharp*, 40 id. 69.)

It became the duty of the officers of the State to notify the proper officers of the general government of her selection, and if upon investigation the land should be found subject to selection, the Commissioner of the General Land Office was required to certify it to the State in the usual manner. The notice was given and the land was listed over to the State, February 10, 1870. The effect of this listing was to invest the State with the legal title to these lands in trust for the purchaser from her, whose title was confirmed by the first section of the Act of Congress. Who was the beneficiary under this Act? It is evident that Thomas, if there had been no other selection but his, would have been the beneficiary.

Let us see what effect the selection by Jackson had upon Thomas' rights. The Act of Congress of 1866 operated equally upon all purchasers in good faith from the State, and in the case provided for in Section 1, confirmed the titles thus acquired. It created no distinction between different purchasers of the same lands, and recognized none. (*Le Roy v. Cunningham*, 44 Cal. 599.) Where the Act of Congress is so operative, the question must be settled by priority of right. And in this case, Thomas' selection being prior in point of time to Jackson's, he had the prior right and thereby became the beneficiary. (*Field v. Seabury*, 19 How. 332.)

In the Acts subsequent to that of 1852, dealing with the five-hundred-thousand-acre grant, the Legislature of this State declared that nothing in these Acts contained should be construed to invalidate or injure the rights that parties have acquired by purchase and location of any school-land

warrant, pursuant to the Act of May 3, 1852. (§ 4, Act of April 30, 1857; Laws, p. 356; § 12, Act of April 25, 1858; Laws, p. 248.)

And in such Acts provision is only made for the sale of the unsold portion of the five hundred thousand acres. (See § 1, Act of April 25, 1858; Laws, 248; § 2, Act of April 27, 1863; Laws, 591; § 51, Act of March 28, 1868; Laws, 507.) Whether the selection and location authorized by the Act of 1852 was binding on the United States is an immaterial question. It is binding on the State and her grantees.

The State acquired the title in trust for her grantee, the beneficiary. (*Bludworth v. Lake*, 33 Cal. 262; *People v. Shearer*, 30 id. 648.) A court of equity will control the legal title in the hands of the trustees, so as to protect the just rights of others. (*Estrada v. Murphy*, 19 Cal. 248; *Salmon v. Symonds*, 30 id. 301; *O'Connell v. Dougherty*, 32 id. 462; *Carpentier v. Montgomery*, 13 Wall. (U. S.) 496.)

Wheaton & Scrivner, for Respondents.

The complaint shows that in fact neither Thomas nor Hastings ever had any equities in the land whatever. The Act of 1852, under which the land warrants were sold, only allowed the warrants to be located on lands "within the State of California, subject to such location." (*Hastings v. Devlin*, 40 Cal. 363.) The allegations of the complaint in this case are no broader than were the proofs in the case above cited. The trouble with these allegations is that they do not, if true, constitute any selection of the land under any law of the State or United States. The Legislative Act of 1852 did not once refer to the United States Land Office or the United States Register. It did not provide for filing the warrants in the United States Land Office, or anywhere else, or for surrendering the warrants in any form, or for writing the word "surrendered" across the face thereof, or for the issuance of any certificate by the United States Register. All these proceedings were unauthorized by State or national law, and were utterly idle and void proceedings. (*Hastings v. Jackson and Devlin*, 46 id. 244.)

It is evident that the law of 1852 did not intend to provide for the transfer of any legal or equitable interest in the

land. It gave no other relief on the location of its warrant than a naked right of possession, until the land should be surveyed by the United States Government. The provisions of the law of 1852 conflicted with the United States law which made the grant. These provisions, even had they been valid, limited the rights which could be obtained under the Act to a mere right of possession, and possibly to a right to obtain a patent by complying with the terms of the future legislation, yet expected and indicated in Section 14, provided the location made under the Act should be made to correspond with the expected United States survey, when made as stated in Section 14. In view of the fact that there is no allegation in the complaint that the location of Thomas, under the Act, ever was made to correspond with the subsequent United States survey, and there is no allegation that the provisions of the subsequent laws for obtaining a patent were complied with, we think it clear that neither Thomas nor Hastings ever could or ever did acquire any rights or equities in the land in dispute.

The complaint does not negative the regularity of the proceedings under and by which Jackson located his warrants and obtained his patent.

The patent issued to Jackson according to law, and it was issued by the officers authorized to issue it. It was not void upon its face. It was not prohibited by law, and was not issued without authority. The State, at least, is concluded by it. (*Durfee v. Plaisted*, 38 Cal. 83.) It is true that no title vested in the State under the law of July, 1866, until the lands were "certified over to the State," etc. (*Collins v. Bartlett*, 44 id. 371.) This provision in the law of July, 1866, could have no application to Jackson's selection, which was made several years before, and was made upon the land after survey by the United States, and was a valid selection when made.

But suppose the title to the land did not vest in the State till February, 1870, the patent to Jackson still passed such title when it did vest in the State. The law of 1859, Section 4, declared that "such patents shall vest in the grantee therein named a good and valid title, in fee simple, to the lands therein described." Surely such a patent would vest in

the patentee any title subsequently acquired by the State, whether such title came by listing the lands or otherwise. It is equally sure that such subsequently acquired title would not have vested in Hastings by his Sheriff's deed, even if it had passed to Thomas.

The Act of Congress of July 23, 1866, has no effect upon the case, one way or the other. All that it could do, and all that it undertook to do, was to make good to the State the selections which had been illegally made under the laws of the State. It could not and did not undertake to pass any title to the grantees of the State. In its terms and operation it was limited to making good to the State its former grant from Congress. It could have no effect upon the particular land in dispute, even in confirming it to the State, for the reason that prior to 1863 Jackson had made a valid selection of the land in accordance with the State and United States laws, and his selection had been recognized as valid, and acted upon as valid, by both the United States and the State.

SHARPSTEIN, J.:

Thomas to whose interest the relator has succeeded, attempted in June, 1853, to locate a school-land warrant upon the land in controversy. That attempt was made in the manner prescribed by the Legislature, but was ineffectual because the land was then unsurveyed, and not subject to selection. (*Hastings v. Jackson*, 46 Cal. 234.) On the first of the succeeding October, the land was surveyed by the Government of the United States. On the twenty-fourth of December, 1853, "said location was presented to the Register of the United States Land Office of the district wherein the same was located, and was by him duly accepted and approved." This is characterized in *Hastings v. Jackson, supra*, as an unauthorized proceeding, which no law, State or Federal, justified. In *Hastings v. Devlin*, 40 Cal. 358, the Court said: "We know of no statute of California or of the United States authorizing the performance of the acts set forth in the certificate of Gift, Register of the Land Office at Benicia, of December 24, 1853." It was accordingly held, in *Hastings v. Jackson, supra*, that the plaintiff in that case, who is the relator in this proceeding,

bore no such relations to the property, which was the same in that case as in this, as would entitle him to call in question the title of the defendants, who were the same in that case as in this.

In February, 1857, the defendant Jackson located two school-land warrants upon the land and obtained a patent for it from the State in March, 1863. The land was not listed by the United States to this State until February, 1870. In September, 1871, the United States Land Commissioner canceled Jackson's location and sent back to him the warrants which he had located on the land. This was done after the land had been listed to the State, and the Commissioner had no power over the subject after that. (*Hastings v. Jackson, supra.*) It does not appear anything has transpired since the commencement of the action of *Hastings v. Jackson, supra*, to change the relations which then existed between those parties, or to materially affect their rights in the premises. The grounds upon which the plaintiff in that case claimed relief are those upon which the plaintiff in this case claims relief, and the Court, in that case, passed upon all the questions involved in this, except that it declined to consider whether the State could avoid its conveyance to Jackson because the land was not listed to the State when he obtained the patent for it, or because no notice of his application to locate his warrants upon the land was published as required by law, for the reason that the plaintiff was not in a position to raise those questions.

A point, however, is raised in this case which does not appear to have been before considered, i. e., that the Act of Congress of July 23, 1866, entitled "An Act to quiet land titles in California," made Thomas' premature location valid. The argument, as we understand it, is that neither the defendant nor the relator had acquired the title to the land prior to the passage of that act, and that the equity of the relator, being older, is the stronger.

It must be admitted, we think, that the patent to Jackson was prematurely issued. Section 2 of the Act of April 30, 1857, authorizes the issuance of a patent after the certification of the land located to the State. But we can not see how the State could avoid the patent on that ground. After the land had been certified over to the State, the locator was en-

titled to a patent upon the presentation of a register's certificate, or other satisfactory evidence that his location had been duly made. A valid location might have been made after the land had been surveyed by the United States, and before the land was certified over to the State. That is, valid in the sense that if after the location was made, the land was certified over to the State, the locator would be entitled to a patent. As between him and the State, his right to the land was fixed by a location upon it in the manner prescribed by the laws of the State. But the title remained in the United States until after the certification of the land over to the State. Before that event, a patent from the State would not convey the title, for the obvious reason that the State had none to convey. Still, upon a valid location, made after the survey, and before the certification by the United States, the locator was in a position to demand and compel the issuance of a patent whenever the land so located should be certified over to the State. Therefore, if Jackson's location was a valid one, and no patent had been issued to him, he would be entitled to have one issued to him now. We are, therefore, unable to perceive that the State can avoid the patent heretofore issued, on the ground that it was prematurely issued.

Aside from the claim that the relator acquired a prior and superior right to that of Jackson to the land, we find but one other objection to the validity of his location, and that is, that no notice of his application to the Register of the Land Office for a certificate of location was published, as the law required it should be.

The law, however, does not make the validity of the certificate or patent dependent upon the publication of that notice, which was required to be given in order that adverse claimants might be heard in opposition to the application if they chose to be. But they were not concluded by the granting of the certificate, with or without notice. The State certainly was in no way prejudiced by the failure to publish such notice; and no one can take advantage of the omission without showing that he was in some way prejudiced by it. This objection was not pressed at the argument, and does not appear to be much relied on, although it is adverted to in one of the briefs.

The point upon which the learned counsel for the relator mainly rely is, that the location of Jackson, although made after the survey of the land by the United States, was equally invalid with that of Thomas', which was made before said survey, because both were made before the land had been certified by the United States over to the State, and that neither would be valid except for the Act of Congress of July 23, 1866, entitled "An Act to quiet land titles in California."

If Jackson's location was invalid, Thomas undoubtedly has the superior right to the land under that Act. But we are unable to discover that Jackson's location was invalid. It was not made until after the land had been surveyed, and, as we understand the law, a valid selection and location might then be made, and the person making it be entitled to a patent from the State, whenever the land so selected and located should be certified over to the State by the United States. If this view of the law be correct, it necessarily follows that the Act of Congress last above referred to can not be successfully invoked in behalf of the relator. - No one will maintain, we think, that that Act could be so construed as to affect a valid location made prior to its passage. It would cure the invalidity of Thomas' location if no intervening right had accrued in the mean time. But a valid location made between the date of Thomas' location and the passage of the Act would constitute an intervening right, which it was clearly not the intention of Congress to interfere with.

We think that the demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was properly sustained, and that the judgment should be affirmed.

Judgment affirmed.

MORRISON, C. J., and THORNTON, J., concurred.

[No. 7,732.— In Bank.]

June 30, 1881.

PEOPLE EX REL. GABRIEL HAINES v. W. A. HENRY.

ELECTION OF POLICE JUDGE — MUNICIPAL OFFICER — DEFINITION — CONSTITUTIONAL LAW.— A Police Judge, though a judicial officer, is also a municipal officer, and is not one of those mentioned in Section 10 of Article xxii. of the Constitution.

APPEAL from a judgment for the defendant in the Superior Court of the County of Sacramento.

The action in the Court below was brought to determine the title to the office of Police Judge of the City of Sacramento. The relator claimed the office by virtue of an election held in November, 1880; the defendant, by virtue of an election in September, 1879.

S. Solon Holl, for Appellant.

Henry Edgerton, W. B. C. Brown, and W. A. Anderson, for Respondent.

Ross, J.:

A Police Judge is undoubtedly a judicial officer, but he is a judicial officer of a municipality. He is, therefore, a municipal officer, and is not one of those mentioned in Section 10 of Article xxii. of the present Constitution. (*In re Stuart*, 53 Cal. 748; *Barton v. Kalloch*, 56 Cal. 95; *Uridias v. Morrill*, 22 id. 473; *People v. Provines*, 34 id. 520; Political Code, §§ 4355, 4370.)

This disposes of the claim of the relator to the office of Police Judge of the City of Sacramento. But the purpose of the action was to oust the respondent as well as to install the relator.

Respondent was elected to the office at the general election held in September, 1879. He was elected by virtue of the Act of the Legislature approved April 1, 1864, and of those provisions of the present Constitution continuing in existence Police Courts and changing the time of holding judicial elections from October to the day of the general elections in the month of September.

The Act of April 1, 1864, is entitled "An Act to provide for the election of the Police Judge of the City of Sacramento at the time of the election of other judicial officers," and declares: "The Police Judge of the City of Sacramento shall be elected at the special judicial election to be holden on the third Wednesday in October, A. D. 1865, and every two years thereafter, and shall take office on the first day of January next succeeding his election, and shall hold for two years and until his successor is elected and qualified."

The evident purpose of this act was, as its title indicates, to provide for the election of the Police Judge of the City of Sacramento at the time of the election of other judicial officers. Until the adoption of the present Constitution such judicial elections were held in the month of October, but by the provisions of that instrument the time of holding them was changed to the day of the general elections in September. Accordingly, at the general election in September, 1879, the judicial officers of the State were elected. At that time the respondent was voted for and elected Police Judge of the city of Sacramento. And although he was not elected on the third Wednesday in October, he was elected at the time of the election of the other judicial officers, which was in accordance with the obvious intent and meaning of the Act of April 1, 1864; and having been elected in substantial compliance with the law, and having qualified and entered upon the discharge of the duties of the office, we think his tenure ought not to be disturbed.

Judgment affirmed.

McKINSTY, THORNTON, and SHARPSTEIN, JJ., concurred.

[No. 7,554.— Department One.]

July 18, 1881.

R. WITTENBROCK v. JOHN BELLMER ET AL., AND
WILLIAM KLEINSORGE, INTERVENOR.

NEW TRIAL — PARTIAL — LAW OF THE CASE — CASE OVERRULED.— Judgment was entered in this case in favor of the plaintiff and of the intervenor, but a new trial was granted, which on a former appeal (reported 57 Cal. 12) was affirmed as to the plaintiff, but reversed as to the intervenor on

the ground that the notice of motion was not addressed to or served upon him.

Held: In the absence of notice to all the adverse parties, the Superior Court should have denied the motion for a new trial as to all the parties. That point was not made or considered by this Court on the former appeal, and the appeal was decided upon different principles; but the ruling of the Court upon the former appeal has become the law of the case.

Id.—Id.—Id.—JUDGMENT—APPEAL.—Where a new trial has been granted as to some of the antagonistic parties, the findings are set aside which determine the rights of such parties, and as to them the case stands as if it had never been tried; but the judgment and findings, in so far as they purport to determine the rights of the moving parties, and those as to whom the new trial has been denied, continue to exist, and the judgment is appealable.

MORTGAGE—PLEDGE—MARSHALING OF SECURITIES.—B. and K., partners, mortgaged land held by them in common, and at the same time pledged certain stock (found by the Court to be partnership assets) to secure the mortgage debt. Shortly afterwards they partitioned the land between them, and K., having paid one half of the debt, obtained from the mortgagee a release of his land from the mortgage. B. and K., as partners, were adjudicated bankrupts, and the mortgagee delivered the stock to the intervenor, their assignee in bankruptcy, who claimed the right to detain the same. This action was brought by the assignee of the mortgagee to foreclose the mortgage.

Held: There can be no doubt that the intervenor, as assignee in bankruptcy, can have no property in the stock which is not subject to the lien of the mortgage, and that the appellants may insist that it be sold, and the proceeds applied to the mortgage note to reduce the lien on the land and the personal liability of D.

APPEAL from a judgment for the plaintiff in the Superior Court of Sacramento County. **DENSON, J.**

A petition for hearing in Bank was filed in this case after judgment, and denied. The facts were as stated in the opinion and in the syllabus.

A. C. Freeman, for Appellants.

Creed Haymond and L. S. Taylor, for Respondents.

The COURT:

As the case stands, a new trial on motion of the defendants John and Maria Bellmer has been granted as to plaintiff and denied as to the defendant or intervenor, William Kleinsorge. (*Wittenbrock v. Bellmer*, 57 Cal. 12.) The defendant or intervenor, William Kleinsorge, and the defendants John Bell-

mer and Maria Bellmar, occupied antagonistic positions in the action. In the absence of notice to all the adverse parties, the Superior Court should have denied the motion for a new trial as to all. That point was not made or considered by this Court at the former appeal, and the appeal was decided upon different principles. The ruling of the Court at the former appeal is the law of this case.

But the effect of the ruling upon the *judgment* of the lower Court is a matter now for the first time to be considered.

The present appeal is from the judgment of the Superior Court, and respondent moved to dismiss the appeal on the ground that there was no judgment when the appeal was taken.

A motion for a new trial is an application for a re-examination of the issues of fact. (C. C. P., § 656.) It is an application to have the verdict or decision set aside, and is not addressed to the judgment. (Id., § 657.) When the new trial is granted as to all the parties, the whole judgment falls as an incident to the vacation of the verdict or decision. Where a new trial has been granted as to some of the antagonistic parties (the cause having been tried by the Court), it is apparent that the findings are set aside which determine the rights of such parties, and as to them the case stands as if it had never been tried. The judgment, so far as it affects the rights of the moving party, and the adverse parties with respect to whom the new trial has been granted, comes to naught with the findings by which it was supported. But the judgment and findings, in so far as they purport to determine the rights of the moving party and those as to whom the new trial had been denied, continue to exist, and the judgment is appealable. The motion to dismiss should therefore be denied. The Court below found "that John Bellmer [defendant], for the purpose of securing the payment of said note [the note to secure which the mortgage was given], and as a part of said transaction, and for no other purpose, pledged to said corporation fifteen shares of stock of said corporation, by indorsement thereon and assignment thereof, which stock then and theretofore stood in the name of said John Bellmer on the books of said corporation, which said

stock was delivered to said corporation. That said stock is now worth \$1,590."

The findings show that the stock thus pledged to the Germania Building and Loan Association, the corporation referred to, was never specially assigned to plaintiff. The stock was delivered by the corporation to defendant, William Kleinsorge, who claims the right to detain the same as assignee in bankruptcy of John Bellmer and Charles Kleinsorge, bankrupts, as part of the partnership assets of said John and Charles.

The note and mortgage were executed by John Bellmer and Charles Kleinsorge, and it clearly appears in the findings that the stock was pledged by both "as part of the same transaction." The transaction occurred February 18, 1875, and John Bellmer and Charles Kleinsorge were not adjudicated bankrupts until February 27, 1878. There is no suggestion that the pledging of the stock was fraudulent, or that the pledgors were indebted at the time of the contract between the corporation and themselves.

There can be no doubt that William Kleinsorge, as assignee in bankruptcy, can have no property in the stock which is not subject to the lien of plaintiff as assignee of the promissory note, and that the appellants may insist that it be sold and the proceeds applied to the mortgage note, to reduce the lien on the land and the personal liability of John Bellmer.

Motion to dismiss denied, and judgment reversed and cause remanded for a new trial.

[No. 7,849.— In Bank.]

August 1, 1881.

**HORACE W. CARPENTIER v. JOSEPH D. BARTLETT
ET AL.**

DISMISSAL OF APPEAL FOR FAILURE TO FILE TRANSCRIPT—CERTIFICATE OF CLERK.—Upon a motion to dismiss an appeal for failure to file transcript the Clerk's certificate must show service of the appeal.

APPEAL from the Superior Court of Ventura County.
HINES, J.

CAL. REFS. LXII—86

B. S. Brooks, for Respondent.

Williams & Williams, for Appellants.

THE COURT:

The motion to dismiss the appeal in this case must be denied. The Clerk's certificate does not show that any notice of appeal had been served. On the contrary, he does certify that "notice of appeal was never served, as appears from the files." The respondent attempts to supply the omission by an affidavit of service of said notice. But that can not be received in lieu of the Clerk's certificate, which the rule of this Court requires. (See *Frederick v. Tierney*, 54 Cal. 583.)

Motion denied.

[No. 10,535.—In Bank.]
August 12, 1881.

THE PEOPLE v. H. HARTMAN.

LARCENY — EVIDENCE OF PREVIOUS OFFENSES.—Upon the trial of a person charged with larceny, it is error to permit evidence to be introduced tending to show that the defendant had at another time stolen other property than that described in the indictment.

APPEAL from a judgment of conviction, and from an order denying a new trial, in the Superior Court of San Bernardino County. *ROLFE, J.*

A. B. Paris, Satterwhite & Curtis, for Appellant.

A. L. Hart, Attorney General, for Respondent.

THE COURT:

The appellant was indicted for the crime of grand larceny, and on the trial the District Attorney was permitted, against the objection of defendant, to introduce evidence tending to show that the defendant had at another time stolen other property than that described in the indictment. This was error. (*Walker v. Commonwealth*, 1 Leigh, 574; *State v. Daubert*, 42 Mo. 242; *State v. Goetz*, 34 Mo. 85.)

Judgment and order reversed.

[No. 7,907.— In Bank.]

August 19, 1881.

W. B. TREADWELL v. THE BOARD OF SUPERVISORS
OF YOLO COUNTY.

ELECTION OF COUNTY OFFICERS — CONSTITUTIONAL LAW.— Application for writ of *mandamus* to compel the Board of Supervisors of Yolo County to take steps preparatory to the holding of an election on the first Wednesday of September, 1881, for certain county officers. Application denied. (McKINSTRAY and ROSS, JJ., dissented; MORRISON, C. J., expressing no opinion.)

APPLICATION for writ of *mandamus*.

W. B. Treadwell, for Plaintiff.

George F. Baker and W. B. C. Brown, for Defendants.

SHARPSTEIN, J.:

Application for a writ of *mandamus* to compel the Board of Supervisors of Yolo County to take steps preparatory to the holding of an election on the first Wednesday of September of this year, for the election of certain county officers, as provided in Section 4109 of the Political Code as it stood prior to March 7, 1881, when the Legislature attempted to amend it.

The petitioner insists: 1. That the amendatory Act, if constitutional, does not dispense with the holding of an election this year for the officers enumerated in his petition; 2. That if it does, it is repugnant to that provision of the Constitution which prohibits the extension of the term of any officer "beyond the period for which he is elected or appointed." (Const., Art. xi., § 9.)

The Act of March 7, 1881, is entitled "An Act to amend Section 4109 of 'An Act to establish a Political Code,' approved March 12, 1872, relating to the election and terms of office of county, city and county, and township officers, and to repeal Sections 4024, 4027, and 4111 of said Political Code."

By comparing this Act with that of which it purports to be amendatory, it will be seen that an attempt is made to completely revise Section 4109. As it originally stood, that

section provided for the holding of county elections on the same day that general elections were held, under the late Constitution. The present Constitution has changed the time of holding general elections from the first Wednesday of September to the first Tuesday after the first Monday of November. The intention of the Legislature to make a corresponding change in the Code in relation to the time of holding elections for county and township officers is sufficiently manifest in the amendment of March 7, 1881. The effect of such a revision upon the provisions of the section revised is the point which we will first consider.

In *Murdock v. Memphis*, 20 Wall. 617, the Court says: "We are of opinion that it was their (Congress') intention to make a new law so far as the present law differed from the former, and that the new law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform." (Citing *United States v. Tynen*, 11 Wall. 88; *Henderson's v. Tobacco*, id. 652; *Bartlet v. King*, 12 Mass. 537; *Commonwealth v. Cooley*, 10 Pick. 36.)

In this case the intention of the Legislature to revise in the later Act the entire subject-matter of the former one, appears more plainly than it did in any of the cases above cited. And whenever that intention clearly appears, the subsequent Act operates as a repeal of the former, although it contains no express words to that effect. An amendment of a statute will operate precisely as though the subject-matter of the amendment had been originally incorporated in the statute amended, as regards any action had after the amendment is made. (*Holbrook v. Nichol*, 36 Ill. 161.)

It does not seem to us that under the authorities there can be any doubt as to the operation of the Act of March 7, 1881. If constitutional, it completely superseded the section which it amended and revised. (*State v. Andrews*, 20 Tex. 230.)

Its constitutionality is attacked on the ground that if it dispenses with the holding of an election of county officers this year, it in effect extends the terms of the present incumbents. It is not claimed that it expressly or directly attempts to do anything of the kind. But it is claimed that such

would be the necessary result, because the present incumbents are entitled to hold their respective offices until their successors are qualified. The Code so provides, but if that provision of the Code is repugnant to the Constitution, the Code must give way, and the result would be that all of these offices would become vacant at the expiration of the terms for which the incumbents were elected, and such vacancies would have to be filled in the manner prescribed by law. And if there be no mode provided by law for filling them, they must be filled in the mode provided by Section 8 of Article v. of the Constitution. If either Act is unconstitutional, it is the one which provides that officers shall hold after their terms have expired, and not the one which changes the time of holding the election.

Application denied.

THORNTON, J., concurred.

MYRICK, J., concurring:

I concur in the judgment, upon the ground that, in my opinion, there can be, under the Constitution, no election the present year.

McKEE, J.:

The Constitution of 1879 excepted from the operation of its provisions upon the subject of election of county officers, and their official duties and terms of office, the first election held after its adoption. (§ 20, Art. xx.) It required that the officers to be chosen at the election of 1879 should be elected at the time and in the manner *then* provided by law. (§ 10, Art. xxiii.) The laws regulating that election were not disturbed, but remained in full force and effect as to all officers whose election, duties, and terms of office were to be afterwards regulated and fixed by the Legislature. By them the time and mode of election had been prescribed, and the terms of office had been fixed. (P. C., Art. ii.) And it had been also provided that the officers elected under them should continue to hold until their successors were elected and qualified. (P. O., § 879.) Officers elected at the election of 1879, therefore, continue to be, by the law of their election, officers

de facto and *de jure* until the election and qualification of their successors. (*People v. Tilton*, 37 Cal. 614; *People ex rel. Stratton v. Oulton*, 28 id. 44, 383; *People v. Whitman*, 10 id. 38.)

But the successors of the officers elected in 1879, under then existing law, could not be elected until the Legislature, in the exercise of the powers conferred upon it by Section 5, Article xi., of the Constitution, gave effect to constitutional provisions upon the subject of elections by the passage of a general and uniform law for the election in the several counties of the State, of such county, township, and municipal officers as, in its judgment, the public convenience might require, and prescribing their duties, and fixing their terms, and so regulating the subject of elections as to enable the people of the State to adjust themselves to the requirements of the Constitution, which provided for future elections to be held in even-numbered years. (§ 10, Art. xxii.) The Legislature discharged the duty devolved upon it by the passage of the Act of March 7, 1881. This Act took effect immediately upon its passage, and all the constitutional provisions upon the subject of the election of county officers, their terms and duties, as enforced by the Act, became operative; and all the provisions of the Political Code upon the same subject were repealed. There is, therefore, no law in existence which authorizes an election to be held in accordance with the organic and statutory law of the State until the year 1882.

The Act of March 7, 1881, is a law which makes the election of all county officers, and the officers to be elected under it, subject to the provisions of the Constitution. Elections for such officers are only to be held in even-numbered years; the compensation of such officers shall not be increased after their election, nor during their terms of office; nor shall the term of any such officer be extended beyond the period for which he shall be elected. (§ 9, Art. xi.) But, as I had occasion to observe in *Woods v. Election Commissioners*, 58 Cal. 561, the officers elected at the election of 1879 are not within the intent and meaning of these constitutional provisions, because they were elected by authority of the Constitution itself, under laws which commanded them to hold their respective offices until their successors were elected

and qualified under legislation, which was necessary to carry into effect the provisions of the Constitution upon the subject. Therefore I concur in the judgment.

(MORRISON, C. J., did not express any opinion in the case.)

McKINSTRY, J., dissenting:

I dissent. I am able to discover no constitutional objection to Section 879 of the Political Code, which reads: "Every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified." The section does not operate to extend the term of any officer "beyond the period for which he is elected or appointed." (Constitution of California, Art. xi., § 9.) It is prospective in its operation, and applies only to officers elected or appointed after it was enacted. As to such an officer, his term is not extended, but the section referred to forms part of the law which establishes his term. He is elected or appointed in view of the possible event that his successor may not qualify within the definite period which constitutes his term in case his successor shall qualify within such period. Section 879 should be read in connection with the other provisions of the Code relating to terms of office, and, so read, each officer is elected or appointed for a definite period, and such additional time, if any, as may elapse between the expiration of the definite period and the qualification of his successor. Nor can resort properly be had to the words "although his term has expired," to modify or control the evident intent of the Legislature, as expressed in Section 879. The other provisions of the Code which relate to the term of any officer are to be read with the condition that the term fixed by such provisions shall be continued until the successor shall qualify.

If the Act of March 7, 1881 (Stats. 1881, p. 72), is to be construed to repeal or abrogate Section 4109 of the Political Code, as the same stood prior to that date, then either the county officers who shall be elected in Yolo County under the Act of March 7, 1881, or those who may be "appointed" *ad interim* by the Governor or other appointing power, will be the successors of the present county officers.

If those who shall be elected under the Act of March 7, 1881, will be the successors of the present officers, the Act necessarily extends the terms of the present officers. The present officers were elected to hold office until the first Monday in March, 1882, or until those elected in 1881 should qualify. If the Act of March 7, 1881, has repealed the section of the Code under which they were elected, the present officers — as a direct consequence of that Act — will continue in office until the first Monday after the first day of January, 1883, or until those elected in 1882 shall qualify. The act therefore extends the terms of the present officers beyond the period for which they were elected, and, so construed, is violative of Section 9, Article xi. of the Constitution.

The section of the Constitution applies as well to the terms of officers elected before as to those elected after the Constitution went into operation. It is a limitation upon the power of the Legislature chosen under the present Constitution, and there is nothing in the language employed which can be supposed to authorize an extension of the terms of those in office when the limitation took effect.

It has been suggested that the effect of the Act of March 7, 1881, will be to create a vacancy as to each county officer from the first Monday in March, 1882 — to be filled by the appointing power. But it is clear that the Act can not be held to make such vacancy as can be filled by the Supervisors, or by any officer other than the Governor. Section 996 of the Political Code defines the vacancies which may thus be filled, and declares that such vacancies shall occur only by reason of certain acts or omissions of the "incumbent," before the expiration of his term.

It is said, however, that the Governor has power to fill the vacancies until the next election by the people. (Const., Art. v., § 8.) Thus, to construe the Constitution and the Act of March 7, 1881, is to declare that the power has been transferred to the Governor to appoint all county officers (whose terms are supposed to be affected by the legislation we are considering) to hold from the first Monday of March, 1882, until the first Monday of January, 1883. There is nothing in the language of the Act of March 7, 1881, to indicate that such concentration of patronage was within the contemplation of the Legislature, and if anything is clear from the Constitu-

tion as a whole, and from many of its provisions separately considered, it is a design that matters of local interest shall be regulated and conducted by officers selected by the people of the several counties, towns, and cities, or by those appointed by such as are so selected. It would seem to be the evident intent of the present as well as former Constitution to limit the executive patronage. (*People v. Mizner*, 7 Cal. 519.)

But in case the Act of March 7, 1881, should be construed as entirely abrogating Section 4109 of the Political Code, the question would remain, Will vacancies occur such as the Governor is authorized to fill? Sections 2, 15, and 16 of Article v. of the present Constitution — except in certain particulars not affecting any question involved in the present controversy — are like Sections 2, 16, and 17 of the same article of the former Constitution. In *People v. Whitman*, 10 Cal. 45, it was said: "The Constitution itself clearly defines the sense of the phrase 'vacancy in the office of Governor' as used in the sixteenth section, by specifically enumerating in the succeeding section the instances which devolve the duties of the Executive upon the Lieutenant-Governor. It will be seen that all the instances mentioned are such as can only occur after the term of the Governor has commenced to run. * * * When the Constitution clearly enumerates the events that shall constitute a vacancy in a particular office, we must suppose all other causes of vacancy excluded." With reference to the second section of the fifth article, the Court in the same case said: "By this section it is provided that 'the Governor shall be elected, etc., and shall hold his office two years from the time of his installation, and until his successor shall be qualified.' This language is exceedingly plain. The term of the office is fixed at two years certain, with a contingent extension. When this contingency happens, this extension is as much a part of the entire term as any portion of the two years." "If the Governor-elect fail to qualify, from any cause, the Governor would hold over until his successor be elected and qualified." The Court proceeded to apply the definition of the word "vacancy" in the phrase "vacancy in the office of Governor" to the office of Controller, and held that it was only where a vacancy thus defined occurred that the Governor had power to

appoint a Controller — adding: “If the Controller-elect fail to qualify from any cause, the Controller holds over until his successor is elected and qualified. It is only where there is no incumbent of the particular office *to hold over* that the system will allow the appointment of the Executive to fill the office.”

If Section 879 of the Political Code is valid, and constitutes a portion of the law fixing the terms of county officers, the principles applied to the construction of the clauses of the former Constitution are applicable to the present Constitution and the Statutes which relate to terms of county officers. These officers, like the Governor, hold office until their successors qualify. They continue to be the *incumbents* until successors are elected and qualify. If there is a failure to elect a successor, no vacancy occurs to be filled by the Governor. There is nothing in the nature of things — in the absence of express provision to that effect — which requires that the incumbents should be supplanted by those in whose selection the people have no voice. Indeed, the whole argument that the Governor may fill the county offices in case there should be no election this year, seems based upon the proposition that Section 879 of the Political Code, which authorizes every officer to continue to discharge the duties of his office until his successor is qualified, is repugnant to the provision of the Constitution which prohibits the Legislature from extending the term of any officer beyond the period for which he was elected. (Art. xi., § 9.) We have endeavored to show that Section 879 is not obnoxious to that objection. The purpose of the prohibition of the Constitution is sufficiently obvious. It is to relieve members of the Legislature from the solicitations of partisan office-holders, and to remove any temptation for those in office to employ their influence to secure a continuation of official life without any appeal to the popular voice. The terms of county officers may be fixed in advance, but no man in office can have his term extended by an act of the Legislature.

The Act of March 7, 1881, provides that the successors of the present county officers shall take office (if they shall then have qualified) in January, 1883, instead of March, 1882; Section 879 of the Political Code (which has not been re-

pealed) provides that the present officers shall continue in office until their successors shall qualify. If section 4109 of the Political Code is dead for every purpose, the terms of the present county officers have been extended by the Act of March 7, 1881. We can not, under the Constitution, give such an effect to that Act.

Nor is it necessary, in order to prevent the Act referred to from operating an unconstitutional extension of terms of office, that we should hold the Act to be absolutely void. There is no necessary conflict between the several provisions of the Constitution mentioned by counsel. There can be no doubt that the Legislature *might* have legislated in such manner as that their work would have accorded with *all* the provisions of the Constitution.

It seems to have been assumed by counsel that the Legislature could not comply with the mandate of the Constitution "to provide for the election or appointment" of officers in the several counties, "prescribe their duties and fix their terms," without incidentally violating the prohibitory clause that no officer's term shall be extended "beyond the period for which he is elected or appointed;" and that when the Legislature fixed terms of office to commence in January, 1883, if the effect was to extend the terms of the present officers, it was an effect necessarily resulting from obedience to the constitutional mandate. But certainly a clause might have been inserted in the Act of March 7, 1881, in substance — "This Act shall not be construed to extend the term of any officer." The Constitution inserts this clause — it may plainly be read by all expounders of the law. It is not necessary to assume, however, that it was the legislative intention to extend the term of any officer. The Act of March 7, 1881, simply provides that certain officers shall be elected at a certain election, their terms to commence at a certain date thereafter. Full force and effect can be given to the Act without holding it to mean that there shall be no election of such officers in the mean time. There is nothing in the Constitution which prohibits the shortening of the term of the present county officers, or of those who shall be elected this year, by an Act of the Legislature. The Act may fairly be construed as providing for a future system of biennial elections and terms of

office commencing in 1882, and not until then superseding the present system. So construed, it violates no provision of the Constitution. Even admitting that the Act of March 7, 1881, was intended to repeal Section 4109 of the Political Code, the repeal by implication can have no greater effect than would a distinct repealing clause. If the Act had, in terms, repealed the section of the Code, the Constitution would have intervened and prevented the repeal from becoming absolute. But the Act is prospective, and is to be read as if it had declared "*hereafter* the several county officers shall be elected at the general election in 1882," etc. There is no attempt to interfere with the present system until that election arrives. (*P. & A. Tel Co. v. Commonwealth*, 66 Pa. St. 72.)

It has been further urged, that there can be no election of county officers this fall, because there is no law providing for a general election this fall. It is said that the Act of April 16, 1880 (Amdts. 1880, p. 77), amends Section 1041 of the Political Code, by providing that the general elections shall be held on the even instead of the odd numbered years. But that Act does not directly refer to the terms of any class of officers, or in any way determine what officers shall be elected at the general election. It is not pretended that its effect was to shorten the terms of county officers, but, on the contrary, that, in connection with the Act of March 7, 1881, it has extended them until such officers shall be succeeded by those elected in 1882. As has been said with reference to the Act of March 7, 1881, it is not necessary to declare the Act of April 16, 1880, absolutely void in order to construe it so that it shall not violate the Constitution by extending the term of any officer.

The Act of April 16, 1880, provided that there should be a general election in 1880 and every second year thereafter; but there was no law for the election of *county officers* on an even-numbered year until March 7, 1881. Neither of these statutes can be construed to extend the term of such officers. There was no law providing for the election of the county officers in 1880 or 1882, which *was operative* in the year 1880. So far as such officers are concerned, the election must be held in 1881, because to construe the Act of April 16, 1880,

as changing the time of their election from 1881 to 1882 would be to extend the terms of such officers. Nevertheless, a general election must be held in 1882, and at that election county officers should be elected as successors of those elected in 1881. This construction of the statutes of 1880 and 1881 will accomplish the purpose of the provision of the Constitution which requires the Legislature to provide for the election of county officers and to fix their terms, without violating the other provision, which prohibits the extension of the term of any officer beyond the period for which he was elected.

Ross, J.:

I dissent. For the reason stated in my concurring opinion in the case of *Wood v. Election Commissioners*, 58 Cal. 561, the Act of the Legislature approved March 7, 1881, and generally known as the Hartson Act, is, I think, a valid constitutional law, prospective in its operation, and provides for a future system of biennial elections on the even-numbered years, commencing in the year 1882.

In my view, therefore, the determination of the present case depends on the question, whether, independent of the Hartson Act, there is any existing law requiring an election for county officers to be held in the month of September of this year. If there is, the Hartson Act can not operate to postpone such election, because that would be in effect to extend the terms of office of the present incumbents beyond the period for which they were elected. Those incumbents were elected at the general election held in September, 1879, by virtue of Section 1041 and 4109 of the Political Code, which were then in force, and then read as follows:

Section 1041: "There must be held throughout the State, on the first Wednesday of September, in the year eighteen hundred and seventy-three and in every second year thereafter, and also on the Tuesday next after the first Monday of November in each bissextile or leap year, an election to be known as the general election."

Section 4109: "All county and township officers, except judicial officers, assessors, and supervisors, must be elected at the general election held in September, eighteen hundred and seventy-three, and every two years thereafter, and hold

office for two years from the first Monday of March next after their election."

Read in connection with Section 1041, as it must be, Section 4109 provided for the election of the officers therein mentioned at the general election held on the first Wednesday of September, in the year 1873, and every two years thereafter. Both sections were continued in force by the provisions of the new Constitution, until such time as the Legislature should alter or amend them, or pass such other laws as should be inconsistent therewith—all, however, subject to that other provision of the Constitution which declares that the term of no county, city, town, or municipal officer shall be extended beyond the period for which he is elected or appointed.

In 1880, the Legislature, with a view to require all elections to be held on the even-numbered years, amended Section 1041 of the Political Code so as to make it read as follows: "There must be held throughout the State, on the first Wednesday after the first Monday of November, in the year 1880, and in every second year thereafter, an election to be known as the general election;" and at the same session, but in an independent act, attempted to amend Section 4109 so as to require the county officers to be elected at such general election to be held in the even-numbered years, commencing with the year 1880. This latter act, however, was declared invalid by this Court in *Leonard v. January*, 56 Cal. 1. Section 4109 of the Political Code therefore remained unchanged. By its provisions the county officers are required to be elected at the general election to be held on the first Wednesday in September, 1881. In view of the constitutional inhibition against the extension of the term of any county, city, town or municipal officer beyond the period for which he is elected, neither the Hartson Act nor the amendment of 1880 to Section 1041 of the Political Code, in my opinion, can or should be so construed as to prevent the election contemplated by Section 4109 of the Political Code, but rather that they should be construed prospectively, thus conforming to all the provisions of the Constitution on the subject, and establishing a system of biennial elections in the even-numbered years, commencing with the year 1882. The term of the officers who should thus be elected in 1881 would be *shortened*,

but there is no constitutional objection to any act of the Legislature shortening the term of any officer. As the result of the judgment of the majority, the officers elected in 1879 will, in my opinion, continue to hold office until their successors are elected and qualified.

[No. 7,754.— In Bank.]

August 30, 1881.

S. NEWCOMB ET AL. v. JAMES B. TISDALE ET AL.

DESTRUCTION OF PROPERTY UNDER URGENT NECESSITY.—In an action to recover damages for the destruction of crops, etc., caused by defendants cutting a levee or embankment across Wilkin's Slough, the defendants justified under an alleged urgent necessity to save life and property from destruction; and the evidence tended to show that such necessity existed, under the stress of which they acted. The Court, in effect, instructed the jury, that if the levee or embankment was constructed in pursuance of plans reported to the Board of Supervisors of Colusa County, etc., then the act of the defendants was unlawful, and they were responsible in damages for any injury sustained by the plaintiffs.

Held: This instruction took from the jury the defense set up, and in effect directed them to disregard it; for this error, judgment reversed. (MYRICK and McKEE, JJ., dissenting.)

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Superior Court of the County of Colusa. HATCH, J.

J. C. Ball and Jo Hamilton, for Appellants.

The law of necessity invoked by the appellants was conclusive, and the Court below erred in disregarding it. (2 Kent's Com. 338, 339; 1 Hilliard on Torts, 97; *Surocco v. Geary*, 3 Cal. 73, 74; *Russell v. The Mayor etc.*, 2 Denio, 474; *The Mayor etc. v. Lord*, 17 Wend. 285; S. C., 18 id. 129, 130; *American Print Works v. Lawrence*, 1 Zab. 257, 258; *Hale v. Lawrence*, 1 id. 729, 730.)

A. L. & T. J. Hart, for Respondents.

THORNTON, J.:

In this action, which was brought to recover damages for

the destruction of crops, etc., caused by defendants cutting a levee or embankment across Wilkin's Slough, the defendants justified under an urgent necessity to save life and property from destruction. The evidence tended to show that such necessity existed, under the stress of which they acted. The Court instructed the jury if the levee or embankment across Wilkin's Slough, the cutting of which is complained of, was constructed in pursuance of plans reported to the Board of Supervisors of Colusa County of Reclamation District No. 108, then the defendants had no right to cut the levee without the consent of the owners thereof, and if they did so cut it, their act was an unlawful act, for which they were responsible in damages for any injury sustained by plaintiffs.

This instruction took from the jury the defense set up, and in effect directed them to disregard it.

This was repeated in the direction given by the learned Judge to the jury when he read to them Request vii. of defendants.

For this error, the judgment and order are reversed, and cause remanded for a new trial.

ROSS, MCKINSTRY, and SHARPSTEIN, JJ., concurred.

MYRICK, J., dissenting:

This action was brought to recover damages for the wrongful and unlawful cutting of an embankment of earth on the west side of the Sacramento River, in Colusa County, whereby water was caused to flow from said river and flood and inundate the lands of plaintiffs and destroy plaintiffs' growing crops of grain. The plaintiffs resided and had growing crops on the west side, and the defendants with their families resided on the east side of the river.

The defendants in their answer averred that at times the said river is subject to great floods and overflows; that when the river becomes full of water the bed of the river is insufficient to hold the body of water; that along the river there are several natural outlets for the drainage of the river, which was designed by nature, and which do and did carry off the surplus water, and thereby ease the volume of water flowing in the stream; that on the westerly side of the river

one of these natural outlets was called Wilkin's Slough, which with other outlets in their natural state act as outlets for the surplus water and tend to ease the flow at times of high water; that except for the relief from said natural outlets the river at times of excessive high water is liable and does break over its banks, floods the whole country for miles in extent, and does great damage to the property of persons on the easterly side of the river, and washes away their houses and endangers the lives of defendants and others; that before and on the twenty-second of December, 1879, from excessive floods from above, the river became and was full of water to its utmost capacity; that it was still rising; that its condition threatened, and public calamity was thereby rendered imminent; that it became and was necessary, in order to arrest such public calamity, and to save the lives of persons residing on the easterly side of the river, that said natural outlets should be rendered free from obstruction; that the defendants and many others consulted together, and it was resolved to be and it was necessary, in order to prevent public calamity and to save the lives and property aforesaid, that the obstructions in said outlets should be removed; that said Wilkin's Slough had become and was filled up and obstructed so that it was unable to receive said surplus water, or to act as a natural outlet; that the defendants, in order to prevent the threatened public calamity, proceeded to remove the obstructions from said slough, in order to ease and prevent the flow of the water over said country as aforesaid — all of which acts were necessary and proper, and done from stress of necessity, and to save life and property as aforesaid.

There is no averment that the other outlets referred to were filled up or obstructed; there is no distinct averment that the said other outlets were insufficient to carry off the surplus water; neither is there any averment that the removal of the obstructions in Wilkin's Slough accomplished the result desired, or eased the flow, or saved life or property.

The case was tried before a jury, and a verdict of \$1,000 in favor of plaintiffs returned; for which amount, with costs, judgment was rendered. Defendants' motion for a new trial was denied, and the appeal was taken.

sides of the river levees had been constructed; that on the west by the Reclamation District, that on the east by the defendants. The levee on the west had the effect to raise the waters of the river three to four feet, and to threaten to overflow defendants' lands from two to three feet; and defendants had constructed their levee six to seven feet high, which had, so far, afforded protection. Some water had run over the levee in places, but how much, or with what result, does not appear. Defendants had also stopped up two smaller sloughs, which had formerly served as outlets for the waters of the river. Besides, at the time the defendants cut the levee the waters of the river were subsiding; had already receded three to seven inches.

Assuming, under the facts as presented and the law applicable thereto, that the Reclamation District was properly formed and the levee legally constructed and maintained, I do not see that the defendants were justified in cutting the levee, and in causing the injury complained of.

I do not think it necessary to pass upon the instruction given to the jury "that the flooding," etc. (vi., p. 17, Transcript), nor upon the instructions asked for by the defendants as to what is a nuisance and their right to remove it; the matters therein contained were not applicable to this case. Even if it be conceded that the levee was a nuisance, the defendants had no right to cut it and thus cause the waters to flow into the slough in such volume as to exceed the capacity of the slough and overflow its banks.

McKEE, J., concurred in the foregoing dissenting opinion.

[No. 7,473. — In Bank.]

February 7, 1882.

**SAN FRANCISCO GAS LIGHT COMPANY v. JOHN P.
DUNN, AUDITOR, ETC.**

MUNICIPAL CORPORATION — CONTRACT FOR SUPPLY OF GAS — POWER OF SUPERVISORS TO PROVIDE FOR LIGHTING STREETS — DELEGATION OF LEGISLATIVE POWER.— A contract was entered into between the City and County of San Francisco, May 24, 1869, containing the following provision: "Upon

the expiration of the term of five years, hereinbefore limited, the party of the first part (unless it shall elect and notify the party of the second part of its election to advertise for proposals, as hereinafter provided) shall purchase and take from the party of the second part all the gas required for lighting said City as aforesaid for another term of five years, dating from the expiration of the term, hereinbefore limited, and pay therefor at such rates as shall be agreed upon by a majority of a commission to be constituted: one commissioner to be appointed by the party of the first part, one by the party of the second part, and one by the two appointed. The contract was renewed under this provision in 1869; and afterwards, in 1879, after the taking of the appropriate steps, the following resolution was passed, on the seventh day of July of that year, by the Board of Supervisors: Resolved, that the rates to be charged for gas to be supplied to the City and County of San Francisco, by the San Francisco Gas Light Company, during the term of five years from the nineteenth day of May, 1879, as fixed by the commission, composed of J. O. Rountree, J. B. Haggin, and J. O. Eldridge, appointed and acting under and in pursuance of the contract existing between said City and County and said company, be and are hereby accepted, adopted, and approved, and the report of said commission was hereby adopted, ratified, and confirmed." In November, 1879, a claim for the amount due for the preceding month was presented by the plaintiff, and approved by the Board of Supervisors, and afterwards, having been presented to the defendant, and he having refused to audit the same, an appeal was taken to the Board of Supervisors, who finally approved and allowed the said demand; but notwithstanding such allowance, the defendant still refused to audit the same; and the petitioner applied for a writ of mandate.

Held: The Board of Supervisors had no lawful authority to delegate to persons not members of that Board the power to fix and determine upon the amounts to be paid by the City and County for gas, or to alienate from the Board its power of final determination with regard to such amounts; and the provision of the contract of May 24, 1869, for the renewal of that contract, was therefore void.

The resolution of July 7, 1879, is, however, to be read as if the report referred to were incorporated in it; and thus read, it fixes the rates which the city and county agreed to pay. Thus read, the final determination with respect to the rates to be paid was exercised by the Board of Supervisors, and not by the commission.

In the absence of an express limitation as to the period of time for which a contract may be made by the Board of Supervisors, the Court is not prepared to declare that such a contract for five years would be unreasonable. It may therefore be assumed, for the purposes of this decision, that the contract of 1879 is valid as an independent contract, unless prohibited by express statutory provision.

The proviso of the first section of the Act of April 3, 1876 (Stats. 1875-6, p. 854), prohibits the making of any contract for any purpose "binding said city for a longer period than two years;" and unless this proviso was repealed by the subsequent Act of February 25, 1878 (Stats. 1877-8, p. 111), the contract of 1874 was one which the Supervisors were not empowered to make, and any claim based upon such contract one which they had no authority to allow. It is, however, unnecessary to decide in this case whether or not the proviso was repealed.

after having been published five successive days, according to law, taken up and passed by the following vote:

“Ayes—Supervisors Foley, Mangels, Danforth, Rountree, Farren, Acheson, Scott, Haight. Noes—Supervisors Talbert, Smith, Gibbs, Brickwedel.

“ (Signed) JOHN A. RUSSELL, Clerk.”

The rates fixed by the “commission” were before the Board in the report of Supervisor *Rountree*. The resolution is, of course, to be read as if the report referred to were incorporated in it; and thus read, it fixes the rates which the City and County agreed to pay. Thus the “final determination,” with respect to the rates to be paid, was exercised by the Board of Supervisors, and not by the “commission.”

Section 74 of the Consolidation Act empowers the Board “by regulation or order * * * to provide for lighting of streets,” and by Section 71 it is enacted “that the street-light *fund* shall be applied and used in payment for lighting the streets of the city, and for the repair of lamp-posts in pursuance of any existing or future contracts of the said City and County.” It is not disputed that under these provisions of the charter the Supervisors have power by “order,” duly published, to contract for the lighting of the streets. As we construe resolution 13,725 (new series), they did so contract.

It is urged, however, that the Board had no power to make such contract to run for a period of *five years*.

We entertain no doubt that the power conferred upon the Supervisors, “by resolution or order,” to provide “for lighting the streets” includes a power to enter into an appropriate contract for carrying into effect the major power. The power to provide for lighting the streets has been held, however, to be a governmental power, to be employed by the legislative department of the local government; such as can not be ceded away, nor used in such manner as shall control or embarrass future legislation. “No legislative body can part with its powers by any proceeding so as not to be able to continue the exercise of them. Such body has no power, even by contract, to control and embarrass its legislative powers and duties.” (Cooley’s Con. Lim. 205.)

In *East St. Louis v. Gas Light Company*, the Supreme

Court of Illinois said: "We do not think there can be a doubt that the power conferred on the city council to provide for lighting the streets and provide the means to pay for the same by taxation is legislative power." (10 Rep. 109, and cases therein cited.) It is not to be inferred, however, that a subsequent Board of Supervisors may disregard every contract entered into by their predecessors, or annul every such contract, even by former legislative act. The power of the members of the Board to determine, on behalf of their constituencies, that it is expedient to secure the lighting of the streets, by a company or individuals, upon *certain terms*, is legislative. But when a contract (which the Board is authorized to make) is entered into between the Supervisors and a company or individuals, the corporation is as much bound by it as is any other person by his contracts. If, however, under pretense of carrying into effect a legislative power, conferred, the Board shall enter into such a contract as was evidently not intended to be authorized, or such as shall amount to a cession of the right of future legislation, the contract is invalid. In *East St. Louis v. Gas Light Company*, 10 Rep. 109, it was held that a contract giving to a company the exclusive privilege of lighting that city for thirty years was invalid. But in the absence of an express limitation as to the period of time for which a contract may be made, we would hold, perhaps, that the contract with the plaintiff for five years was not beyond the power of the Supervisors. The exigencies of the present case do not demand a determination of that question. We only say we are not now prepared to declare that such a contract, for five years, must necessarily embarrass the Supervisors or disable them from performing their legislative or governmental functions. (Dillon's Mun. Corp. 61.)

While, therefore, the attempt, by the clause of the contract of 1869 above recited, to transfer to "Commissioners" the power conferred by the charter upon the Supervisors, of determining what rates it might be expedient for the city and county to pay to a gas company five years in advance, is of no force or effect, because the Board had no power thus to cede to others their legislative function (and of this the Supervisors were fully informed by their legal adviser long

and was an action of the Board which they were empowered to take, by Sections 71 and 74 of the Consolidation Act. They were not legally bound to allow the claim by reason of the contract of 1869, or of any "renewal" of that contract. But the gas had been furnished the city, and they were fully empowered to provide for its payment *such sum as it was worth*. They have allowed a claim which they were authorized to allow, in such amount as the Board should deem *reasonable and just*. We must presume that they were of opinion that \$22,514.80 was the fair value of the gas furnished and repairs done by plaintiff, during the month of October, 1879. Neither the Auditor nor this Court has power to review the judgment of the Supervisors with reference to the amount allowed to plaintiff as the actual value of the gas furnished and repairs made. As we have seen, the city and county is not bound by the contracts of 1869, 1874, or 1879, and no duty is cast upon the Board to audit or allow any claim of plaintiff, according to *the rates* mentioned in any one of those contracts. But each time a claim is presented by plaintiff, which is allowed in whole or in part by the Board of Supervisors, the latter employ their legislative function of deciding it to be expedient for the city and county to pay at the rates named in the bill, and also enter into a fresh contract to pay the sum allowed. This, as we have seen, they have power to do.

The allegation in plaintiff's petition, that the Board of Supervisors allowed the claim as "based" on the contract of 1869, can not influence the decision of this case. The allegation is not one of fact upon which an issue could be framed. The Board of Supervisors allowed the claim, and the defendant here, a ministerial officer, has no discretion to reject it; nor has he any authority to refuse to pass it unless the Board exceeded its powers in allowing it. The only facts capable of proof with respect to the allowance of the claim are proved by the record of the proceedings of the Board, which shows only the presentation of the claim and (after proper publication) the votes of the Supervisors allowing it in whole. That the members of the Board mistook the law, or supposed they were bound by an invalid contract when they voted to allow the claim, does not appear from the record of their proceed-

ings, and can never be made to appear legally until some method is invented for proving the unspoken thoughts of men. The presumption is, that they did their duty; and this presumption is not weakened by the circumstance that they had before them the opinion of the former legal adviser of the Board that the contract of 1869 expired in 1874, nor by the further circumstance that they had also before them the Act of 1876, which absolutely prohibited such a contract as was attempted in 1879.

Neither plaintiff nor defendant in the present action is at liberty to aver or admit the *motive* which induced members to vote for the allowance of the claim, except so far as the motive can be established by their formal and recorded action. The defendant here can only object that the Board had no power to allow the claim, and—without any intimation or suggestion that too much was, in fact, allowed—we say the members of the Board had the *power* to allow many times the actual value of the gas consumed if they dared to violate their official duty. They *alone* had power to determine the real value—their judgment is conclusive—and it is not a function of the Courts to make a contract for them, nor to set aside a contract which they had the capacity to make.

It follows that the authorization upon the Street Light Fund for the payment of the amount allowed was regular.

Let the writ issue as prayed for.

MYRICK, MCKEE, and SHARPSTEIN, JJ., concurred.

ROSS, J., dissenting.

I concur in that portion of the opinion of Mr. Justice McKinstry (and in the reasoning by which it is supported) wherein he holds that the contract relied on by the petitioner is one which the Board of Supervisors had no power to make, and therefore no power to allow any claim by virtue thereof. And for that very reason I can not concur in the judgment. As I read the record, the claim of the petitioner is based on the contract, and its allowance was obtained by virtue of the contract, and not otherwise. The petition itself, in effect, so states, and that fact is so declared in the briefs of the counsel for the respective parties. I entertain no doubt that the

and power of gas and the rate to be charged for each thousand feet—the standard illuminating power to be not less than that of sixteen candles, and the rate to be not more than three dollars per thousand cubic feet. It further provides that no person shall furnish gas to any such city, or its inhabitants, of less power or for a greater price, under penalty of one thousand dollars.

In the former opinion we said: “The members of the Board had the *power* to allow many times the value of the gas consumed if they dared to violate their official duty. They alone had the *power* to determine the real value—their judgment is conclusive—and it is not a function of the Courts to make a contract for them, nor to set aside a contract which they had the capacity to make.” In view of the provisions of the Act of March 4, 1878, above referred to, it is manifest that the language quoted from the former opinion must be received with the condition that the Board has no power to allow more than three dollars for every one thousand cubic feet of gas furnished.

4. It has been further urged by counsel for respondent that the “demand” should have referred to the act of the Legislature last cited. But a reading of the Act of March 4, 1878, will show that it furnishes no authority for *any* demand upon the treasury of the city and county.

As we said in the former opinion, the demand of the plaintiff refers to subdivisions of Section 71 of the Consolidation Act, which provide for the creation of a “Street Light Fund,” and for the application of such fund to the lighting of streets and the repairing of lamps and posts. The reference is distinct to the law authorizing the payment of the demand by title, date, and section. It is a more appropriate reference than would have been one of Section 74 of the Consolidation Act, which in general terms confers power on the Board “to provide for lighting the streets.”

5. Further, with respect to the Act of March 4, 1878, we are asked by counsel for respondent to *assume*—in the absence of any evidence, and of any averment in the pleadings, to that effect—that the Supervisors violated the act by allowing more than three dollars a thousand for gas, and that the officers and agents of plaintiff have subjected themselves

to the penalty therein provided. For aught that appears in this case, every requirement of the Act of March 4, 1878, has been fully complied with by the Board of Supervisors.

6. It was suggested by respondent that this Court should set aside the allowance of plaintiff's demand, because the rates allowed are not "reasonable." In aid of this view resort was had to the proposition — supported by innumerable adjudications — "Municipal by-laws must be *reasonable*. Whenever they appear not to be so, the Court must, as a matter of law, declare them void." The statement as applied to the facts of the case before us involves some confusion of thought and expression. The power of the Board of Supervisors to pay for gas furnished comes from the *statute* and not from any by-law. The statute confers on the Board the power of determining what is just and reasonable compensation for gas which may be supplied; with the proviso that not more than three dollars per thousand feet shall be allowed. By-laws, or ordinances (an equivalent word), are in the nature of local laws, and the cases established that they must be reasonable; that is to say, they must not be oppressive, nor inconsistent with the principles of the Constitution or of the common law having relation to the liberty of the citizen or the rights of private property. Even with respect to an ordinance apparently unreasonable, the Courts will not hold it to be unreasonable if the Legislature, by a constitutional law, has expressly authorized the municipality to adopt it. If the allowance of a claim can be called an ordinance at all — within the meaning of the rule as to reasonable ordinances — the Consolidation Act in terms empowers the supervisors to allow demands for various supplies, including gas, in such sums as in their judgment may be just. This Court constitutes no part of the municipal government.

The question before us is simply, Does the law confer on the Board of Supervisors the *power* of deciding what shall be paid for gas supplied — with the single limitation that the maximum allowed shall not exceed three dollars per thousand feet?

If it be true, as stated by counsel, that the Supervisors have allowed or paid too much for gas (a fact of which we can not

The proceeding which is here provided for is somewhat, if not quite, analogous to that provided for in cases where appeals are taken from one Court to another. It is usual in such cases to send a *remittitur* from the appellate to the lower Court, containing the decision of the former, which the Clerk of the Court below is required to attach to the judgment roll, and enter a minute of the judgment of the appellate Court on the docket, against the original entry. That the duty which he is required to perform is purely ministerial, no one can doubt. Neither can it be doubted that the appellate Court would compel him to perform it, even if the Court of which he was Clerk should order him not to make the proper entry. Nor would an appellate Court, in a proceeding by *mandamus* to compel the Clerk to make such an entry as the law requires to be made in such cases, permit its jurisdiction to render the decision which it had rendered to be questioned.

A decision by an appellate Court is final when the law declares it shall be final. Is it conceivable that when the Legislature declared that a decision of the Board of Supervisors should be final, it meant that it should not be final? That an appeal should lie from it to the Auditor, and that his decision should be final? Nothing of the kind is expressed in the act, and as the direct reverse of that is expressed, I may safely add that nothing of the kind is implied.

But it is urged that this reasoning will not apply to a case in which the Board of Supervisors have no power to allow a demand — in which their action is *ultra vires*. It will probably be conceded that the Board has all the power which the law confers upon it, and that while acting within the scope of the powers so conferred, its action can not be held to be, in any sense, *ultra vires*. Among the powers conferred upon the Board is that of “providing for lighting the streets.” That undoubtedly implies the power to pay for it, unless it can be obtained for nothing.

But it is said that they can not pay for what they have had because they contracted for more than the law authorized them to contract for. On the other hand, it is contended that there was no law in force at the time the contract was made which forbade its being made for the period specified in it. And it is further contended that if there was, it would

not absolve the municipal corporation from the obligation to pay for what it has consumed. Now, these are questions which arose when the demand of the plaintiff was presented to the Board of Supervisors for allowance. And it had to be presented to and approved by that Board before it could be allowed by the auditor, "or in any manner be recognized or paid." (Sec. 85, Consolidation Act.) And unless so presented within one month after it accrued, if in the power of the holder to present it within that time, it would become forever barred by limitation of time. (Id., sec. 90.) Now, if the Board of Supervisors had no jurisdiction to pass upon that demand, it was worse than idle to present it to them, because they had no power to allow or disallow it. But the question upon which its allowance or disallowance hinged was one which had to be decided before the demand could properly be allowed or disallowed. If the contract was a valid one, the demand was a valid one, and it was the duty of the Board to allow it. And, as before stated, that question had to be decided by the Board. The demand had to be presented to it, and if allowed by it, to be presented to the Auditor. If disallowed by him, the party aggrieved had a right to appeal to the Board, and the decision of the Board on that appeal is by law made final. If that be so, what is the use of having an Auditor? asks the respondent's counsel. If it be not so, what is the use of having a Board of Supervisors? might be asked with quite as much propriety. If it was the design of the Legislature that the decision of the Auditor should be final, it is impossible to conceive why an appeal from that decision should have been provided for, with the further provision that the decision of the appellate tribunal should be final.

I am unable to find anything in the Consolidation Act which, to my mind, indicates an intention to clothe the Auditor with the supervisory powers which it is claimed in this case that he possesses.

It seems to me that he is placed where he is to check what may be termed the hasty or inconsiderate action of the Board of Supervisors upon demands presented to it. That after a demand has been allowed by it, it must be presented to and examined by him before it can be paid. If there are in his

last considered here it was agreed by all of the judges who expressed an opinion on the point, that the contract entered into between the Board of Supervisors of the City and County of San Francisco and the Gas Company, in May, 1879, was invalid, because expressly prohibited by the Act of the Legislature approved April 3, 1876. At that time the subsequent Act of February 25, 1878, was not called to the attention of the Court, and consequently was not considered. It is now urged on behalf of the company that this latter Act repealed by implication the Act of April 3, 1876, and that therefore the contract in question was not prohibited by law, but was one the Board of Supervisors was empowered to make.

An Act of April 3, 1876, is entitled "An Act to confer additional powers upon the Board of Supervisors of the City and County of San Francisco, and upon the Auditor and Treasurer thereof," and is in these words: "If at the beginning of any month any money remains unexpended in any of the funds set apart for maintaining the municipal government of the City and County of San Francisco, and which might lawfully have been expended the preceding month, such unexpended sum or sums may be carried forward and expended by order of the Board of Supervisors in any succeeding month; *provided*, that said Board of Supervisors shall not hereafter make any contract for any purpose binding said city for a longer period than two years."

The enacting clause of this statute, as will readily be seen, relates entirely to the disposition of certain unexpended funds of the city. It is this enacting clause that it is said was impliedly repealed by the Act of February 25, 1878. And the argument is that such repeal of the enacting clause necessarily repealed the proviso. That depends on the nature of the proviso. Unboubtedly the office of a proviso generally is, as was said by the Supreme Court of the United States, in *Minis v. The United States*, 15 Pet. 445, "either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extended to cases not intended by the Legislature to be brought within its purview." Yet, that a proviso may contain provisions broader than the enacting clause, and lay down a general rule of a permanent nature

applicable to all cases, is impliedly admitted by the Court in the same case. (15 Pet. 445.) In construing a statute, as in construing a contract, deed, or other instrument, the paramount object is to ascertain—from the language employed—the intention of the party making it. What, then, did the Legislature intend when it said, in the proviso to the Act of April 3, 1876, that “said Board of Supervisors shall not hereafter make any contract for any purpose binding said city for a longer period than two years”?

This language, it seems to me, is very explicit, and prohibits the *making* of *any* contract, for *any purpose*, binding the city for a longer period than two years. In no respect can it be satisfied by confining its operation to the unexpended balance of the city funds referred to in the enacting clause. To do this would be to restrict, where the obvious meaning of the language employed admits of no restriction. It was the unmistakable intention of the Legislature, I think, to deprive the Board of Supervisors of the power of entering into any contract which, by its terms, purported to bind the city for any longer period than that named in the proviso. Inasmuch, therefore, as this prohibition was not confined to the subject-matter of the enacting clause, it follows necessarily that the implied repeal of the latter could not have the effect of repealing the prohibition—more especially in view of the rule that repeals by implication are not favored. (Sedgwick on the Construction of Stat. and Const. Law, 2d edition, pages 105, 106.)

The objection made to the Act of 1876, on the ground that the subject of the proviso is not stated in the title of the Act, can not be sustained for the reason that the Act was passed prior to the adoption of the present Constitution, and it is settled by a long line of decisions in this State that the provision in the old Constitution requiring the subject of the Act to be expressed in its title was merely directory. With respect to laws passed under the old Constitution, we are bound by those decisions, although it is otherwise with respect to those passed under the new.

The Board of Supervisors having had no power to make the contract in question, it had no power to allow any claim based upon it. As I read the record in this case, the claim of

Gray & Gale, for Respondents.

There was no error in denying the motion for a nonsuit, for two reasons:

1. No sufficient grounds were stated for the motion. The statement that "there was no evidence to sustain the action without specifying wherein the evidence was insufficient" did not aid the Court, and might as well not have been made. (*Kiler v. Kimbal*, 10 Cal. 267; *McGarrity v. Byington*, 12 id. 429; *People v. Banvard*, 27 id. 470; *Sanchez v. Neary*, 41 id. 485.)

2. On the merits the motion was properly denied. It was admitted "that the ancestors of plaintiffs owned and possessed the premises in dispute, and that at their death it descended to plaintiffs" (these respondents). If it descended to them from their ancestors, it was their property, unless they had been in some way legally divested of their title. It is not claimed that they were, unless it was by the fraudulent deed obtained by Greenfield and his mortgage to Hefner.

We know of no rule of law or equity whereby the beneficiaries of a trust can thus be deprived of their property while under legal disability and unable to defend their rights.

We do not question the rule of law relied upon by appellant, "that where one of two innocent parties must suffer by the acts of a third party, he by whose negligence it happened must be the sufferer." The rule has no application to this case. The respondents were under age, had nothing directly or indirectly to do with the transaction, and negligence can not be imputed to them.

Hefner took with notice. There was nothing to indicate that there had been any transfer of the property prior to the Safford deed, except the record of the pretended sale of Greenfield to himself, which, under the decisions of this Court, was not voidable only, but absolutely void. Furthermore, it appears from his own testimony that he knew that Judge Safford held the property in trust under the Town Site Acts, and under those acts the patent creating the trust expresses the object and purposes of the trust, and any sale or transfer in violation of such trust was absolutely void. (See Civil Code, § 870; 2 R. S. (U. S.) 435; Statutes of Cal. 1867-8, p. 692;

Belmont v. O'Brien, 12 N. Y. 394—405; *Briggs v. Davis*, 20 id. 21; S. C., 21 id. 577.) This rule applies to purchasers in good faith as well as to any others.

These respondents are the beneficiaries of the trust held by Judge Safford, so far as the property in question is concerned. (*Le Roy v. Cunningham*, 44 Cal. 599; *McCreery v. Sawyer*, 52 id. 257, and cases there cited.)

The above cases go no further than to hold that the deed is sufficient evidence as against one who shows no right to the property. In this case it is admitted that the property in dispute was owned and possessed by respondents' ancestors, and that it descended to them. Judge Safford could not sell or convey the property to any one but them. All this was known to appellant Hefner when he took his mortgage, and he must be held to have taken with notice.

THORNTON, J.:

In this action, which was brought to declare the defendant Greenfield a trustee for the plaintiffs of the real property described in the complaint, Hefner intervened, and in his intervention set up the title of Greenfield and a mortgage executed by the latter to him, the judgment of foreclosure in an action against Greenfield to foreclose the mortgage, sale under such judgment by the Sheriff, and a deed by the Sheriff to him.

The cause was tried by the Court, and judgment was rendered against Greenfield, decreeing him a trustee for the plaintiffs, and that he convey to them, and also a judgment that Hefner take nothing by his intervention, and that it be denied.

The Court rendered the following decision:

" 1. Mary Greenfield died intestate in said county in April, 1866, and at the time of her death she was the wife of John Greenfield.

" 2. That the said Mary Greenfield died seised and possessed in her own right of the lands and premises described in the complaint, and the same were her separate property.

" 3. That at her death she left her surviving five minor children, to wit, Lizzie Coffey, Mary Ellen Coffey, John A. J.

of them, to cheat or defraud the intervenor of his interest in the property in controversy herein.

" 14. On an accounting these plaintiffs would not, nor would either of them, owe the defendant Greenfield any sum of money whatever for advances made by him for their support and maintenance, or otherwise; nor is there any collusion between the defendant Greenfield and these plaintiffs, or either of them, to conceal the facts or to cheat or defraud the intervenor.

" 15. On or about the eighteenth of December, 1869, the said John Greenfield obtained an order from the Probate Court of said county for the sale of the premises, and afterward sold the same and became himself the purchaser at such sale; but the said order of sale was made by said Court without authority of law, the notice required by law not having been given; and the said sale was made under said invalid order, without first giving sufficient notice thereof; the order of sale and the said sale were both null and void, and the said Greenfield did not thereby acquire any right, title, or interest in or to the said property.

" As conclusions of law, I find that the defendant, John Greenfield, took and held the legal title to the lands and premises described in the complaint in trust for the children of the said Mary Greenfield, deceased; that he never has had or held any other right or interest to or in said property, or any part thereof, except as such trustee for the said heirs of Mary Greenfield; that the plaintiffs are entitled to have and receive from the said defendant, John Greenfield, a good and sufficient deed of conveyance of the said lands and premises, and to judgment accordingly."

Hefner appeals from the judgment and order denying a new trial.

On the trial, after the plaintiffs had closed their evidence, Hefner moved for a nonsuit, on the ground that plaintiffs had not introduced any testimony tending to sustain the action. The motion was denied and Hefner excepted.

The motion was properly denied. It is settled law in this State that a party moving for a nonsuit should state in his motion precisely the grounds on which he relied, so that the attention of the Court and the opposite counsel may be par-

ticularly directed to the supposed defects in the plaintiff's case. (*People v. Banvard*, 27 Cal. 470; *Sanchez v. Neary*, 41 id. 487; *Kiler v. Kimbal*, 10 id. 267; *McGarrity v. Byington*, 12 id. 429.) The general ground above stated did not comply with the rule, and therefore the Court did not err in denying the motion. We have, however, examined the evidence, and are of opinion that there was testimony tending to sustain the action.

It appears from the findings that Mary Greenfield died intestate in April, 1866, and that at the time of her death she was the wife of defendant, John Greenfield; that on her death she left five minor children, who inherited all her property. It was admitted on the trial (as appears from the statement) that the ancestors of the plaintiffs owned and possessed the premises in dispute, and that at their death it descended to the plaintiffs — four of the minor children above referred to, and the administrator of another who died in 1878, before the commencement of this action, are the plaintiffs.

The lots in controversy constituted a part of the lands derived by the town of Oroville under the Act of Congress of March 2, 1857 (see 14 U. S. Statutes at Large, 541), and the Act of the Legislature of this State approved March 30, 1868 (see Stat. 1867-8, p. 692).

On the death of Mary Greenfield, defendant John Greenfield was by the Probate Court of the County of Butte appointed guardian of the minor children above mentioned, except one (William T. Coffey), who was at that time residing in New York, and has never since resided in this State. No guardian was ever appointed for his estate. While John Greenfield was such guardian he obtained this deed mentioned in the findings from Safford, County Judge, in his own name and for his own benefit. Such deed was null and void as to his wards, by the provisions of Section 18 of the Act of the Legislature of March 30, 1868, above referred to (see Stat. 1867-8, p. 698), and was voidable as to William T. Coffey.

By the provisions of the same section any party injured or aggrieved by such action on the part of the guardian is allowed to bring an action for the recovery of his interest, at any time within five years after the discoverey of such fraud.

It appears from the findings that the plaintiffs had not known of the deed of the County Judge to defendant Greenfield until the latter part of 1878 or the beginning of 1879. This action was commenced on the 26th of March, 1879.

It will be observed that all of the acts of defendant Greenfield occurred during the minority of the children and heirs of Mary Greenfield. The eldest of these heirs (William T. Coffey) attained his majority in 1875, and the deed of the County Judge to Greenfield was executed in 1873.

It is contended that Hefner occupied the position of an innocent purchaser without notice. Nowhere in his pleadings is any such averment made. On the contrary, the fair inference from the matters set up by him is that, as matter of law, he concluded that the title to the lots in question was in John Greenfield, and, on this conclusion, dealt with him.

We find no error in the record, and the judgment and order are hereby affirmed.

So ordered.

MORRISON, C. J., and SHARPSTEIN, J., concurred.

[No. 7,178.— Department One.]

March 3, 1882.

D. N. DILLA v. WALTER BOHALL.

FORMER APPEAL — LAW OF THE CASE — PRACTICE.— The questions presented were determined on former appeal. (See 53 Cal. 709.)

APPEAL by defendant from the judgment of the District Court of the Eighth Judicial District in and for the County of Humboldt. HAYNES, J.

Action of ejectment. This is the second appeal in this case to the Supreme Court. The case on the first appeal will be found reported in 53 Cal. 709. The judgment of the former Supreme Court reversed the judgment of the Court below, and ordered judgment to be entered on the findings for the plaintiff for the possession of the land, and for rents and profits, as admitted by the defendant's answer unless the

plaintiff should elect to have a new trial. On the filing of the *remittitur* in the Court below, the plaintiff waived his right to have a new trial, and moved the Court for judgment on the findings and the admission in the answer, as ordered by the Supreme Court. Judgment was given accordingly on the fifteenth day of December, 1879. Defendant, on the twenty-eighth day of February, 1880, appealed to this Court.

S. M. Buck, for Appellant.

J. J. DeHaven, for Respondent.

THE COURT:

The questions now presented were finally determined on the former appeal.

Judgment affirmed.

[No. 6,936.— Department One.]

March 20, 1882.

PATRICK ROGERS ET AL. v. DAVID MAHONEY ET AL.

MALICIOUS PROSECUTION — PROBABLE CAUSE — INSTRUCTION.— In an action for malicious prosecution the Court in its charge said: "The jury in an action for malicious prosecution are not to determine whether the facts amount to a probable cause; but it is the province of the Court to determine that question. I have determined that question, gentlemen, when I tell you that the very fact that this man was arrested and liberated in the Police Court gave him a right of action."

Held: The charge was erroneous, in that the Court determined that the facts mentioned established conclusively want of probable cause.

ID.— ID.— ID.— CHARGE OF COURT — EXCEPTION — PRACTICE.— Defendants' counsel excepted "to that part of the charge about probable cause." reciting the first sentence employed by the Court in treating of the subject.

Held: The exception to the portion of the charge objected to was sufficiently specific.

APPEAL from a judgment for plaintiffs, and from an order denying a new trial, in the Twelfth District Court of the City and County of San Francisco. DAINGERFIELD, J.

John M. Burnett and *Frederick Hall*, for Appellants.

B. S. Brooks, for Respondents.

The COURT:

This cause was heard in Department One of this Court, and its opinion filed March 20, 1882. (9 Pac. C. L. J. 220.) Subsequently the Court granted a hearing in Bank, which has been had. We are satisfied with the opinion of the Department; and for the reasons therein given the judgment and order are reversed, and the cause is remanded for a new trial.

The following is the opinion of Department One, referred to:

After charging at some length, the Court proceeded: "The jury, in an action for malicious prosecution, are not to determine whether the facts amount to a probable cause; but it is the province of the Court to determine that question. I have determined that question, gentlemen, when I tell you that the very fact that this man was arrested and liberated in the Police Court gave him a right of action," etc.

There was such conflict in the evidence as left it proper that the question of the existence of the facts on which the want of probable cause depended should be passed upon by the jury, *unless* the Court below was correct in holding that the bare facts that the woman called *man* in the instruction) was "arrested and liberated" in the Police Court gave her a cause of action. The charge was erroneous, in that the Court determined that the facts mentioned established conclusively want of probable cause. The rule as laid down by the Court would certainly simplify the trial of this class of actions. If correct, the law might be thus formulated: First, where plaintiff has been arrested, charged with an offense, and *convicted*, his action for malicious prosecution will not lie; second, where he has been arrested, charged, and discharged, and these facts are proven to the satisfaction of the Court, the case of plaintiff in an action for malicious prosecution is made out, because *malice* may be inferred from want of probable cause. It needs but to state the second position to show that it can not be successfully maintained.

The exception to the portion of the charge objected to was sufficiently specific under the rule laid down in *Hicks v. Coleman*, 25 Cal. 146; *Sill v. Reese*, 47 id. 348; and *Robinson v. W.*

P. R. R. Co., 48 id. 409. The whole charge can not be excepted to generally. The exceptions should be sufficiently specific to call the attention of the Court to the alleged error. Here the counsel excepted "to that part of the charge about probable cause," reciting the first sentence employed by the Court in treating of that subject. We think this was enough.

Judgment and order reversed, and cause remanded for new trial.

[No. 8,176.— Department Two.]

April 20, 1882.

IN THE MATTER OF THE ESTATE OF H. W. DEAN, DECEASED.

ESTATE OF DECEASED PERSONS — APPEALABLE ORDER.— An order of the Superior Court setting aside a decree of settlement of the final account of an executor and vacating a decree of distribution is not an appealable order.

APPEAL by executor from an order vacating decree of settlement of final account and decree of distribution, made by Superior Court of the County of Santa Barbara. **HINES, J.**

Administration of estate of deceased person.

On the thirteenth day of July, 1876, E. W. Dean, the appellant, as one of the executors of the estate of H. W. Dean, deceased, the other executor having removed from the State, rendered to the Probate Court of Santa Barbara County a final account of his administration, and at the same time a petition for final distribution.

On July 25, 1876, the Probate Court made an order purporting to allow the account, distribute the estate, and to discharge the executors.

After finding that the notice of hearing of the settlement of account and petition for distribution was defective, the Superior Court of Santa Barbara County, on the application of Nellie T. Bassett, a party interested in the estate, and after hearing, on September 5, 1881, ordered and adjudged "that the decree made and entered by the Probate Court of the county of Santa Barbara, on the twenty-fifth day of July, 1876, in the matter of the estate of H. W. Dean, deceased, ap-

proving, allowing, and settling the final accounts of E. W. Dean, and finally and fully discharging said Dean and Sylvester Trull from the further execution of their trusts, be and the same is hereby vacated and set aside; and that E. W. Dean, executor of the estate of H. W. Dean, deceased, be and is hereby required to file with the clerk of the Court, within thirty days, a further inventory of the property belonging to said estate which has come into his hands, and also an account of all money received by him belonging to the said estate, and for and on account thereof, and of all money paid out by him on account of claims duly presented and allowed."

After settlement of his bill of exceptions, the executor, E. W. Dean, took this appeal.

R. B. Canfield, for Appellant.

W. C. Stratton, for Respondent.

On the authority of *Estate of Cahalan*, 60 Cal. 232, appeal dismissed.

[No. 8,811.— Department Two.]

April 21, 1882.

WILLIAM H. BROADRIBB, AN INSANE PERSON, BY H. GOODCELL, JR., HIS GUARDIAN, v. LUTHER C. TIBBETTS ET AL.

APPEALABLE ORDER.—The defendant appealed from an order of the Court below denying his motion for judgment by default against the plaintiff H. Goodcell, Jr., guardian of William Broadribb, insane, for the sum of one hundred and thirty-seven dollars and forty-four cents, and that said Goodcell be removed from the position of guardian, as prayed in defendants' cross-complaint. *Held:* The order is not an appealable order.

APPEAL by defendant Luther C. Tibbetts from an order of the Superior Court of the County of San Bernardino denying motion for judgment by default on cross-complaint. **ROLFE, J.**

Action of foreclosure of mortgage. The action was brought against defendant Luther C. Tibbetts and Eliz M., his wife. The transcript contains what purports to be the answer and cross-complaint of the defendant, Luther C., appearing in

propria persona as the defendant in the case, but contains no evidence of their service or filing except the following:

"Demand for judgment. (Title of court and cause.) Now comes defendant Luther C. Tibbetts and asks for and demands judgment by default against H. Goodcell, Jr., guardian for William Broadribb, insane, for the sum of one hundred and thirty-seven dollars and forty-four cents, and that said Goodcell be removed from the position of guardian of the estate of William H. Broadribb, or the person and estate of said Broadribb, and that all of said Goodcell's acts as guardian be set aside, and that the note and mortgage now in the hands of the said Goodcell be put into the hands of Edward Broadribb, guardian of the person and estate of said William H. Broadribb, and that Edward Broadribb be authorized and empowered to go on and settle up the estate of William H. Broadribb, and report to this Court upon the pleadings in the before-entitled action, for the following reason: A copy of plaintiff's complaint was served on defendant December 6, 1881, and that within ten days thereafter defendant served on plaintiff's attorneys copy of answer and a cross-complaint, and put the original answer and cross-complaint on file in the Clerk's office of this county, and that more than ten days have expired and plaintiff has neither got an extension of time, demurred to defendant's answer and cross-complaint, made a motion to strike out, nor answered the same. Luther C. Tibbetts, Defendant in person. Indorsed: Filed January 3, 1882."

This demand for judgment was denied by the Court below, and the defendant Luther C. gave notice of appeal. Respondent moved in this Court to dismiss the appeal.

A. B. Paris and R. E. Bledsoe, for the motion.

Luther C. Tibbetts, in propria persona, contra.

The Court:

The appeal in this case is "from the order of said Court [the Superior Court of San Bernardino County] denying defendant's motion for judgment by default against H. Goodcell, Jr., guardian of William Broadribb, insane, for the sum of one hundred and thirty-seven dollars and forty-four cents,

and that Goodcell be removed from the position of guardian, as prayed in defendants' cross complaint."

Section 963, C. C. P., enumerates the cases in which an appeal may be taken from a Superior Court to the Supreme Court, and the order above specified is not embraced in said enumeration.

Appeal dismissed.

[No. 8,410.— Department Two.]

April 21, 1882.

THE PEOPLE EX REL A. J. LOWRY v. LOUIS McLANE
ET AL.

RECEIVER OF RAILROAD — FORECLOSURE OF MORTGAGE — REMEDY — MANDAMUS.

— Application for a writ of mandamus to compel the receiver of a railroad appointed in a foreclosure suit to operate the road.

Held: There is a plain, speedy, and adequate remedy, if the plaintiff is entitled to any, in the cause and court in which the defendant was appointed receiver.

APPLICATION for alternative writ of *mandamus*.

The affidavit states in effect that by an order made on the twenty-first day of December, 1879, by the Fifteenth District Court in and for the County of San Francisco, in an action for the foreclosure of a mortgage upon the Placerville and Sacramento Railroad Company, then pending in said Court, and now pending in the Superior Court of said City and County, the defendant was appointed receiver of said railroad and authorized to take possession and control of the same, and that under the said order, which still continues in full force and effect, he entered upon and took possession and control of the said railroad, and of all of its rights, privileges, and franchises, and thence hitherto has and still does keep and retain possession of the same, but that he has failed and refused, and still fails and refuses, to operate the same.

No briefs on file.

The COURT:

The application for the alternative writ of mandate is

denied. There is a plain, speedy, and adequate remedy, if the petitioner is entitled to any, in the cause and court in which McLane was appointed receiver. (C. C. P.; § 1086.) The petitioner should make his application to that forum.

Application denied.

[No. 8,388.— Department Two.]

June 29, 1882.

HENRY GOODCELL, SR., v. R. A. DAVIS ET AL.

DAMAGES FOR FRIVOLOUS APPEAL.

APPEAL by the defendant, the San Bernardino Gas Light Company, from the judgment of the Superior Court of the County of San Bernardino, and from an order denying a motion for a new trial. ROLFE, J.

Action of foreclosure of mechanics' lien.

The action was brought to foreclose a lien for material furnished by the plaintiff to the defendant Davis, as a contractor, in the construction of a building belonging to the defendant, the Gas Light Company. The defendant Davis made no defense. The Gas Light Company appeared and answered. Upon a trial being had, judgment went for the plaintiff.

Boyer & Gibson, for Appellant.

Paris & Goodcell, for Respondent.

The COURT:

The only issue presented by the answer of the defendant, the San Bernardino Gas Light Company, was as to the filing by plaintiff of his claim. The findings of the Court below are full as to the filing of the claim. There is no merit in the appeal; it was evidently taken for delay. The judgment is affirmed, with twenty-five per cent. damages.

[No. 8,527.— In Bank.]

December 11, 1882.

THE CENTRAL PACIFIC RAILROAD COMPANY v.
THE SUPERIOR COURT OF TULARE COUNTY.

REMOVAL OF CASES TO FEDERAL COURT — JURISDICTION — PROHIBITION.— In an action to recover State and county taxes, defendant answered and also filed a bond and petition for a removal of the cause to the Circuit Court of the United States, on the ground that the suit was one arising under the constitutional laws of the United States, and the petition being denied, applied to this Court for a writ of prohibition. Writ denied.

APPLICATION for a writ of prohibition to the Superior Court of Tulare County.

The facts relied upon in the lower Court, to support the petition, are the same as those involved in the *San Francisco and North Pacific Railroad Company v. The State Board of Equalization*, 60 Cal. 12; and the *Central Pacific Railroad Company v. The State Board of Equalization*, id. 35

Creed Haymond, for Plaintiff.

A. L. Hart, Attorney General, for Defendant.

The COURT:

We are not satisfied that this is a proper case for the issuance of a writ of prohibition—a writ in the nature of a prerogative writ.

Writ denied, and proceeding dismissed.

MORRISON, O. J., and THORNTON, J., expressed no opinion.

[No. 7,556.— Department One.]

December 20, 1882.

SAMUEL B. MARTIN v. ANTHONY THOMPSON.

ACTION TO RECOVER PERSONAL PROPERTY — CROP GROWING ON LAND HELD ADVERSELY.— An action can not be maintained to recover grain sown and harvested by defendant upon lands to which he claimed title, and of which he had the actual adverse and exclusive possession.

Id.—Id.—CASES DISTINGUISHED.—*Halleck v. Mixer*, 16 Cal. 574; *Harlan v. Harlan*, 15 Pa. St. 518; *Elliott v. Powell*, 10 Watts, 453; *Mather v. Trinity Church*, 3 Serg. & R. 509; S. C., 8 Am. Dec. 663; *Kimball v. Lohmas*, 31 Cal. 159; *Atherton v. Fowler*, 96 U. S. 515, distinguished.

LEAVE TO AMEND—DISCRETION OF COURT.—It can not be held that it is an abuse of discretion for the Court to refuse to allow an amendment to the complaint, where it does not appear from the transcript that any proposed amendment was served or presented, or that the notice of motion pointed out the precise amendment which the plaintiff would ask leave to make.

APPEAL from a judgment for the defendant, and from an order denying a new trial, in the Superior Court of the City and County of San Francisco. WILSON, J.

A petition for hearing in Bank was filed in this case after judgment, and denied.

L. Aldrich and *E. D. Wheeler*, for Appellant.

Mich. Mullany, for Respondent.

THE COURT:

The action is brought to recover the possession (or the value thereof) of certain *grain* sown and harvested by defendant upon lands to which he claimed title, and of which he had the actual adverse and exclusive possession. The action can not be maintained.

In *Halleck, Executor, v. Mixer*, 16 Cal. 574, a demurrer to the complaint had been sustained in the Court below upon the ground that the complaint showed the title to land to be involved in such sense as precluded the action. The complaint alleged that the plaintiff's testator was seised and possessed of certain real estate at the time of his death, and that the executor, ever since his appointment, had been in possession of the same; that persons (whose names were not designated) had entered upon the lands without authority and cut down timber growing thereon, to the amount of three hundred cords; that defendant afterward also entered upon the premises, without authority, and removed the wood thus cut, and still detained it, etc. There was no suggestion or pretense that the defendant, or any other person than plaintiff

and his testator, ever had possession of the land on which the wood was cut.

It was said by the Supreme Court, in reversing the judgment of the District Court, that the complaint in *Halleck v. Mixer* did not show title to the land to be involved in such sense as to preclude the action. "In all cases where the owner of real estate sues for property severed from the freehold, the action must rest upon the proof in the first instance of title or right of possession (or possession) taken previous in the plaintiff; and, if the position of the respondent were tenable, no action for the recovery of said property would ever lie. If the complaint alleged the title, it would, upon his argument, be demurrable; if it merely alleged ownership of the property, the party *would be excluded* on the trial from the proof of his title, or be nonsuited on its production. The true rule is this: The plaintiff out of possession can not sue for property severed from the freehold, when the defendant is in possession of the premises from which the property was severed—holding them adversely in good faith under claim and color of title; in other words, *the personal action can not be made the means* of litigating and determining the title to the real property as between conflicting claimants. But the rule does not exclude the proof of title on the part of the plaintiff in other cases, for it is, as we have already observed, upon such proof that the right of recovery rests. * * *

A mere intruder or trespasser is in no position to raise the question of title with the owner so as to defeat the action." The Court then cites with approval *Harlan v. Harlan*, 15 Pa. St. 513.

This was the case of *Harlan v. Harlan*. The plaintiff was the purchaser of certain real estate, being a cotton manufactory. Certain machinery in the mill passed to him as a part of the freehold. A fixture, part of the machinery, was detached by the former owner, and it was held that the purchaser of the real estate could maintain replevin for it.

Certain cases were cited by counsel as authority to the point that the action would not lie; but Roger, J., commenting upon those cases, pointed out the distinction between them and the case then at bar.

In the case of *Harlan v. Harlan*, the title to the real

property was not *disputed* by the defendant, and the Court suggested that it might be that the mere assertion of a title would avail little. "The Court looks to the substance, and where it appears in truth it is a *trial of title*, then it is properly ruled that replevin is not the proper action, but that it must be tried in another form."

It was said in *Elliott v. Powell*, 10 Watts, 453, as was also said in *Halleck v. Mixer*, *supra*, it is a mistaken supposition that title to real estate may not be incidentally tried in a transitory action, much less that replevin can not be maintained where the plaintiff can make title to the chattel only by making title to the land from which it was severed. (See also *Heath v. Ross*, 12 Johns. 140; *Goff v. Hawks*, 5 J. J. Marsh. 341; *Player v. Roberts*, Wm. Jones, 243.) The cases cited by the Pennsylvania Court in *Harlan v. Harlan* indicate the true rule. In *Mather v. Trinity Church*, 3 Serg. & R. 509, S. C., 8 Am. Dec. 663, it was ruled that trover for gravel from land does not lie by one who has the right of possession against one who has the actual adverse possession "and sets up title to it" — that conflicting claims of title can not be tried in the action of trover. To the same effect, *Baker v. Howell*, 11 Serg. & R. 476; *Brown v. Caldwell*, 10 id. 114; S. C., 13 Am. Dec. 660. The cases go to the point that where the property sued for has been severed from plaintiff's land, he can show his ownership of the chattel by showing his ownership of the land unless defendant has, and had when the property was severed from the freehold, adverse possession of the land, claiming title thereto. Of course, to exclude plaintiff's right to sue for the personal property, defendant must have the *adverse* possession, *claiming title*. If a tenancy or *quasi* tenancy exists, the defendant and occupant not claiming to be owner of the personal property, as owner of the realty, the reason for precluding the personal action does not exist. (*Harlan v. Harlan*, *supra*; *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Mooers v. Wait*, 3 Wend. 104; S. C., 20 Am. Dec. 667.)

But we find nowhere (except in *Kimball v. Lohmas*, 31 Cal. 159), that, with respect to the right of a plaintiff to resort to replevin, a distinction exists between a defendant in adverse possession of the land, claiming title by writing, and

a defendant in adverse possession, claiming title without any written foundation for the claim. The distinction seems to have been suggested by a phrase employed in the opinion of *Halleck v. Mixer*, with reference to a holding adversely "in good faith," etc.

But the case now before us differs in two respects from *Kimball v. Lohmas*: 1. The defendant claims a right to the possession under *color of title*. 2. The grain, the subject of the present controversy, was sown while defendant was in the adverse possession of the land. It did not exist, even potentially, while plaintiff had possession of the land — if plaintiff ever had possession of the land.

The present is also unlike the case of *Atherton v. Fowler*, 96 U. S. 513. There the hay, the subject of controversy, was cut from the meadows *set in grass* by plaintiff's testator. And besides, in that case, the District Court of the State, "having given the law on the subject very clearly" (in favor of plaintiff's right to maintain the action), and inasmuch as it related to "a doctrine not affected by the Constitution or laws of the United States," the Supreme Court of the United States held, they "must take it to have been correctly expounded to the jury." (96 U. S. 515.)

There is no precedent for an action like the present, and no good reason why this should be made a precedent.

We can not say the Court abused its discretion in disallowing plaintiff's motion to file a second amended complaint. It does not appear from the transcript that any proposed amendment was served or presented, or that the notice of motion pointed out the precise amendment which plaintiff would ask leave to make or file.

Judgment and order affirmed.

[No. 7,555.— Department One.]

December 22, 1882.

SAMUEL B. MARTIN v. MARTIN DURAND ET AL.

ACTION TO RECOVER PERSONAL PROPERTY — CROP GROWING ON LAND HELD ADVERSELY.

APPEAL from a judgment for the defendants, and from an order denying a new trial, in the Superior Court of the City and County of San Francisco. WILSON, J.

L. Aldrich and E. D. Wheeler, for Appellant.

Mich. Mullany, for Respondents.

The COURT:

On the authority of *Martin v. Thompson*, *supra*, judgment and order affirmed.

[No. 6,861. — In Bank.]

December 22, 1882.

JOHN BRICKELL v. DAVID F. BATCHELDER ET AL.

FORECLOSURE — MORTGAGE — PROMISSORY NOTE — INTEREST — DEFAULT — PREMATURE COMMENCEMENT OF ACTION.— When the interest on a promissory note is made payable monthly, and the note contains the additional clause following: "Any interest remaining due and unpaid shall be added monthly to the principal, and bear interest at the same rate;" and where the mortgage securing said note provides that in case default shall be made in the payment of the principal sum, or the interest thereon, or any part thereof, according to the terms of the note, the mortgagee is empowered to proceed to sell the mortgaged premises in the manner prescribed by law; and further, that out of the proceeds of such sale the mortgagee shall retain the principal sum, with interest, costs, and charges of sale, and attorney's fees; and further, where a subsequent mortgage, between the same parties, contained the stipulation that all arrearages of monthly interest then existing, or thereafter to accrue upon the prior note, shall bear interest from the date respectively at which they have accrued, or shall accrue, at a higher rate than that expressed in the note —

Held: Taking the terms of said note and mortgage together, the mortgagee has the right on default in the monthly payment of the interest, to commence an action to foreclose.

Id. — SALE. — **Held,** further, the power given in the mortgage "to proceed to sell in the manner prescribed by law," is in substance the same as a power to proceed to sell by means of an action to foreclose.

MORTGAGE — CONSTRUCTION. — The clause in the mortgage, giving the right to sell in case of default, refers to a default in the payment of interest, not to a default in adding it, when unpaid, to the principal; the right to dispose of the interest due and unpaid, in the mode prescribed in the note, was given to the mortgagee, not to the mortgagors; the mortgagee might delay it, or waive it, but a delay in exercising this right could not be construed as depriving him of it.

CASE DISTINGUISHED. — The clause in the mortgage, above quoted, is entirely unlike that in *Bank of San Luis Obispo v. Johnson*, 53 Cal. 99.

MORTGAGE — CONSTRUCTION. — The stipulation contained in the subsequent mortgage aforesaid merely refers to the rate of interest which the arrearages of interest referred to in it are to bear, increasing the rate, and nothing more. The clauses in the mortgages and note are to be considered together.

ID. — TAXES — DEFAULT. — Where a mortgage contains the covenants, that the mortgagors shall pay all taxes upon the mortgaged premises, and that, in default thereof by them, the mortgagee shall be empowered to sell, such default gives the mortgagee the right to proceed to foreclose, if there is no other. It makes no difference that the mortgagee, has the right to pay the taxes and charge them to the mortgagors, the same to become part of the mortgage lien. The right to foreclose is not waived or lost, or the default condoned by the mortgagee on his paying the taxes and charging the mortgagor.

ID. — ID. — ID. — CASE CRITICISED AND DISTINGUISHED. — *Williams v. Townsend*, 31 N. Y. 411.

CONSIDERATION. — In drawing instruments of any kind where a consideration is essential, it is not necessary, nor is it the practice, to repeat the consideration upon the insertion of every several promise or covenant. Where a sufficient consideration is expressed, none can be implied.

CONTRACT OF MARRIED WOMAN. — Section 167 of the Civil Code, under which a married woman was unable to make a contract for the payment of money, was changed by the Legislature of 1873-4, taking effect July 1, 1874, so that a married woman could make such contract, and bind herself by note and mortgage. A mortgage executed by a married woman June 1, 1874, was binding upon her.

JURY. — The point whether the recognition by a married woman of an obligation for the payment of money, void when made, after the disability to so contract had been removed, did not make the obligation binding upon her, noticed but not decided.

APPEAL from a judgment for the plaintiff in the Twenty-third District Court in and for the City and County of San Francisco. **THORNTON, J.**

Sol. Hydenfeldt, Jr., S. Hydenfeldt, and Hydenfeldt & Jefferson, for Appellant.

The Court erred in overruling the demurrer.

At the time the note and mortgage for thirty-six thousand dollars were made and delivered, June 1, 1874, the defendant, Maria Baker Batchelder, was and still is a married woman, and could make no contract for the direct payment of money. (C. C., § 167, before repeal.) Neither could she dispose of the community property, for the law placed the control and disposition of it during life and cover-

ture in the husband. Therefore, she could, at the time this note and mortgage were made, make a contract of such character only in reference to her separate estate; and in order for the complaint to state a cause of action against her, it should contain an allegation that the contract was made in reference to her separate estate or property, and the condition of the property should also be stated. There being no allegation of this kind, the complaint is fatally defective. (*Coats v. McKee*, 26 Ind. 223; *Robson & Allen v. Shelton & Husband*, 14 La. An. 712; *Sexton v. Fleet*, 6 Abb. Pr. (N. Y.), 8-10; *Murray et al. v. Keyes et al.*, 35 Pa. St. 384; *Wallace v. Rippon*, 2 Bay (S. C.), 112; *Trimble v. Miller*, 24 Tex. 214; *Covingtons v. Burleson*, 28 id. 368.)

The defendant, Maria Baker Batchelder, being unable to make a contract for the direct payment of money on June 1, 1874, simply joining in the note with her husband, made it the obligation of the husband alone. (*Shartzer v. Love*, 40 Cal. 93; *Brown v. Orr et al.*, 29 id. 120; *Althof v. Conheim*, 38 id. 233.)

The Court erred in overruling the demurrer, for the further reason that at the time of the commencement of this action nothing was due on the thirty-six-thousand-dollar note of June 1, 1874, and therefore the suit to foreclose the mortgage was premature. (*Bank of San Luis Obispo v. Johnson*, 53 Cal. 99; *Williams v. Townsend*, 31 N. Y. 411; *Jones on Mortgages*, 1175.)

The note and mortgage of June 1, 1874, upon a legitimate construction, do not authorize a foreclosure upon the breach of any condition before the first day of June, 1879. But if there should be any doubt in this, then the clause above quoted in the third mortgage must of a certainty set it at rest. A new contract is made, increasing the rate of interest, and expressly provides what shall be done, not only with the interest in default, but for the interest that shall accrue, viz., all interest in default, whether past or future, shall bear interest at the rate of one per cent., and be added to the principal. (*Haggerty v. The Allaire Works*, 5 Sandf. 230-237.)

Again, to give the construction asked for by counsel for respondent to this mortgage is to declare in favor of a penalty, and, in effect, it would work a forfeiture of the contract.

Now, it is a universal rule of courts of equity never to enforce either penalty or a forfeiture. (Story's Eq. Jur., vol. 2, sec. 1819.)

"Contracts under which a forfeiture is claimed to have accrued should be construed strictly, and the facts urged in support of the forfeiture ought to be clear and explicit, and not be left to inference or argument." (*Von Schmidt v. Huntington*, 1 Cal. 56; *Colman v. Clements*, 23 id. 248; *Wiseman v. McNulty*, 25 id. 237; *Waring v. Crow*, 11 id. 367.)

By increasing the rate from ten to twelve per cent. upon the interest in arrears, and all interest to accrue and be in arrears on the mortgage of June 1, 1874, the mortgagee was increasing and adding to his debt the sum of eight hundred and seventy-five dollars. This is the consideration by which the clause in the mortgage of February 20, 1877, is governed.

Parties can make a certain agreement between themselves for a consideration referable to this agreement alone, and at the same time bind themselves in the contract to carry out or extend the terms of a foreign contract, based upon an entirely different and separate consideration. (Parsons on Contracts, 5th edition, vol. 2, page 217.)

The Court erred in giving judgment against the defendant, Maria Baker Batchelder, for deficiency after sale. (*Butler v. Baber*, 54 Cal. 178.)

The mortgage gives the mortgagee no right to consider the whole principal sum and interest due, with the right to foreclose upon default in the payment of taxes by the mortgagors. (Jones on Mortgages, vol. 2, sec. 1175; *Williams v. Townsend*, 31 N. Y. 411, 412.)

E. J. and J. H. Moore, for Respondent.

Defendants' demurrers were all properly overruled.

If default is alleged, in that interest was not paid, or that taxes were neglected to be paid by defendants and were paid by plaintiff, and not repaid to him, does it not plainly follow that the right to foreclose and sell at once arose upon such default?

Defendants' neglect to pay the taxes, and their payment by plaintiff to prevent the sale of the mortgaged premises for

such taxes, gave plaintiff the complete right of action to foreclose at once, and collect the whole debt. How otherwise can plaintiff be "empowered to sell the premises above described in the manner prescribed by law, and out of the proceeds of such sale retain the above amount of \$36,000, with interest," etc.?

The decisions applicable to this branch of the case are: *Whitcher v. Webb*, 44 Cal. 127; *Bank of San Luis Obispo v. Johnson*, 53 id. 499; *McKissick v. Cannon*, 4 P. C. L. J. 285.

The mortgage is exactly in accordance with the approved forms in like cases. (See Spaulding's Law Encyclopedia and Forms, ed. 1887, p. 345.)

The general principles applicable to this case, in this regard, are also laid down in 1 Jones on Mortgages, §§ 71-77; *Chick v. Willetts*, 2 Kan. 384, 385; id. 54; *Rubens v. Prindle*, 44 Barb. 336; *Broderick v. Smith*, 26 id. 539; 37 id. 60; 15 How. Pr. 434; 24 id. 400.

Judgment was properly entered on the complaint, and answers upon the ground stated, because the answers failed to deny the facts alleged. They do not deny the genuineness and due execution of the notes and mortgages. "In such cases there can be no issue of fact upon the tenor or effect of the instrument." (*Burnett v. Stearns*, 33 Cal. 473, 474; *Sacramento Co. v. Bird*, 31 id. 67-73; *Corcoran v. Doll*, 32 id. 83-88.)

Every denial is of some conclusion of law, made to negative, not some fact stated by the complainant, but some legal conclusion only. Such denials are mere evasions. (*Lighter v. Menzel*, 35 Cal. 460; *Burke v. Table Mountain W. Co.*, 12 id. 403, 407; *Piercy v. Sabin*, 10 id. 22, 27; *Nelson v. Murray*, 23 id. 338; *Lightner v. Menzel*, 35 id. 452; *Castro v. Wetmore*, 16 id. 379; *Christy v. Dana*, 42 id. 174; *Kinney v. Osborne*, 14 id. 113; *Towdy v. Ellis*, 22 id. 659; *Higgins v. Wortell*, 18 id. 330, 333.)

The notes and mortgages now before this Court, having, as they do, the signatures of both husband and wife, properly acknowledged and certified, are valid and binding on both parties and on the property for all purposes, and would have so been at any time for more than twenty-five years past. It matters not whether the property in question belonged to the

husband or to the wife, or was that of the community. (*Marlow v. Barlew*, 53 Cal. 456; *Perry v. Kelley*, 52 id. 334.)

As part consideration for the increase of two per cent. per year on the arrearages of interest, the mortgagee was lending \$2,000 additional. Will it reasonably be inferred that he lent this further sum and waived his right to foreclose and get his principal of \$36,000 on default of payment of interest, taxes, etc., for so paltry an advantage, and yet carefully guard that right on all the inferior sums in all subsequent mortgages, and notably in the very mortgage containing the supposed waiver? Should not the waiver be explicit, and not left to inference or argument? (*Racouillat v. Sansevain*, 32 Cal. 376; *McNeil v. Shirley*, 38 id. 202; *Saunders v. Clark*, 29 id. 299; Civil Code, §§ 1697, 1698.)

THORNTON, J.:

This is an appeal prosecuted by defendants from a judgment of foreclosure in an action brought on several notes and mortgages executed to secure their payment. The notes are four and the mortgages three in number, and are all set forth *in hæc verba* in the complaint.

It is contended on behalf of appellants that the action was prematurely brought; that when it was instituted nothing was due, at least on the note and mortgage of first of June, 1874. In the discussion of this contention, our attention is called to the following matters which are disclosed by the record. The note first in order of time is in these words:

"SAN FRANCISCO, June 1, 1874.

"\$36,000. Five years after date, without grace, for value received, we jointly and severally promise to pay to John Brickell, or his order, the sum of thirty-six thousand dollars in gold coin of the United States, of the standard fineness now established by law, with interest thereon, payable monthly at the rate of ten per cent. per annum in like coin until paid. Any interest remaining due and unpaid shall be added monthly to the principal, and bear interest at the same rate. This note is secured by mortgage of even date herewith.

"DAVID F. BATCHELDER,

"MARIA BAKER BATCHELDER."

And to the following stipulation, among others which appear in the mortgage above referred to:

"But in case default shall be made in the payment of the said principal sum or the interest thereon, or any part thereof, according to the terms of said promissory note, or in the performance of any of the covenants hereinafter expressed, then said party of the second part, his heirs, executors, administrators, or assigns, are hereby empowered to proceed to sell the premises above described, with all the appurtenances, in the manner prescribed by law.

"And out of the money proceeding from such sale, the party of the second part shall retain the above amount of thirty-six thousand dollars, with interest *as aforesaid*, together with the costs and charges of such sale, and two per cent. upon the said principal and interest for lawyers' fees, which shall become a debt from said party of the first part upon filing the complaint in foreclosure, and the amount of all such other charges as are herein mentioned; and the overplus, if any there be, shall be paid by the party making such sale on demand to the party of the first part, heirs and assigns."

In February, 1877, a note was executed by defendants to plaintiff, of which the following is a copy:

"SAN FRANCISCO, February 20, 1877.

"\$2,000. On the first day of June, one thousand eight hundred and seventy-nine (1879), without grace, for value received, we jointly and severally promise to pay John Brickell, or order, two thousand dollars in gold coin of the United States, with interest thereon until paid, at the rate of one and a quarter per cent. per month, payable monthly in gold coin. Any interest which remains due and unpaid shall be added monthly to the principal, form part thereof, and bear interest at the same rate.

"DAVID F. BATCHELDER,

"MARIA BAKER BATCHELDER."

A mortgage was executed by defendants to the payee of this note to secure payment, bearing the same date with the note, containing the following stipulation, *inter alia*, to which we are directed, and on which reliance is placed:

"It is further agreed and understood that all arrearages of

monthly interest now existing, or hereafter to accrue, upon that certain note and mortgage made by said David F. Batchelder and Maria B. Batchelder to said John Brickell, dated June 1, 1874, (mortgage recorded in Liber 407 of Mortgages, at page 180, City and County of San Francisco), shall bear interest from the date respectively at which they *have accrued, or shall accrue*, at one per cent. per month, the same to be added monthly to the principal thereof."

In regard to the note and mortgage of June 1, 1874, we are of opinion that, taking the terms of the note and the stipulation above quoted from the mortgage, the plaintiff had the right, on default in the monthly payment of the interest, to commence an action to foreclose. The interest by the terms of the note was payable monthly, and there was a default in its payment, so alleged and not denied.

It would be difficult to detect any difference between a stipulation empowering a mortgagee to proceed to foreclosure on such default, and one giving authority on like default "to proceed to sell" "in the manner prescribed by law." The law prescribes but one mode of sale in the case of mortgaged property, and that is at public outcry, by virtue of an execution issued on a judgment of foreclosure. (C. C. P., §§ 684, 726, 744.) The power given in the mortgage by the clause just above quoted is to proceed to sell in the manner prescribed by law — which, in our judgment, is in substance the same as a power to proceed to sell by means of an action to foreclose. The power to sell in the manner prescribed by law being given, all means given by law to render such power effectual are also conferred; that is, all means necessary to effectuate a sale in the mode established by law are given. The power to use the lawful means necessary and proper to carry out the express power is conferred and given by an implication as strong and clear as if it was expressed in so many words. (C. C., § 1656.) This is a familiar and well-established rule in the construction of powers. (See Story on Agency, Secs. 55, 56, 58, 59, 60, 73; Wharton on Agency, Sec. 187.)

Let it be observed here that the choice of means is not left at large. It is limited to that which the law furnishes, and such means the plaintiff is allowed by the language of the contract to adopt. But it is urged that the proper interpretation

of the language of the note shows that such remedy was not to be allowed to plaintiff; that his only right, if the interest was not paid every month, was to add it to the principal and to have interest on it at the rate which the principal bore. To admit the soundness of this position would be to lay out of view the terms of the note, which binds the makers to pay the interest monthly. It would be to discard and reject the rule which requires one in looking for the true meaning of an instrument to accord to every word its just and proper meaning. (C. O., §§ 1639-1641; Broom's Leg. Maxims, 555 — *Ex-antecedentibus*, etc.)

Some stress is laid on the words "according to the terms of said promissory note," and attention is invoked to the use of the plural "terms," and it is said that "terms" refer as well to the clause of the note relating to the interest remaining due and unpaid, that "it shall be added monthly to the principal," etc., as to the clause relating to the payment of interest monthly. But it should be observed that the clause in the mortgage refers to a default in *the payment* of the interest or any part thereof, not to a default in adding it when unpaid to the principal. Indeed, such a default must refer to something to be done by the mortgagors. It could scarcely refer to something with which the mortgagors had nothing to do. The right to dispose of the interest due and unpaid in the mode prescribed in the note was given to the plaintiff mortgagee, not to the mortgagors. A failure to so dispose might arise from the concession of the plaintiff, and not from any default of the mortgagors, except by a default in paying the interest monthly. The language of the note and mortgage gave to the mortgagee the right on default to proceed to foreclose. He might delay it or waive it, but a delay in exercising this right could not be construed as depriving him of it.

The clause in the mortgage above quoted is entirely unlike that in *Bank of San Luis Obispo v. Johnson*, 53 Cal. 99. This dissimilarity will be apparent on comparing the clauses in the respective mortgages. Hence, the decision in that case can not rule the case under consideration.

But it is said that the clause above set forth in the mortgage of the twentieth of February, 1877, entirely alters the agreement made by the note and mortgage of June 1, 1874,

and that the effect of such clause is to postpone the payment of the note of June 1, 1874, with all unpaid interest on it, until the maturity of the note, five years after its date.

If the language is any indication of intent — and we must hold it to be indicative of the intent of or thought in the minds of the parties — we can not perceive how any such conclusion can be reached. If we collate and compare the note and stipulations in the respective mortgages, it must clearly appear that the stipulation of 1877 merely refers to the rate of interest which the arrearages of interest referred to in it are to bear — increases the rate from ten per cent. per annum to twelve per cent. per annum, and nothing more. The interest on the note at the rate fixed on is still to be paid *monthly*, and if it was not paid monthly, the party on whom the obligation rested to pay was still in default, and the stipulation in the mortgage of June 1, 1874, applied to it, and authorized the plaintiff to proceed to foreclose by suit. The agreement that the interest at the increased rate should be added to the principal remains unchanged, except the modification introduced by the clause in the mortgage of 1877.

In fine, the stipulation in the mortgage of 1877 only affects the note of June 1, 1874, and only affects that part referring to the interest not paid when it fell due monthly. It was only intended to modify the term of the note in relation to interest remaining due and unpaid, which was to be added to the principal. The effect was to modify the note, and that only in the particular above referred to, and to make it read as it had originally down to and including the words “payable monthly at the rate of ten per cent. per annum in like coin until paid,” and as to the remainder of the note, to read, “all arrearages of monthly interest now existing, or hereafter to accrue on this note, shall bear interest from the date respectively at which they have accrued, or shall accrue, at one per cent. per month, the same to be added monthly to the principal thereof. This note is secured by mortgage of even date herewith.”

We must construe these clauses and the first note together. This is the rule which ordinary foresight would indicate in order that the intent of the parties might be detected. The rule on this subject is well established by decided cases. They

are numerous. We will refer to some of them: *Doe v. Whitehead*, 2 Burr. 704; *Davies v. Bush*, 1 McCle. & Yo. 58; *Crop v. Norton*, 2 Atk. 74; *Osborn v. Phelps*, 19 Conn. 68, 89; *Isham v. Morgan*, 9 id. 374; *Thompson v. McClenachan*, 17 Serg. & R. 110; *Jackson v. Dunsbagh*, 1 Johns. Cas. 92; *King v. King*, 7 Mass. 496; *Chickering v. Lovejoy*, 13 id. 51; *Perry v. Holden*, 22 Pick. 269; *Stow v. Tifft*, 15 Johns. 458; S. C., 8 Am. Dec. 266; 2 Smith's L. C. 517. This rule is adopted as part of our statute law by the provisions of the Civil Code, Section 1642: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially the one transaction, are to be taken together," and when this is done the other rules in relation to interpretation must be applied, observing that "however broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." (C. C., § 1648.)

The clause in the first mortgage, giving the right to foreclosure, remained and was applicable to the modified terms of the note, and the clause in the mortgage of 1877 was a recognition by all the parties of the note and mortgage of June 1, 1874, as subsisting and valid from 1877, with the modification from the last date. We can not see that construction can make this matter any plainer. Further discussion would be "wasteful and ridiculous excess." No extent of argument could make it any plainer than the words employed make it.

Again, it is covenanted by the parties to the mortgage of June 1, 1874, "that the party of the first part [the mortgagors] shall pay all taxes upon the above-described premises," etc., and if the party of the first part, "in the performance of any of the covenants hereinafter expressed" (of which the covenant in relation to the payment of taxes, etc., is one), should make default, then the party of the second part (mortgagee) is empowered to sell the mortgaged premises. (See this stipulation fully set forth above.)

There was default in payment of taxes for the fiscal year 1877-8, amounting to \$580.45. Such default gave the plaintiff the right to proceed to foreclose, if there was no other. It makes no difference that the mortgagee had the right to pay the taxes and charge them to the mortgagors, the same to become part of the mortgage lien. The right to

foreclosure was not waived or lost, or the default condoned by the mortgagee plaintiff on his paying the taxes and charging the mortgagors as above, nor by the stipulation which appears above in the mortgage of 1877.

If the case of *Williams v. Townsend*, 31 N. Y. 411, is in conflict with what is stated above, we cannot accept it as law here, whatever it may be in New York. In that case an action was brought to enjoin the sale of mortgaged premises situated in the city of Buffalo, under a statutory foreclosure. The plaintiff, on the eighth of May, 1853, executed to assignor of defendant a bond and mortgage to secure the payment of \$2,640, in ten years from the date thereof, with annual interest. The mortgage contained a condition as follows: "And shall also pay all assessments, taxes, and charges on said premises to be charged on the same, and in case of default in paying the same," the mortgagee and her representatives might discharge such assessments, taxes, and charges, and collect the same, with interest, from the time of such payment under the mortgage, in the manner specified in the condition of the bond.

The condition in the bond relating to the question in this case was in these words: "And shall also pay all assessments, taxes and charges on the premises described in the mortgage bearing even date herewith and collateral hereto, and in case of any default in paying the same, the said" (obligees) "may discharge said assessments, taxes, and charges, and collect the same, with interest from the time of payment, as part of this bond and the said mortgage." The mortgage contained a power of sale, providing that if default should be made in the payment of all or any part of the said principal sum of \$2,640, or the assessments, taxes, and charges, as aforesaid, or of the interest thereof, at the time or times when the same ought to be paid, in such case the mortgagees were empowered to sell the same at public vendue, etc., and out of the moneys arising from such sale to keep and retain in their hands the said sum of \$2,640, together with such assessments, taxes, and charges, as shall have been paid by them, together with all costs, charges, and expenses on account of such sale or sales. In 1856, taxes amounting to \$33.66 were assessed by the city of Buffalo on the mortgaged premises, for which they were

sold at auction by the comptroller of the city on the twenty-seventh of May, 1857, for taxes, interest, and expenses, then amounting to \$36.75. The premises were bid off by one Viele as agent of defendant, and certificates in pursuance of the charter were issued to Viele, who took them in his own name for convenience of transfer. On the first of August, 1857, the defendant commenced a foreclosure under the statute by advertisement in one of the Buffalo newspapers. There was nothing then due of the principal or interest secured by the mortgage. Before the day of sale mentioned in the advertisement, plaintiff paid to the proper officer the amount legally necessary to redeem from the tax sale, and defendant refusing to discontinue the proceedings for foreclosure, the plaintiff commenced this action to restrain the sale. The plaintiff had judgment at special term, which was affirmed by the general term, and defendant appealed.

The opinion of the Court by Davis, J., in which all concurred, announces in the opening sentence this proposition, that, "by the condition of the bond and mortgage, the defendant undoubtedly had a right, after failure by the plaintiff to pay the taxes assessed on the mortgaged premises, to pay and discharge the same, and thereupon to collect the amount so paid by suit upon the bond or by foreclosure of the mortgage." It is then held that a purchase at a tax sale is not a payment of the tax so as to enable the mortgagee to proceed for a foreclosure, and not being paid, the action could not be maintained. This proposition is discussed at much length—which really disposed of the question on which the case was made to turn by the Court. The learned Judge then proceeds: "But it is urged that the failure of the plaintiff to pay the tax was a breach of the condition of the mortgage, and gave defendant a right to foreclose and collect the whole amount secured. There is no clause of the mortgage making the whole sum due on failure to pay the interest, or on breach of any condition. The clause which authorizes the retention by the mortgagee of the whole amount secured after a sale of the premises does not have the effect claimed for it; nor do I think it would countervail the provision of the statute which requires a sale in parcels, when that is practicable, and prohibits a sale of more than sufficient to pay the amount actually due, with the

expenses of sale. (3 R. S., 5th ed., p. 800, § 6.) But no right to foreclose would accrue upon a simple failure of the mortgagor to pay the taxes. To give that right, it is essential that the holder of the mortgage shall have paid off and discharged the assessment or tax, otherwise no money has become due which the mortgagee is entitled to retain on a sale. The language of the mortgage settles this, for it provides that '*such assessments, taxes, and charges as shall have been paid by them*' may be retained."

It will be observed that the learned Judge states, "there is no clause in the mortgage making the whole sum due on failure to pay the interest or on breach of any condition. The clause which authorizes the retention by the mortgagee of the whole amount secured after a sale of the premises does not have the effect claimed for it."

The clause in the mortgage is set forth above. It is in the power of sale, which provides that if default be made in the payment of taxes, etc. (see above), then and in such case the mortgagees were empowered to sell at public vendue, and out of the moneys arising from such sale or sales, to *keep and retain* in their hands the said sum of two thousand six hundred and forty dollars, together with such assessments, taxes, etc.

If such language does not authorize a party to proceed for a statutory foreclosure on failure to pay taxes by the mortgagor, it would be difficult to find any sufficient reason why. Words could not make it plainer, unless it be held that a power "to sell the premises at public vendue" does not vest such authority. But it is said by the learned Judge, there is no clause of the mortgage which makes the whole sum due, on failure to pay the interest, or on breach of any condition. As to what is said of interest, it may be laid out of view, as all the interest had been paid, and the statement as to interest is correct; but as to the breach of any condition, the Judge was surely mistaken. There was a condition in the mortgage to pay all taxes, etc., and the right to sell the *mortgaged premises* was given on failure by the mortgagor to pay. How then can it be said it was not given on breach of any condition? But it is said the clause which authorizes the collection of the moneys arising from the sales does not make the

whole amount due, and there is no clause in the mortgage to make it due. Then the mortgagee is authorized to proceed to sell and retain out of the proceeds all the principal and taxes, etc., and still there is nothing due. What does such language mean? Is it to be discarded as meaningless? No repugnancy appears which would compel its being disregarded. Is it not the fair construction that the default occurring, the mortgagee is allowed to proceed for the whole amount of principal as due, to collect it and apply it as directed? Is not this implied as strongly and clearly as language could make it, and is it not true that "all things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom"? (C. C., § 1656. The last clause of this section is not applicable here, and is not quoted.) If he is allowed to sell, certainly the whole is due under the rule just above quoted.

Further in regard to this case: no right to foreclose, it is said in the opinion, on simple failure of the mortgagor to pay the taxes. Why? The clause relating to the power of sale above quoted gives it in clear and plain words. It seems to us that the Judge was mistaken in saying the right of the mortgagee to proceed to sell only arose on payment of the taxes by her. The language employed speaks another way. The right to retain was given when paid by her. The mortgagee was not bound to pay the taxes. The judgment so holds (*Williams v. Townsend*, 31 N. Y. 415), and the right to retain was only given where it was necessary to enable her to retain, i. e., when she paid. It was useless for any purpose until she had paid. The only reason this term as to payment of taxes was inserted was to make it clear that the mortgagee might retain when she did pay them. It was not to abridge the right to proceed to sell before given, but to give authority to retain when paid, which payment might occur when the proceedings were pending, and which the mortgagee might be compelled to make to protect her security.

Unless the judgment in the case cited proceeds on some rule peculiar to the jurisprudence of New York, and not stated in the opinion (for the reason that it was so well known to

the Court that it was unnecessary to state it), we can not see how the conclusion reached by Davis, J., can be sustained.

The clause in the mortgage in this case is different from the one in the New York case, as construed by that Court. It authorizes the mortgagee, on failure to pay the interest, or any part of it, according to the terms of the note, or on failure to perform any of the covenants hereinafter expressed, of which the covenant to pay taxes is one, to proceed to sell *the premises in the manner prescribed by law*, and out of the money arising from the sale to retain the whole sum of \$36,000, with interest as aforesaid, together with costs and charges of such sale, and lawyers' fees, and the amount of all such other charges as are mentioned in the mortgage, and the surplus, if any there be, to be paid to the mortgagors. The prior payment of the taxes was not essential to commence the action, and if it was, the mortgagee had paid them before commencing it.

It is not apparent that any question has been made by counsel for appellants as to the consideration of the agreement, made by the above-quoted clause from the mortgage of 1877. It was sustained by sufficient consideration—the consideration which sustained the mortgage of 1877 sustained the agreement made by this clause. This is evident from the language with which the clause commences, "It is further agreed and understood," which places it in the same category with all the other promises of the mortgage agreement, and makes the same consideration applicable alike to all. The same consideration sustains each and every pact or promise in the agreement. "*Verba illata in esse videntur.*" (Broom's Leg. Maxims, 645, 646, *et seq.*) The words above quoted are words of reference. In other words, it may be said that every pact or promise in the mortgage springs out of, or is born of and fed by, the same consideration. (See notes to *Roe v. Transmarr*, 2 Smith's L. C. 515, *et seq.*) In drawing instruments of any kind where a consideration is essential, it is not necessary, nor is it the practice, to repeat the consideration upon the insertion of every several promise or covenant. The mention of it once is generally considered sufficient. (O. C., §§ 1614, 1641.) *Haggerty v. The Allaire Works*, 5 Sandf. S. C. 231, is cited by counsel for appellants. To what point arising in

the case it is applicable we can not perceive. In that case it was held that the interest on a bond and mortgage was properly computed at seven per cent. per annum, raised by agreement from six per cent. from a certain date in December, 1842. Two reasons were given: "1. Because the agreement for raising the interest from six to seven per cent. was valid in law, *the consideration of forbearance* being necessarily implied, and the continuance of the agreement being co-extensive with the forbearance; 2. Because it was sufficiently proved that the agreement was adopted and acted upon by the defendants, and it was therefore unimportant whether it was originally made by Allaire under their authority."

We presume this judgment of the Court to be correct, but it is no authority to construe the covenant in the mortgage of 1877 above referred to, to be sustained by the consideration of forbearance, and that therefore the mortgagee agreed to forbear until the maturity of the note of June 1, 1877, five years after date. There being a sufficient consideration expressed in the mortgage of 1877, none can be implied; as was done in the case cited. "*Expressum facit cessare tacitum.*" (Broom's Leg. Maxims, 630. See rules for interpretation of contracts, C. C., division 3, part 2, title 3.)

The Section 1175, from Jones on Mortgages, a portion of which is quoted in brief for appellants, sustains the views taken in this opinion. (See the section and cases cited in it, particularly *Pope v. Durant*, 26 Ia. 233; *O'Connor v. Shipman*, 48 How. Pr. 126.) *Williams v. Townsend* is referred to in it. That has been above considered. No further observations as to this citation of appellants are requisite.

At the time the note of first of June, 1874, was executed by the defendants, Batchelder and his wife, a married woman was unable to make a contract for the payment of money. Such was the express language of Section 167 of the Civil Code. (*Butler v. Baber*, 54 Cal. 178.) This section was changed by the Legislature of 1873-4, so that a married woman could make such a contract and bind herself by note and mortgage. (*Parry v. Kelley*, 52 Cal. 334; *Wood v. Orford*, id. 412; *Marlow v. Barlew*, 53 id. 458; *Alexander v. Bouton*, 55 id. 19, 20.) But this did not go into effect until the first of July, 1874.

Consequently the note of June 1, 1874, at the time of its execution, did not bind the wife.

It is conceded by respondent, that the note of June 1, 1874, was not binding on the defendant, Maria B. Batchelder, and never bound her personally, and though the facts in the case show strong grounds to hold otherwise, in consequence of the recognition by her for a new consideration, in the clause quoted from the mortgage of 1877, of this note in all its terms as a valid obligation, such recognition having been made when the disability to contract for the payment of money no longer existed, yet as the point is conceded, we say nothing further in regard to it; intending by this to leave the point open for decision should it again come before us. The mortgage of 1874 and the other mortgages are, in our opinion, binding on Mrs. Batchelder, the above-named defendant.

When the notes appearing in the record, other than the note of June 1, 1874, were executed by the defendant Maria, she was competent to make such notes, and they bind her.

It follows from the above that the Court below erred in rendering a personal judgment against Mrs. Batchelder on the note of June 1, 1874, and the interest on it, and the decree will be modified in that regard. In other respects the judgment is correct and is affirmed.

Counsel for respondent will prepare a decree modified in accordance with the views herein expressed, and present it on notice to the Chief Justice of this Court.

MORRISON, C. J., and MYRIOK and SHARPSTEIN, JJ., concurred.

After the foregoing decision was rendered, a rehearing was had in Bank, upon which the following decision was rendered:

The COURT:

This case was heard before Department One of this Court, and its opinion filed June 24, 1881. (7 Pac. C. L. J. 733.) Subsequently, a hearing before the Court in Bank was granted. Such hearing having been had, an opinion by the Court in Bank was filed May 30, 1882. (9 id. 515.) Thereafter a re-

hearing in Bank was granted. Such rehearing has been had. We are satisfied with the views expressed in the opinion of the Court in Bank; and for the reasons therein given, the Court now makes the same order, and gives the same judgment as therein contained.

McKINSTY, McKEE, and Ross, JJ., dissented.

[No. 8,510. — In Bank.]

December 28, 1882.

THE SAN FRANCISCO GAS COMPANY v. HENRY
BRICKWEDEL.

MANDAMUS — DEBT OF MUNICIPALITY — CONSTITUTIONAL LAW. — *Mandamus* to the defendant, as Auditor of San Francisco, to compel him to audit certain bills for gas furnished the city. . The defense set up in the answer was: 1. That the revenue for the year in which the indebtedness was incurred had been exhausted at the time of the presentation of the bills; and, 2. That the plaintiff was indebted to the city and county in a larger amount for taxes.

Held: Under Section 18 of Article xi. of the Constitution, no indebtedness or liability can be incurred by a municipality (except in the manner therein stated) exceeding in any year the income and revenue actually received by it. In other words, each year's income and revenue must pay each year's indebtedness and liability, and no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year.

Id. — Id. — TAXES — DEBT — DEFINITION. — THORNTON, J., concurring in the leading opinion, was also of the opinion that a tax is a debt within the meaning of Section 82 of the Consolidation Act; and that under that section the plaintiff, if the allegations of the answer were true, was not entitled to the writ.

Id. — Id. — Id. — McKINSTY, J., was of the opinion that the writ ought not to issue, and therefore dissented from the order of reference.

APPLICATION for writ of *mandamus* to Henry Brickwedel, Auditor of the City and County of San Francisco, to compel him to audit certain demands for gas furnished to said city and county.

Clement, Osmend, & Clement, for Plaintiff.

John F. Swift and J. F. Cowdery, for Defendant.

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Ross, J.:

We think it clear that when the framers of the present Constitution said, as they did by Section 18 of Article xi. of that instrument, that "no county, city, town, township, board of education, or school district shall incur any indebtedness or liability, in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two thirds of the qualified electors thereof, voting at an election to be held for that purpose," etc., they meant that no such indebtedness or liability should be incurred (except in the manner stated) exceeding in any year the income and revenue actually received by such county, city, town, township, board of education, or school district. In other words, that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year. The system previously prevailing in some of the municipalities of the State by which liabilities and indebtedness were incurred by them far in excess of their income and revenue for the year in which the same were contracted, thus creating a floating indebtedness which had to be paid out of the income and revenue of future years, and which, in turn, necessitated the carrying forward of other indebtedness, was a fruitful source of municipal extravagance. The evil consequences of that system had been felt by the people at home and witnessed elsewhere. It was to put a stop to all of that, that the constitutional provision in question was adopted. The change was eminently wise. A somewhat similar provision in the old Constitution with respect to State indebtedness saved the people of the State a vast amount of money. (*People v. Johnson*, 11 Cal. 503; *Nouques v. Douglass*, 7 id. 65.)

We have neither the right nor the disposition, by judicial interpretation, to take away the wholesome restriction upon municipalities thus imposed by the Constitution. Of course, in giving effect to this radical change from the pre-existing condition of things, it will not be strange if some shall be found to suffer. But it must be remembered that all are presumed to know the law, and that whoever deals with a munici-

pality is bound to know the extent of its powers. Those who contract with it, or furnish it supplies, do so with reference to the law, and must see that limit is not exceeded. With proper care on their part and on the part of the representatives of the municipality, there is no danger of loss.

From the petition and the answer before us we are unable to ascertain the facts essential to the proper determination of the petitioner's application. The answer sets up affirmatively certain matters of fact, which are by the law deemed denied by the petitioner. For the purpose of ascertaining the ultimate facts in respect to the income and revenue of the city and county for the fiscal year 1881-2, and in respect to the disposition and disbursement of that income and revenue, and in respect to petitioner's demands, we must refer the cause for proof and findings.

Ordered that the cause be and is hereby referred to Honorable J. F. Finn, Judge of the Superior Court of the City and County of San Francisco, who will, on proper notice to the respective parties, take proof and report findings of fact to this Court in accordance with the views above expressed.

MYRIOK and McKEE, JJ., concurred.

THORNTON, J., concurring.

I concur in the view taken by Justice Ross of the twelfth section of Article xi. of the Constitution, and desire to say what follows in addition.

The demands preferred by the petitioner in this case, for which the writ of mandate is asked, amount to the sum of \$178,648.98.

It is set forth in the answer to the petition that there is due by the petitioner, the San Francisco Gas Light Company, to the Treasury of the City and County of San Francisco, the sum of \$195,465.38, for taxes, for fiscal years 1880-1 and 1881-2, no part of which has been paid — an amount, it will be seen, largely in excess of the demands of the petitioner.

It is contended on behalf of respondent that petitioner is indebted for these taxes as above stated, and as the amount of indebtedness exceeds the amount of the demands of petitioner, the Auditor is justified in not allowing these demands;

and to support this contention, we are referred to Section 82 of the Consolidation Act. By this section it is provided, *inter alia*, that "no demand upon the Treasury shall be allowed by the Auditor in favor of any person or officer in any manner indebted thereto, without first deducting the amount of such indebtedness."

We have no doubt that the petitioner, though a corporation, is a person within the meaning of the clause above quoted. We can not conclude that the law-makers intended to make one rule for natural persons and another for artificial persons as to the subject-matter of this clause. The word "person" here is intended to include persons both natural and artificial.

If this indebtedness for taxes bring the petitioner within the provision above quoted from the Consolidation Act, the Auditor is justified in not allowing the demands.

The question to be determined is the effect of the delinquency of a person in the payment of taxes, on his right to have a claim allowed against the City and County Treasury.

It will be observed that the language quoted from the above-mentioned Section 82 is broad and general. It refers to a person "*in any manner indebted thereto*," i. e., to the City Treasury. Taxes are not debts due by contract, express or implied. Such is the remark made in the opinion in *Perry v. Washburn*, 20 Cal. 350, by Field, C. J., in relation to the proper meaning of the word "debts" in the Act of Congress passed twenty-fifth of February, 1862, commonly known as the *Legal Tender Act*. Referring to the provision in that Act, which declares that the notes issued under its authority shall be "a legal tender in payment of all debts, public and private," the opinion proceeds: "Taxes are not debts within the meaning of this provision. A debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract; it does not establish the relation of debtor and creditor; it does not draw interest; it is not the subject of attachment; and it is not liable to set-off. It owes its existence to the action of the legislative power, and does not depend for its validity and enforcement upon the individual assent of the tax-payer. It operates *in invitum*."

That a sum of money does not draw interest, is not the subject of attachment, and is not liable to set-off, does not prevent it from being a debt. At common law, debts did not draw interest, were not subject to attachment, and were not liable to set-off. There was a limited power in courts of equity to set off or compensate one debt for another, under certain circumstances (see Story's Eq. Jur., §§ 1431, 1432, 1433), but the general right of set-off was allowed by the statutes passed in the reign of George II. Interest on debts was not allowed until authorized by statutory enactment, and it is well known that attachment or garnishment grew out of a custom which prevailed in the city of London, and had no existence outside of that city until allowed by statute. The process of attachment in the various States of the Union exists by virtue of legislative acts. These qualities of a debt might by legislative action be made to apply to taxes. I know of no restriction upon the power of the Legislature which could prevent it from passing such a law. But, as is remarked in the opinion above cited, "the term debt, it is true, is popularly used in a far more comprehensive sense, as embracing not merely money due by contract, but whatever one is bound to render to another, whether from contract or the requirements of the law," and I am of opinion that the form of expression used in the eighty-second Section above mentioned is used in the larger sense; that when the Legislature employed the words "in any manner indebted," it referred to a case of obligation to pay, however such obligation arose, whether from contract or by operation of law. Under our revenue laws the sum mentioned in the answer as due and unpaid for taxes, when paid, goes into the City Treasury, and is due to it. The view above taken is sustained by Section 3716 of the Political Code, which is as follows:

"Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof." The law here creates the personal obligation to pay, and to pay a sum certain and fixed by lawful authority. These, *i. e.*, the personal obligation and the certainty of the

sum, are the most striking characteristics of a debt. (See further on this point, *Moore v. Patch*, 12 Cal. 270; *People v. Seymour*, 16 id. 340; *Dugan v. Baltimore*, 1 Gill & J. 499; 2 Bl. Com. 464, 465.)

If the petitioner has any legal defense to the payment of the taxes herein referred to, such defense could not be made in an action for the writ of mandate.

The legislation as interpreted above is eminently just and reasonable. A tax-payer should not be allowed to have a claim against a municipal corporation satisfied when he owes to such corporation the money which goes to furnish the means of discharging his claim.

If the facts are as set forth in the answer (and for the purposes of this opinion they must be held to be so), the Auditor is justified in withholding his allowance from the demands of the petitioner. It was within the discretion vested in him by law to refuse his *allocatur*, and it was his duty to do so.

As the case now stands, the writ should be denied. But for the purpose of bringing before the Court the question discussed in the opinion of Justice Ross, I concur in the order of reference.

McKINSTRY, J., dissenting:

Because, at the hearing, certain allegations in the answer were admitted to be true, I am of opinion, as at present advised, that the writ ought not to issue, and therefore dissent from the order. With reference, however, to all questions involved, I reserve to myself the benefit of any further argument on the coming in of the report of the referee appointed by the Court.



VOLUME LXII.

62 Cal. 1-6. CONDEE v. BARTON.

Conclusions of Law may be changed by the court at any time before entry of the judgment, p. 6.

Cited in *O'Brien v. O'Brien*, 124 Cal. 426, noted under *Hayes v. Wetherbee*, 60 Cal. 396. Distinguished in *Estate of Cook*, 77 Cal. 229, 11 Am. St. Rep. 274, holding that a judgment by default which was not entered for five years, through neglect of the clerk, took effect as from the date of rendition; *Crim v. Kessing*, 89 Cal. 489, 23 Am. St. Rep. 498, holding that the judgment was rendered at the date the findings were filed. Cited in *Brady v. Burke*, 90 Cal. 5, holding that until a judgment is entered, the court retains complete jurisdiction of the case; *Broder v. Conklin*, 98 Cal. 363, to same effect as the principal case; *Los Angeles v. Lankershim*, 100 Cal. 532, holding that findings cannot be changed after the entry of final judgment while the judgment is allowed to stand; *Fresno Bank v. Dusy*, 110 Cal. 76, to same effect.

Judgment not Final Till Recorded, p. 6.

Cited in *Crim v. Kessing*, 89 Cal. 491, 23 Am. St. Rep. 499, holding the statute of limitations runs from entry of the judgment, and *Herrlich v. McDonald*, 104 Cal. 553, to same effect; *State v. Brown*, 31 Wash. 402, order of court, though signed and handed to clerk for entry, does not become finality until actually entered, and may be modified or annulled at any time before it is spread upon record.

62 Cal. 6-9. STEELE v. MERCED COUNTY.

Service by Mail.—The affidavit must show that all the requirements of the statute have been observed, p. 9.

Cited in *Insurance Company v. Shepardson*, 76 Cal. 377, holding that it must be shown there was a regular mail communication between the places; *Thompson v. Brannan*, 76 Cal. 620, to same effect as the principal case.

Notes Cal. Rep.—194. 3089

62 Cal. 9-18. PRIET v. HUBERT.

Dupont Street Widening.—When several persons claim a warrant for compensation, the decree must determine the amount due each, p. 18.

Referred to in *Priet v. De la Montanya*, 85 Cal. 150, in holding as to the liability of the bondsmen of the treasurer of San Francisco for warrants on the Dupont Street fund.

62 Cal. 20-27. CAMP v. GRIDER.

Title Acquired Subsequent to Mortgage inures for the benefit of the mortgagee, p. 25.

Cited in *Orr v. Stewart*, 67 Cal. 277, confirming the ruling when the title was acquired from the government; *Stewart v. Powers*, 98 Cal. 520, holding that a mortgage in fee by a pre-emption claimant before final proof and payment carries the after-acquired title; *Weber v. Laidler*, 26 Wash. 148, fact that entryman under homestead act mortgages homestead before actual entry thereon does not invalidate mortgage; note to 76 Am. Dec. 458, on mortgage carrying after-acquired title of mortgagor; note to 52 Am. St. Rep. 251, on encumbrances by pre-emptors.

Mortgage on Homestead must be presented for allowance as a claim against estate of deceased homesteader, or foreclosure will not be decreed, pp. 26, 27.

Cited in *Bank of Woodland v. Stephens*, 144 Cal. 663, 664, but holding rule inapplicable to probate homestead; *Wise v. Williams*, 72 Cal. 547, holding that a claim so presented is not affected by the statute of limitations; *Bollinger v. Manning*, 79 Cal. 11, 12, holding that although an action to foreclose was commenced in the life of the homesteader, the claim must still be presented, and (p. 12) reaffirming the decision of the principal case; *Building Assn. v. King*, 83 Cal. 442, 443, sustaining the ruling, although the wife was a party to the note and mortgage; S. C. p. 444, confining the ruling of the principal case and section 1475 of the Code of Civil Procedure to mortgages on homesteads; *Hearn v. Kennedy*, 85 Cal. 57, holding that a suit to foreclose a joint mortgage where the claim has not been presented was subject to a general demurrer; *Rosenberg v. Ford*, 85 Cal. 612, holding that a mortgage to secure in part a debt secured by a mortgage of a homestead, for which no claim had been presented, was void as to the amount of the homestead mortgage; *Sanders v. Russell*, 86 Cal. 122, 21 Am. St. Rep. 28, holding that the holder of a judgment against a surviving spouse cannot secure an order for partition or sale of the homestead after the death of the surviving spouse, without presenting the claim; *Perkins v. Onyett*, 86 Cal. 350, holding that a joint mortgage of a homestead on community property must be presented, other-

wise a foreclosure decree would be reversed; *Wise v. Williams*, 88 Cal. 33 (being a rehearing of the case in 72 Cal. 547, *supra*), reaffirming the principal case; *McGahey v. Forrest*, 109 Cal. 67, holding that the principal case did not apply to probate homesteads. Distinguished in *Weinreich v. Hensley*, 121 Cal. 653, homestead executed by husband and wife on homestead selected by wife from husband's separate estate, without his assent, which had ceased to exist on his death, may be foreclosed without presenting claim against his estate; *Bull v. Coe*, 77 Cal. 62, 11 Am. St. Rep. 241, holding that the principal case did not apply to a mortgage of a homestead on the separate property of the surviving spouse.

62 Cal. 27-29. PEOPLE v. DOGGETT.

Defendant is entitled to an instruction that proved good reputation should be weighed as any other fact established, and might be sufficient to create a reasonable doubt as to guilt, p. 29.

Cited in *People v. Griffith*, 146 Cal. 345, upholding refusal to give instruction that defendant was presumed to be man of good character, in absence of evidence to contrary, where no evidence as to his character introduced; *State v. Sloan*, 22 Mont. 301, noted under *People v. Smith*, 59 Cal. 601; *People v. French*, 137 Cal. 219, noted under *People v. Ashe*, 44 Cal. 288; *State v. Van Kuran*, 25 Utah, 16, following rule; *State v. Spendlove*, 47 Kan. 169, example of erroneous instruction as to; *State v. Schleagel*, 50 Kan. 329, holding testimony on the point not to be excluded; *Moore v. State*, 96 Tenn. 219, holding that evidence must be of previous good character; note to 53 Am. Dec. 134, as to evidence of character in criminal cases.

62 Cal. 29-32. DAVENPORT v. CREDITORS.

Insolvency—Charge of Fraud.—Issue of fraud on the part of the insolvent having been joined, it was the duty of the court to summon a jury to decide it, pp. 31, 32.

Cited in *Hinkel v. Creditors*, 63 Cal. 331, holding that a charge of fraud by a creditor assignee must be met and tried.

62 Cal. 32-37. DOUGHERTY v. ROSENBERG.

Statute of Frauds.—An agreement by A to wait till he had recovered final judgment against C before bringing suit against B is not within the statute, as the event might occur within a year, p. 36.

Cited in *Raynor v. Drew*, 72 Cal. 309, applying the ruling to a lease by a mortgagor to a mortgagee, to continue during the existence of the debt; note to 93 Am. Dec. 89, on contracts not to be performed within a year.

62 Cal. 38-40. TAYLOR v. HUGHES.

Fish Commissioners.—Certiorari to review judgment of conviction under section 637, Penal Code, denied, p. 40.

Distinguished in *Schaezlein v. Cabaniss*, 135 Cal. 470, holding void Statutes of 1889, page 3, and granting writ.

62 Cal. 40-42. SANTA CRUZ COUNTY v. SUPERVISORS.

An adjudication by the superior court upon the merits of an application for a prerogative writ is appealable, but cannot be reviewed, pp. 41, 42.

Cited in *Knowles v. Thompson*, 133 Cal. 248, denying mandamus because of existence of such right of appeal; *State v. Trammel*, 106 Mo. 520, holding that a writ of mandamus issued by a circuit court of United States could not be reviewed by state supreme court; *State v. Lenahan*, 17 Mont. 519, holding that where certiorari had been refused the remedy was by appeal.

62 Cal. 43-44. RHODES v. SPENCER.

Equity Case.—When a new trial has been granted of the special issues submitted to a jury, mandamus will not lie to compel the court to proceed with the hearing of the remaining issues, p. 44.

Cited in *Raisch v. Board of Education*, 81 Cal. 550, by Thornton, J., arguing that the grant of a writ of mandamus could not issue to compel a board of education to draw a warrant for goods supplied under contract.

62 Cal. 49-50. FRAZER v. SUPERIOR COURT.

Statement on Motion for New Trial presented to the court in skeleton, referring to but not setting out the reporter's notes, is wholly insufficient, p. 50.

Cited in *Visher v. Smith*, 92 Cal. 62, holding that the judge cannot be compelled to settle a bill of exceptions in skeleton; *State v. Napton*, 28 Mont. 339, referee is justified in refusing to settle bill of exceptions which recites, "The following testimony was taken before the referee (clerk will here insert testimony)."

62 Cal. 50-55. PEOPLE v. PICO.

Larceny—"Horse" Includes "Mare."—The use of the word mare, in section 487, subdivision 3 of the Penal Code, does not modify the common law rule, p. 52.

Cited in *People v. Monteith*, 73 Cal. 9, holding that "horse" included "gelding"; *State v. Gooch*, 60 Ark. 220, holding that "horse" is a generic term and includes a mare.

Insanity.—It is for the court to determine if the witnesses are "intimate acquaintances," and if there is no abuse of discretion, the decision will not be interfered with, p. 55.

Cited in *People v. Levy*, 71 Cal. 623, holding the determination of the competency of a witness to testify concerning sanity is within the discretion of the trial court; *People v. Fine*, 77 Cal. 149, to the same effect; *Estate of McKenna*, 143 Cal. 584, holding discretion not abused in will contest; *State v. Barry*, 11 N. Dak. 442, upon issue of insanity, competency of layman to give opinion as to sanity or insanity is for court to determine, and determination not disturbed unless abuse shown. Distinguished in *Estate of Carpenter*, 79 Cal. 386, holding that where the showing of intimacy is sufficient the witness should be allowed to give his opinion as to insanity; *Wheelock v. Godfrey*, 100 Cal. 584, holding that the question of "how intimate a witness was" was properly left to the discretion of the court; *People v. Lane*, 101 Cal. 516, holding to the same effect; *People v. Schmitt*, 106 Cal. 52, holding to the same effect; *Estate of Wax*, 106 Cal. 351, to the same effect as *Wheelock v. Godfrey*, *supra*; *People v. McCarthy*, 115 Cal. 258, holding the ruling of the trial court will not be disturbed except where it is clear that the discretion has been improperly exercised; *State v. Lewis*, 20 Nev. 348, holding that the admissibility of the testimony must be left to the discretion of the presiding judge; *State v. Hansen*, 25 Oreg. 395, holding that the exercise of discretion will not be reviewed except in case of abuse.

Insanity.—Submission of question to jury after conviction is within discretion of court, p. 55.

Cited in *State v. Peterson*, 24 Mont. 86, on point that preliminary examination as to insanity is within court's discretion, and on same point in *State v. Nordstrom*, 21 Wash. 407.

It is no error to instruct that a defense of insanity is open to suspicion and must be examined with care, p. 54.

Cited in *People v. Owens*, 123 Cal. 489, on point that doctrine of irresistible impulse is unknown in this state; *People v. Methever*, 132 Cal. 331, noted under *People v. Dennis*, 39 Cal. 636; *People v. Donlan*, 135 Cal. 492, quoting *People v. Larrabee*, 115 Cal. 159; *People v. Sueser*, 142 Cal. 365, approving instructions given; *Marceau v. Travelers' Co.*, 101 Cal. 343, exemplifying a correct instruction; *People v. Larrabee*, 115 Cal. 159, to the like effect; *People v. McCarthy*, 115 Cal. 264, to the like effect, and suggesting that courts in giving instructions on this point should follow approved language; *People v. Kloss*, 115 Cal. 577, to the like effect, and holding further that in giving this instruction the court did not invade the province of the jury by instructing as to matters of fact; *Fatjo v. Pfister*, 117 Cal. 83, to the like effect.

It is correct to instruct that in all other matters except that of insanity, defendant is entitled to every reasonable doubt, p. 54.

Cited in *Lovegrove v. State*, 31 Tex. Cr. 492, approving a charge that defendant must establish his plea of insanity by a preponderance of testimony; note to 76 Am. St. Rep. 97.

62 Cal. 60-65. STEVENSON v. SUPERIOR COURT.

Administration of Estate of Living Person cannot be granted. The proceedings are absolutely void ab initio and throughout. Probate court has power to order the proceedings vacated and annulled, p. 64.

Cited in *Carr v. Brown*, 20 R. I. 222, 78 Am. St. Rep. 861, holding statute void providing for administration in case of absence for certain period; *Costa v. Superior Court*, 137 Cal. 81, 82, denying right of probate court to order administrator to turn over funds to alleged decedent. Distinguished in *Thompson v. Samson*, 64 Cal. 333, differentiating proceedings void and voidable. Cited in *Kahn v. Board of Supervisors*, 79 Cal. 400, holding that a grant of letters was not conclusive, and if the party were in fact alive, the grant was void; *Thomas v. People*, 107 Ill. 522, 47 Am. Rep. 459, approving the ruling of the principal case; *Perry v. St. Jo. Ry. Co.*, 39 Kan. 423, to same effect as the principal case; *Chauncey v. Wass*, 25 Minn. 35, in dissenting opinion of Vanderburgh, J., to illustrate the difference between void and voidable orders; *Springer v. Shavender*, 118 N. C. 44, 54 Am. St. Rep. 712, laying down three propositions as to void judgments; *Scott v. McNeal*, 154 U. S. 43, holding that a judgment by the highest court of a state, affirming the title to land of a purchaser from an administrator of a living person who had no notice of the sale, deprived the living person of his property without due process of law and was reviewable on a writ of error by the supreme court of the United States. Notes to 73 Am. Dec. pp. 126, 127, on administration of estate of living person; note to 79 Am. Dec. 66, on validity of grant of administration; note to 81 Am. Dec. 132, on conclusiveness of probate of will; note to 47 Am. Rep. 465.

62 Cal. 65-67. GARLICK v. BOWER.

Verdict Insufficient.—In an action to recover possession, or value, and damages, a verdict for plaintiff assessing damages at a sum stated is not responsive to the issues, and may be set aside, pp. 66, 67.

Cited in *Vandeford v. Foster*, 62 Cal. 180, holding on a state of facts similar to the principal case that a new trial should have been granted; *Stewart v. Taylor*, 68 Cal. 6, holding on an action similar to the principal case the verdict was insufficient which failed to find the value of the property.

62 Cal. 67-68. HOLLAND v. GREEN.

Forcible Entry and Detainer.—To sustain this action there must be

avement and proof that the party in possession was turned out by force, threats or menacing conduct, p. 68.

Cited in *Kerr v. O'Keefe*, 138 Cal. 422, holding complaint sufficient; *Morse v. Boyde*, 11 Mont. 250, holding that where the alleged entry was only a refusal to give possession, and was without violence, the action could not be sustained, and that ejectment was the proper remedy.

Entry in Good Faith.—A lease to one of the parties entering, offered to show good faith, was properly excluded, p. 68.

Cited in note to 27 Am. Dec. 554, on color of title in forcible detainer.

Good Faith in entry is a defense, p. 68.

Cited in *Carteri v. Roberts*, 140 Cal. 166, noted under *Voll v. Hollis*, 60 Cal. 569.

62 Cal. 69-119. SPRING VALLEY WATER WORKS v. SCHOTTLER.

Referred to generally in *Spring Valley W. W. v. Schottler*, 62 Cal. 119, as being similar in facts to the principal case, and leading to the same decision.

Rules of Board of Equalization are not part of the record on certiorari, p. 100.

Cited in *Hagenmeyer v. Mendocino Co.*, 82 Cal. 216, holding that the party making the return to the writ cannot be heard to complain of the inclusion therein of rules as to notice.

Actual Notice of intended action by board of equalization is sufficient, if in time to allow of a hearing, unless it appears affirmatively that a fair hearing was denied by the action of the board, p. 103.

Cited in *Hagenmeyer v. Mendocino Co.*, 82 Cal. 217, as to sufficiency of a notice by mail; *Allison Co. v. Nevada Co.*, 104 Cal. 164, as to notice to a corporation through an official.

Appearance Waives Defects in Form of notice to show cause, p. 103.

Cited in *Farmers' Bank v. Board*, 97 Cal. 325, holding that a defect in the notice was waived by appearance before the board; *Railroad Co. v. Standing*, 13 Utah, 493, to same effect.

Franchise of a Water Works Company is property liable to taxation, pp. 105-116.

Cited in *People v. City of Oakland*, 92 Cal. 614, holding that the right of a municipal corporation to levy taxes is a franchise; *Spring Valley W. W. v. Barber*, 99 Cal. 38, holding that the mere right to lay pipes through an adjoining county is a bare right of way, and not assessable as a franchise; *People v. National Bank*, 123 Cal. 60, 69 Am. St. Rep. 37, *Bank of California v. San Francisco*, 142 Cal. 279, et passim, and *Lewiston etc. Co. v. Asotin Co.*, 24 Wash. 375-377, noted under *People*

v. Badlam, 57 Cal. 594; Merchants' etc. Co. v. Sterling, 124 Cal. 432, 71 Am. St. Rep. 96, discussing nature of goodwill of corporation; Commercial etc. Co. v. Judson, 21 Wash. 56, quoting State v. Anderson, 90 Wis. 561; Gulf etc. Co. v. Hewes, 183 U. S. 78, construing local (Mississippi) statutes; London and San Francisco Bank v. Block, 117 Fed. 905, under California constitution and laws, franchise of foreign banking corporation engaged in business in California "to be" a corporation is not taxable as franchise; corporation's franchise "to do business" in such state is taxable; State v. Anderson, 90 Wis. 561, holding the franchises of a street railroad company are liable to taxation as personal estate.

Spring Valley Water Works Company is a corporation having power to use the streets of San Francisco under the act of 1858, p. 218, and to supply water and collect rates and to divide its capital stock into shares, pp. 104, 105.

Cited in San Francisco v. Spring Valley W. W., 63 Cal. 531, to same effect.

62 Cal. 120-123. PEOPLE v. HOIN. 45 Am. Rep. 651.

Irresistible Impulse, if it exists, does not constitute that insanity which is a legal defense, p. 123.

Cited in People v. Sewell, 145 Cal. 299, when question to jurors tended to bring out expressed prejudice against defense of insanity, which really related to feigned insanity, and jurors stated they had no prejudice against real insanity, challenge properly denied; People v. Kernaghan, 72 Cal. 617, in dissenting opinion of Temple, J., arguing that the charge given as to emotional insanity was not in accord with the rule laid down by the principal case; S. C., p. 622, in dissenting opinion of Thornton, J., approving the definition of emotional insanity in the principal case. Approved in Marceau v. Travelers' Ins. Co., 101 Cal. 342, as a correct exposition of the law. Cited in same case, p. 346, giving the effect of an instruction in somewhat vague terms, which did not offend against the rule laid down in the principal case; People v. Ward, 106 Cal. 343, and People v. Hubert, 119 Cal. 223, 63 Am. St. Rep. 77, holding that the doctrine of "uncontrollable impulse" has no legal standing in this state; People v. McCarthy, 115 Cal. 264, to the same effect; People v. Barthleman, 120 Cal. 11, to the same effect; People v. Owens, 123 Cal. 489, People v. Methever, 132 Cal. 332, and State v. Knight, 95 Me. 479, holding instruction properly refused; Leache v. State, 22 Tex. App. 310, 58 Am. Rep. 644, holding that if the accused had sufficient intelligence to know what he was doing, and the will and the power to do or not to do it, he was in contemplation of law responsible; State v. Harrison, 36 W. Va. 748, holding that knowledge of right and wrong is the correct test, and discarding the theory of

irresistible impulse; note to 27 Am. St. Rep. 811, on insanity as a defense to crime; note 63 Am. St. Rep. 100.

62 Cal. 125-139. **HAM v. SANTA ROSA BANK.** 45 Am. Rep. 654.

Declaration of Homestead, containing the statements required by section 1237 of the Civil Code, duly executed, acknowledged and recorded is valid, p. 134.

Referred to in *Graves v. Baker*, 68 Cal. 133, but with what object cannot be ascertained. Cited in *Galligher v. Smiley*, 28 Neb. 195, 26 Am. St. Rep. 324, holding that a homestead right once acquired could not be diminished without the consent of the homesteader; note to 63 Am. Dec. 124, on homestead rights; note to 91 Am. Dec. 644, on homestead defined.

The homestead may exceed the value limit and the excess in value is subject to claims of the creditors, p. 138.

Cited in *Tiernan v. Creditors*, 62 Cal. 288, holding that when the declaration stated the value at eight thousand dollars, the homestead was valid up to the statutory limit, but that only one house could be set apart as a homestead; *King v. Gotz*, 70 Cal. 242, holding that a declaration of value of seven thousand dollars did not invalidate the homestead; *Lubbock v. McMann*, 82 Cal. 230, 16 Am. St. Rep. 111, holding that the excess in value of a homestead is subject to the *jus disponendi* of the owner and the claims of his creditors; *Demartin v. Demartin*, 85 Cal. 74, holding that when a homestead was set apart in insolvency proceedings the burden of proof was on the creditors to show that the value exceeded the statutory limit; *Mitchell v. McCormick*, 22 Mont. 253, and *Yerrick v. Higgins*, 22 Mont. 507, construing local statutes.

Selection of Homestead is Constitutional.—This right the legislature was commanded by the constitution to protect from forced sale, p. 138.

Cited in *Lubbock v. McMann*, 82 Cal. 228, 16 Am. St. Rep. 109, holding that exemption is a constitutional right to the limit provided by statute; *Sayers v. Childers*, 112 Iowa, 677, 681, on point that right to homestead is a vested right.

62 Cal. 139-145. **PEOPLE v. SALORSE.**

Larceny.—When the act of taking coexists with the felonious intent to deprive the owner of his property, the offense is complete, p. 141.

Cited in *People v. Morino*, 85 Cal. 518, holding that the question whether the felonious intent existed at the time the property was taken should be left to the jury.

Taking with felonious intent to deprive the owner is larceny, but if the felonious intent is formed afterward, the offense is ~~embezzlement~~ **embezzlement**, p. 141.

Cited in *State v. Harmon*, 106 Mo. 652, holding that embezzlement as distinguished from larceny is a purely statutory offense; *People v. De Graaff*, 127 Cal. 679, noted under *People v. Smith*, 23 Cal. 280; *People v. Jackson*, 138 Cal. 464, holding instructions on larceny properly refused; notes to 98 Am. Dec. 127 and 149, as to distinction between larceny and embezzlement.

Embezzlement of Horse is punishable as grand larceny, irrespective of value, p. 142.

Cited in *People v. Gray*, 137 Cal. 268, on point that verdict may determine degree of crime; *People v. Wickham*, 116 Cal. 386, holding that embezzlement of a horse of the value of forty dollars was punishable by imprisonment in the state prison; notes to 98 Am. Dec. 157, and 161, as to allegation of value and conviction of one offense under indictment for the other.

Venue in Embezzlement.—The offense must be proved to have been committed within the county where the defendant is charged, or within five hundred yards thereof, p. 144.

Cited in *Cohen v. State*, 20 Tex. App. 229, holding that jurisdiction lay in the county where defendant was placed in control of the property, or in any county in which he may have taken or received the property.

Instruction.—When they, as an entirety, correctly lay down the law of the case, the verdict, if in accordance with the evidence, will not be disturbed, p. 144.

Cited in *Territory v. Evans*, 2 Idaho, 398, holding that if taken as a whole the charge is correct substantially and could not mislead the jury, the judgment will not be disturbed.

62 Cal. 151-154. ROSENKRANZ v. WAGNER.

Mechanic's Lien—Complaint.—Necessary allegations are that there was money due to the original contractor when the lien was filed, or that the owner had knowledge of the claim prior to the payment of the full amount under the contract, p. 154.

Cited in *Stimson v. Dunham etc. Co.*, 146 Cal. 284, where materialmen and laborers served notice on owner of their claims against contractor, which in aggregate exceeded contract price, owners not liable beyond contract price, and may compel parties entitled to come in and have rights settled in one decree; *Wilson v. Barnard*, 67 Cal. 423, holding that the principal case applied to claims of loggers under the logger's lien act. Distinguished in same case, p. 425, in dissenting opinion of McKee, J., showing the reason for difference in necessary pleading on mechanics' liens and loggers' liens. Cited in *Turner v. Strenzel*, 70 Cal. 30, holding that a materialman is only entitled to be paid

from that portion of the contract price which remains due and unpaid when the lien is filed; *Wiggins v. Bridge*, 70 Cal. 439, holding that where the contractor never completed the building, and there was nothing due to him, a subcontractor or materialman could not enforce a lien; *McFadden v. Stark*, 58 Ark. 13, holding that as the contract is the foundation of the mechanic's lien it must be stated in the complaint so far as to show the lien and amount.

62 Cal. 155-159. **HANLEY v. KELLY.**

One who obtains a judgment for money which defendant has invested in land, is thereby estopped from pursuing the land in equity, p. 159.

Cited in *Gaffney v. Megrath*, 23 Wash. 494-497, stating general rule as to election between remedies; *Harding v. Atlantic Trust Co.*, 26 Wash. 539, where mortgagee after foreclosure and sale attempts to realize on deficiency judgment by execution on debtor's homestead, he is estopped from claiming equitable lien on homestead by reason of its purchase with proceeds of waste committed upon mortgaged premises; note to 10 Am. St. Rep. 489, on pursuit of one remedy excluding another.

62 Cal. 160-163. **BELCHER COMPANY v. DEFERRARI.**

Mines.—A locator who does work to the extent of one hundred dollars on two claims in one year, and in the January of the following year does work to the extent of twenty-four dollars before relocation, does not lose his rights, p. 163.

Cited in *Pharis v. Muldoon*, 75 Cal. 287, holding that failure to mark boundaries until five days after entry confers no rights on a relocater as against the locator, who in the meantime re-enters and resumes work; *Temescal etc. Co. v. Salcido*, 137 Cal. 214, on point that resumption of work will be presumed done in good faith; *Fee v. Durham*, 121 Fed. 470 (distinguished in dissenting opinion, page 476), majority holding where locator commenced assessment work on December 26th and employees continued work until December 30th, which was Saturday, when they quit and resumed work on Monday, January 1st, one locating on Sunday night between 12 and 1 o'clock acquired no rights. Overruled in *Honaker v. Martin*, 11 Mont. 95, 97, holding that the ruling of the principal case was not sound, that the resumption of work without the expenditure with reasonable diligence of the statutory amount was an evasion of the statute, and the work must be done in good faith in order to secure the claim against relocation. Cited in *Bishop v. Baisley*, 28 Oreg. 126, holding that it was an open question whether, after having resumed, and while in actual possession, and prior to the full performance of the amount required by law, the claim was open to relocation; *Justice Min. Co. v. Barclay*, 82 Fed. Rep. 560, holding that if the ground was subject to relocation, yet that if work

was done on one of a number of adjoining claims to the amount required for all of them for one year, then the locator's rights were revived and a subsequent relocation was invalid.

Failure in Findings.—Failure to find on an issue not injuring the defendants, and not material to the main issue, is not ground for reversal, p. 162.

Cited in *Hooker v. Thomas*, 86 Cal. 178, to same effect and giving an example.

Estoppel of Deed.—Grantors of a mine by deed cannot deny ownership and right to possession at the time the deed was executed, p. 163.

Cited in *De Frieze v. Quint*, 94 Cal. 659, 28 Am. St. Rep. 153, holding that a grantor, purporting to grant in fee, is estopped from subsequently setting up as his title a tax deed acquired after the grant; *Stinchfield v. Gillis*, 96 Cal. 36, holding that the grantor of a mine by deed was estopped from denying a valid location.

Judicial Notice.—The character of mining property, and its original ownership by the United States, will be judicially noticed, p. 163.

Cited in note to 89 Am. Dec. 690, on United States land laws.

62 Cal. 164-176. **WILSON v. SOUTHERN PACIFIC COMPANY.**

Negligence.—When the evidence is conflicting or circumstantial, it is for the jury to determine, pp. 172, 173.

Cited in *Noyes v. Southern Pacific*, 92 Cal. 291, in concurring opinion of Paterson, J., holding that where there is any evidence at all from which inferences of negligence may be drawn, nonsuit should not be granted; *Benson v. Central Pacific*, 98 Cal. 48, in an action for personal injury. Cited in *Stephenson v. Southern Pacific*, 102 Cal. 149, approving the ruling of the principal case, but saying that where the facts were admitted or proven without contradiction, it is for the court to determine if they establish negligence; *Hansen v. Southern Pacific*, 105 Cal. 385, to same effect, where the question was whether or not plaintiff was on the road with the consent of defendant; *Pierce v. Railway Co.*, 22 Mont. 449, holding nonsuit properly grantable in action against carrier; *Ewell v. Mining Co.*, 23 Utah, 197, applying rule in action by employee for damages for injuries received in mine.

When goods are destroyed while in custody of a warehouseman, the burden of proof of negligence is on plaintiff, p. 172.

Distinguished in *Wilson v. California Central*, 94 Cal. 172, holding that where the defendant was sued on contract as a carrier for non-delivery, and not as a tortfeasor, the rule was different. Cited in *Taussig v. Bode*, 134 Cal. 263, 86 Am. St. Rep. 252, applying rule to leakage alleged to have been caused by warehouseman; *James v. Orrell*, 68 Ark. 288, 82 Am. St. Rep. 295, holding instruction as to burden of proof erroneous; *Marshall v. Andrews*, 8 N. Dak. 367, but holding bur-

den of proof on warehouseman in case of loss by burning of warehouse; and see to same effect *Dieterle v. Bekin*, 143 Cal. 688. Approved in *Texas & Pacific Co. v. Morse*, 1 Tex. App. Civ. Cas. (White & W.) 183, holding that common carriers, having warehouses for storing goods, were liable as warehousemen for goods stored there.

General Citation.—*Insurance Co. of North America v. Lake Erie, etc. R. Co.*, 152 Ind. 339.

62 Cal. 179. MENZIES v. BOARD.

Supreme Court.—Original jurisdiction to issue a writ of certiorari will not be exercised where no sufficient reason is shown why the application could not have been made to the superior court, p. 179.

Cited in *Everitt v. Board*, 1 S. Dak. 371, holding that generally the writ is applied for by the attorney general; *People v. City*, 193 Ill. 520, quoting *Everett v. Board*, 1 S. Dak. 371.

62 Cal. 179-180. VANDEFORD v. FOSTER.

Verdict must Cover Issues.—In an action to recover possession or the value, and damages, a verdict which does not find the value will be set aside, p. 180.

Cited in *Stewart v. Taylor*, 68 Cal. 6, holding that a verdict to sustain a judgment must be complete and certain.

62 Cal. 180-181. SANTA CRUZ RAILROAD COMPANY v. SANTA CLARA COUNTY.

Liability of County.—An action will not lie against a count for neglect or refusal by a supervisor to perform a duty imposed on him by law, p. 181.

Cited in note to 68 Am. Dec. 295, on county not liable for acts or neglects of officers.

62 Cal. 181. VAUGHN v. WERLEY.

Appeal for Delay.—Damages will not be granted where no transcript has been filed, as there is no record from which delay can be determined, p. 181.

Followed in *Walter v. Maresch*, 3 Wash. 625, on a similar state of facts.

62 Cal. 182-186. ST. HELENA WATER COMPANY v. FORBES. S. C. 45 Am. Rep. 659.

Supply of Water is a public use, for which the right of eminent domain may be exercised over a stream of water flowing over land, due compensation being made, p. 182.

Cited in *Lux v. Haggin*, 69 Cal. 300, holding that the property of a riparian proprietor in the waters flowing through his land is subject to the law of eminent domain; but distinguished in same case, page 440, in dissenting opinion of Myrick, J., showing that the principal case had no application to the appropriation of water by an irrigation company; *Hamor v. Bar Harbor W. Co.*, 78 Me. 132, to same effect as the principal case. Quoted in *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 562, by Knowlton, J., in his dissenting opinion, arguing that the special laws of Massachusetts did not authorize the taking of water from great ponds without compensation to the riparian owners of streams supplied therefrom. Cited in *Pocantico W. W. Co. v. Bird*, 130 N. Y. 259, holding that a water company, by making special contracts for supplying water to riparian proprietors, does not destroy the character of public use for which the water rights are acquired *Wisconsin W. Co. v. Winans*, 85 Wis. 41, 39 Am. St. Rep. 816, holding that waterworks for the supply of a city or village are for a public use, and that the right of eminent domain may be exercised by the company; *Bigelow v. Draper*, 6 N. Dak. 162, 164, sustaining condemnation of riparian right for railroad purposes.

The right to running water is part of the land over which it flows naturally, and is real property, pp. 183, 184.

Cited in *Gould v. Stafford*, 91 Cal. 155, holding the right may be severed from the land and held as an easement; *Smith v. Denniff*, 24 Mont. 22, 26, on point that trespasser on riparian land cannot acquire water rights thereon.

62 Cal. 186-187. ESTATE OF HILL.

An allowed claim may, in certain cases, be contested on settlement of the final account, p. 187.

Cited in *Selna v. Selna*, 125 Cal. 362, 363, on point that allowed claim is not conclusive on heirs; *Weihe v. Statham*, 67 Cal. 84, holding that the allowance of a claim by the administrator and the probate judge is not conclusive upon the heirs; *Estate of Mouillerat*, 14 Mont. 251, nor is it a judgment as to its validity. Distinguished in same case in dissenting opinion of Harwood, J., 260, arguing that as the contest in the principal case was by the heirs and distributees of the estate, it could not be an authority for the proposition in the prevailing opinion that a creditor could contest the account of another creditor.

62 Cal. 187-190. HART v. SPECT.

Bill of Particulars.—A plaintiff cannot be precluded from giving evidence to support his claim until he has failed or refused to comply with an order for a further account, p. 190.

Cited in *Burns v. Cushing*, 96 Cal. 671, holding in an action on an

attorney's bill, demurred to for ambiguity, that a bill of particulars should have been demanded.

62 Cal. 203-204. KITTIS v. SUPERIOR COURT.

On appeal from a justice's court, the superior court has jurisdiction to allow an amendment of the complaint, p. 204.

Cited in *Ketchum v. Superior Court*, 65 Cal. 495, holding that, on an appeal on questions both of law and fact, a plea might be added to the answer, and any amendment made to enable the parties to present the case on its merits; *Nevada Central v. District Court*, 21 Nev. 414, holding in like case to same effect.

62 Cal. 204-209. PEOPLE v. YE PARK.

Defective Instruction.—When followed by a complete and correct instruction on the same point, is cured by the latter, p. 207.

Cited in *Territory v. Evans*, 2 Idaho, 398, holding that if instructions taken as a whole are correct it is sufficient.

To justify homicide, the circumstances must not only be sufficient to excite the fears of a reasonable person, but the act must have been done under the influence of such fears alone, p. 208.

Cited in *Lynch v. State*, 24 Tex. App. 365, sustaining the ruling; *State v. Rolla*, 21 Mont. 585, noted under *People v. Herbert*, 61 Cal. 544, note to *State v. Sumner*, 74 Am. St. Rep. 730, on self-defense.

Where an attack is made with murderous intent, the person attacked may stand his ground, and, if necessary, kill the assailant, p. 208.

Cited in *People v. Hecker*, 109 Cal. 463, to same effect, where the attack is sudden.

62 Cal. 209-237. PEOPLE v. STEPHENS.

Since the constitution of 1879, any company or individual has the right to use the streets for laying pipes to supply water, and water supply is a public use free from control of the legislature, pp. 231-236.

Ruling followed in *Woodland v. Stephens*, 62 Cal. 238, being another suit on same subject, against same defendant, as the principal case. Cited in *Fresno v. Fresno Canal Co.*, 98 Cal. 183, holding water ditches and canals are included within the constitutional provisions as to water supply; *People v. Elk River Co.*, 107 Cal. 226, 48 Am. St. Rep. 128, holding it was not intended by the constitution to appropriate water for public use without compensation, and as to the right to compensation of a riparian proprietor; *Merrill v. Southside Irrigation Co.*, 112 Cal. 434, holding that water supplied by an irrigation company cannot be arbitrarily refused to any person willing to pay for it, on the flow and line of the company's ditch; *San Diego etc. Co. v. Sharp*, 97 Fed. 399, construing constitution and section 552, Civil Code; In re

Johnston, 137 Cal. 119, denying right of city to impose additional burdens or regulations; *San Diego Co. v. National City*, 74 Fed. Rep. 87, holding that the constitutional obligations relating to water supply apply to a foreign corporation supplying water within the state; *Lanning v. Osborne*, 76 Fed. Rep. 332, 333, holding that no corporation, appropriating water by virtue of the constitution and laws of this state, can exact anything beyond the legally established rates; *Lanning v. Osborne*, 82 Fed. Rep. 577, to same effect, and that the amendment of March 2, 1897, of act of California, March 12, 1895, did not give any validity to previously invalid contracts for water supply.

Cities and Towns are both included in the constitutional provisions relating to water, pp. 236, 237.

Cited in *Pereria v. Wallace*, 129 Cal. 403, construing article 11, section 19 of constitution; *Plummer v. Borsheim*, 8 N. Dak. 568, but holding "city" in local constitution not to include incorporated villages or towns; *State v. Harbor Commissioners*, 4 Wash. 11, to same effect as to the powers of the board of harbor line commissioners.

General Citation.—*Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 570.

62 Cal. 250-260. UPHAM v. HOSKING.

Title Land.—Patent is presumed regularly issued, p. 259.

Cited in *C. P. R. R. Co. v. McCann*, 126 Cal. 555, noted under *Weaver v. Fairchild*, 50 Cal. 360.

Tide Lands.—Where the title was in the state, and had been sold to a purchaser prior to the act of March 27, 1872, the title of the state was by that act vested in the purchaser, p. 259.

Cited in *Wright v. Seymour*, 69 Cal. 126, holding that land between high and low water mark was not included in a patent from the United States of land "bounded by a tidal stream"; *Northern Ry. Co. v. Jordan*, 87 Cal. 28, ruling that the holder of a certificate of purchase of tide lands was entitled to the benefit of the act of 1872.

Forfeiture.—When declared by statute, the title vests in the state, upon the happening of the event or the commission of the offense for which the forfeiture is declared, p. 258.

Cited in *Arcata v. Arcata R. R. Co.*, 92 Cal. 646, holding that the rule did not apply to a switch or sidetrack constructed under a city ordinance, in which no time was fixed for completion; *Hornbrook v. Town of Elm Grove*, 40 W. Va. 548, holding that the charter of a municipal corporation was not forfeited by a failure to observe its provisions; note to 5 Am. St. Rep. 806, as to whether judicial act declaring forfeiture is necessary. Distinguished in *California Reduction Co. v. Sanitary Reduction Works*, 126 Fed. 44, validity of grant of

franchise by city not collaterally attackable by private party in equity for failure of grantees to perform conditions, nonperformance of which would work forfeiture.

62 Cal. 260-263. **HENDY v. DESMOND.**

New Trial should not be granted on the ground of newly-discovered evidence, when the means of obtaining such evidence was by the exercise of reasonable diligence open to the party defeated as well before as after the trial, pp. 262, 263.

Distinguished in *State v. Stowe*, 3 Wash. 211, where additional evidence to prove an alibi was alleged and admitted as ground for new trial, and there had been no lack of diligence shown.

Certificate of Protest is prima facie evidence of the facts therein stated, but where it does not show that protest was given in the manner required by the code its statements may be rebutted, p. 261.

Cited in note to 96 Am. Dec. 604, on certificate being prima facie evidence.

62 Cal. 263. **EX PARTE JOHNSON.**

Physician's License.—The statute requiring a physician to procure a certificate from the board of examiners before practicing is constitutional, p. 263.

Cited in *In re Guerrero*, 60 Cal. 99, holding that the ruling applied to a liquor dealer's license under a municipal ordinance.

62 Cal. 263-282. **DODGE v. RIDENOUR.**

Excusable Neglect.—A defective memory of counsel, by which he failed to appear at the trial, is within section 473 of the Code of Civil Procedure, p. 282.

Cited, but not followed in *O'Connor v. Ellmaker*, 83 Cal. 453, on a different state of facts. Cited and followed in *Grady v. Donahoo*, 108 Cal. 214, holding that the grant of the motion to set aside should rest in the discretion of the court, and any doubt should be resolved in favor of the motion; *Hanthorn v. Oliver*, 32 Oreg. 63, reversing order denying vacation of default.

62 Cal. 283-285. **PIERCE v. SCHADEN.**

Verdict as to facts not put in issue may be disregarded as surplusage, p. 285.

Cited in *Clanton v. Coward*, 67 Cal. 375, holding that a verdict for more than the complaint demanded might be disregarded as to the excess, and judgment entered for the amount claimed; *Johnson v. Visser*, 96 Cal. 313, holding that an informal verdict, if it can be construed to

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be responsive to the issues raised by the pleadings, will support a judgment.

62 Cal. 286-289. TIERNAN v. CREDITORS.

Homestead right is limited to the land actually occupied by claimant, and the land held and used therewith. The portion of a double house occupied by tenants cannot be included in the household, p. 289.

Cited in *King v. Gotz*, 70 Cal. 241, holding that homestead did not extend to a second house on the lot, rented to tenants; *Estate of Crowley*, 71 Cal. 305, holding land leased to another party cannot be set aside as a probate homestead, although adjoining the residence; *Hecht v. Slaney*, 72 Cal. 366, holding that residence at the time of the declaration is essential, and a homestead set apart in insolvency through fraud can be declared free at the instance of a creditor; *Maloney v. Hefer*, 75 Cal. 424, 7 Am. St. Rep. 182, holding that premises separated from the home by a fence and not used therewith, are not subject to homestead; *Lubbock v. McMann*, 82 Cal. 229, 16 Am. St. Rep. 110, holding that the subsequent erection of a second house on the land homesteaded does not destroy the character of the tenure; In *Re Ligget*, 117 Cal. 354, 59 Am. St. Rep. 192, to same effect as the principal case; *McKeough Estate v. McKeough*, 69 Vt. 38, construing the words of a devise of "my home place where I now live." Notes to 70 Am. Dec. 350, on nature of occupancy; 87 Am. Dec. 280, on user; 7 Am. St. Rep. 183, in what premises homestead may be acquired. Distinguished in *Estate of Levy*, 141 Cal. 651, setting aside as probate homestead a building composed of flats.

Declared value may be more than the statutory amount and the existence of a mortgage on the premises is no element in ascertaining the property to be set apart or of its value, p. 289.

Cited in *King v. Gotz*, 70 Cal. 242, holding that where the declared value exceeded the real value, the latter governed; *Yerrick v. Higgins*, 22 Mont. 508, noted under *Ham v. Santa Rosa Bank*, 92 Cal. 125.

62 Cal. 290. VALLEAU v. SUPERIOR COURT.

Proposed Statement on Appeal made up of reporter's notes taken on trial and written out in longhand is improper, p. 290.

Approved in *State v. Napton*, 28 Mont. 339, referee may refuse to settle bill of exceptions which recites, "The following testimony was taken before the referee (clerk will here insert testimony)."

62 Cal. 291-299. PEOPLE v. HOPE.

Burglary.—Evidence of Possession of Tools corresponding to those found at the place of the burglary may be given, p. 295.

Cited in *Starchman v. State*, 62 Ark. 540, holding as to what could be shown to the jury.

Visiting the Locus in Quo by a juror during the trial is not of itself sufficient ground to discharge the jury, p. 293.

Cited in *State v. Perry*, 121 N. C. 537, 61 Am. St. Rep. 685, but doubted as to the jury as a whole, and that where, after the evidence closed, they visited the locus in quo and made inquiry of a passerby, it was ground for a new trial; note to 92 Am. Dec. 344, on inspection of place by court and jury.

Alias Name.—Evidence may be given that a short time prior to the date of the alleged offense the defendant called himself by an alias name, pp. 291, 296.

Note.—It is only by reading the syllabus into the report that this ruling is obtained. All that the decision says is: "The objection to the question put to the witness Aiken was properly overruled"; but there is nothing to show what the question was, or what the reply, except the syllabus.

Cited in *State v. Ellwood*, 17 R. I. 767, holding that the flight of the accused shortly after the commission of the offense, acts of disguise, concealment of person, and use of fictitious names may be shown by the state.

62 Cal. 299-303. **MCCARTHY v. LOUPE.**

Contract of Agency for purchase or sale of real estate must be in writing, under section 1624 of the Code of Civil Procedure, p. 302.

Approved in *Myres v. Surryhne*, 67 Cal. 659, *Zemier v. Antisell*, 75 Cal. 511, *McPhail v. Buell*, 87 Cal. 116, *Shanklin v. Hall*, 100 Cal. 29, all on the same point. Cited in *McGeary v. Satchwell*, 129 Cal. 390, denying recovery by agent under parol contract; *Jamison v. Hyde*, 141 Cal. 113, denying recovery on quantum meruit, under oral contract; *Toomy v. Dunphy*, 86 Cal. 641, 642, also to the same point, and further holding that a contract in writing need not state the consideration. If it shows the employment, the consideration may be proved aliunde, or a recovery had on a quantum meruit; note to 93 Am. Dec. 172, on appointment and termination of employment of broker.

New Trial.—Appellate court may sustain an order granting a new trial on grounds other than those on which the lower court granted the motion, p. 303.

Cited in *Estate of Crozier*, 74 Cal. 181, holding that so long as there were errors upon which a new trial should have been granted, it was immaterial what error the court acted on; *Wakeham v. Barker*, 88 Cal. 50, holding the same ruling as to sustaining a demurrer.

62 Cal. 303-310. PEOPLE v. WESTLAKE.

Justification of Homicide requires a reasonable cause and an actual apprehension of a design to commit a felony or to do some great bodily injury, and that defendant was wholly without fault, pp. 306, 307.

Cited in *People v. Powell*, 87 Cal. 364, holding that any evidence tending to show that defendant acted as a reasonably prudent man would have acted under the circumstances is competent; *People v. Hecker*, 109 Cal. 464, showing how the right of self-defense is not lost, even where one is the first wrongdoer. Distinguished in *People v. Conkling*, 111 Cal. 627, as to the right of pursuit of an assailant who has taken to flight. Cited in *Lynch v. State*, 24 Tex. App. 365, 5 Am. St. Rep. 892, holding that the act done by the deceased, manifesting his intention to execute threats, must be such as to show an immediate intention at the time, and not an intention depending upon some other contingency. Overruled in *People v. Farley*, 124 Cal. 597, discussing effect of *People v. Conkling*, 111 Cal. 627.

Testimony Invading Province of Jury.—Questions as to whether the wound could have been inflicted in a certain manner involve the determination of a fact upon which the jury are to find, and should be excluded, p. 309.

Cited in *People v. Farley*, 124 Cal. 595, holding such evidence improperly admitted; *Connor v. Stanley*, 67 Cal. 316, applying the same principle to questions as to the state of mind of a deceased person which would render him liable to undue influence; *People v. Smith*, 93 Cal. 447, holding medical evidence as in the principal case, improper; to the like effect in *People v. Lemperle*, 94 Cal. 46, *People v. Hill*, 116 Cal. 568, and *People v. Milner*, 122 Cal. 181, also in *Thompson v. State*, 30 Tex. App. 328, holding that a medical witness could not state an opinion, when the jury were equally competent to draw a conclusion from a given state of facts.

Past Threats are no excuse for homicide, without sufficient present demonstration to authorize the belief that the deadly purpose then exists, and a fear that it will be then executed, p. 305.

Cited in note to 61 Am. Dec. 53, on admissibility of threats of deceased previous to the killing.

Self-Defense.—Instruction that the killing must have been done under a well-founded belief of necessity allowed, p. 305.

Cited in *People v. Glover*, 141 Cal. 241, sustaining instruction; note to *State v. Sumner*, 74 Am. St. Rep. 719, on self-defense; *People v. Lemperle*, 94 Cal. 48, holding the same instruction not erroneous, but not commendable.

Exclusion of Evidence of one witness is not prejudicial error where another has testified to same facts, p. 310.

Cited in *Schurr v. Rodenback*, 133 Cal. 89, applying principle to error in granting motion to strike out testimony.

62 Cal. 311-319. REMINGTON S. M. COMPANY v. COLE.

Change of Venue.—The right is to be determined by the condition of things existing at the time the parties claiming it first appeared in the action, p. 318. Dissenting opinion of Sharpstein, J., that it could never have been the intention of the legislature that a plaintiff could, by improperly joining persons who resided in the same county with himself, and against whom the complaint showed no cause of action, defeat the right of the real defendants to a change of venue, p. 319.

Cited, as to the prevailing opinion, in *Ah Fong v. Sternes*, 79 Cal. 33, and yet holding that the plaintiff could not defeat the defendant's right by adding to the complaint a cause of action on which defendant had no right to a change of venue. Overruled in *Sayward v. Houghton*, 82 Cal. 629, holding that the right to a change of venue was not affected by joining as a defendant one against whom there was no cause of action (note this decision was delivered by Sharpstein, who wrote the dissenting opinion in the principal case). Cited in *McKenzie v. Barling*, 101 Cal. 460, as authority for the proposition that where any of the defendants resided in the county where the action is brought, motion to change venue will not be granted unless all the defendants join, or unless good reason is shown why they have not joined; *Brady v. Times Mirror Co.*, 106 Cal. 59, as having decided the rule in the same manner as *Sayward v. Houghton*, supra. (Note.—This is not so, the two decisions are absolutely opposed.) Cited in *Wallace v. Owsley*, 11 Mont. 221, holding that the right is to be determined as laid down in the principal case; note to 74 Am. Dec. 242, as to change of venue.

Time for Moving.—Motion must be made when defendant first appears, and if denied the remedy is by appeal, p. 318.

Cited in *Brady v. Times Mirror Co.*, 106 Cal. 61, holding to same effect, and that the ruling stands, even though the condition of the case may be such that if it could then be made it would be granted; *Elliot v. Whitmore*, 10 Utah, 251, holding that an order denying motion to change venue was appealable; and on same point *In re Whitmore*, 9 Utah, 445.

62 Cal. 320-336. NEHRBAS v. CENTRAL PACIFIC COMPANY.

Contributory Negligence.—Burden of proof is on the defendant unless it can be inferred from circumstances proved by plaintiff, p. 334.

Cited in *MacDougall v. Central R. R. Co.*, 63 Cal. 432, accepting the ruling of the principal case; *Schneider v. Market St. Ry. Co.*, 134 Cal.

487, noted under *Robinson v. Western Pac. R. R. Co.*, 48 Cal. 426; note to 62 Am. Dec. 687, on burden of proof as to contributory negligence.

Negligence.—Plaintiff is not bound to show that defendant was guilty of negligence without any contributory negligence on his own part, p. 434.

Cited in *MacDougall v. Central R. R. Co.*, 63 Cal. 434, to same effect; *Overacre v. Blake*, 82 Cal. 83, holding that negligence is to be decided by the court as a question of law when the facts are clearly settled; *Smith v. Occidental S. S. Co.*, 99 Cal. 468, holding that it is sufficient for a plaintiff to show in the first instance that the injury resulted from the negligence of the defendant; *Bowers v. Union Pacific R. R. Co.*, 4 Utah, 224, holding that unless circumstances leave the question clear of all doubt, it is the duty of the court to leave it to the jury, and not to disturb their finding.

Province of Jury.—All the circumstances surrounding the accident should be considered, and it is for the jury to determine whether plaintiff has exercised the care which the law requires, p. 336.

Cited in *Deans v. Railroad*, 107 N. C. 693, 22 Am. St. Rep. 907, holding that though the facts may be undisputed, yet, if reasonable men might draw different inferences from them, then the issue should be submitted to the jury; note to 90 Am. Dec. 62, as to general duty of railroad company to travelers on highway.

Damages.—The jury is not, under sections 376 and 377 of the Code of Civil Procedure, limited to the actual pecuniary injury sustained by a parent by reason of the loss of the services of his children, p. 336.

Cited in *Cleary v. City R. R. Co.*, 76 Cal. 241, holding that in addition to the loss of services of a child during minority and the medical attendance and funeral expenses, the jury might also consider the mental anguish and suffering of the parents. Distinguished in *Munro v. Dredging Co.*, 84 Cal. 525, 18 Am. St. Rep. 255, holding that "sorrow, grief, and mental suffering" of a parent were too remote, and that the question did not arise in the principal case; *Morgan v. Southern Pacific Co.*, 95 Cal. 518, 29 Am. St. Rep. 146, confining the dictum at the close of the principal case to *Beeson v. G. M. G. M. Co.*, 57 Cal. 20 (note this case overruled the decision in *Cleary v. City R. R. Co.*, supra). Cited in note to 12 Am. St. Rep. 376, on elements and measure of damages; and see *Webb v. Railroad Co.*, 7 Utah, 20, criticising *Cleary* case, supra.

62 Cal. 339-342. **DANIELWITZ v. SHEPPARD.**

A contract, whether by administrator or heir, attempting to bind the estate to pay broker's commission, is void as against the policy of the law, p. 342.

Followed in *Danielwitz v. Sheppard*, 62 Cal. 343, being the plaintiff's appeal in the same action as the principal case. Cited in *Cole v.*

Superior Court, 63 Cal. 95, holding that a guardian ad litem could not make any contract binding on the estate of the ward without the sanction of the court; *Jones v. Hanna*, 81 Cal. 510, holding that a contract by an administrator for realization of the assets of deceased, out of which he was to receive a profit, was illegal and void; note to 52 Am. St. Rep. 122, on estates not liable for contracts of executors and administrators. Distinguished in *Melone v. Ruffino*, 129 Cal. 524, 79 Am. St. Rep. 135, holding administrator personally liable on his contract under facts stated; cf. *Estate of Willard*, 139 Cal. 505, and *Rickel v. Chicago etc. Co.*, 112 Iowa, 153, noted under *Estate of Page*, 57 Cal. 241.

62 Cal. 343-348. DEWEY v. FRANK BROTHERS.

When defendants are not entitled, by reason of knowledge and failure to move for continuance, to a new trial on the ground of surprise, pp. 347, 348.

Cited in *Central Pacific v. Creed*, 70 Cal. 502, holding that a sale to satisfy a judgment in favor of plaintiff will not be set aside on the application of same plaintiff on the ground of surprise five months after it took place; *Hoskins v. Hight*, 95 Ala. 287, ruling that a party must move for a continuance before he can have a new trial on the ground of surprise; *State v. Gardner*, 38 Or. 163, noted under *Rogers v. Huie*, 1 Cal. 429; note to 76 Am. Dec. 518, on nature of surprise constituting ground for new trial.

62 Cal. 348-373. HAYWARD v. ROGERS.

Measure of Damages for wrongful conversion of stock by a pledgee is the highest market price of the stock between the day of sale and the day of trial, p. 353.

Note.—The ruling above stated is contained in the charge to the jury by the trial judge; the question involved in it was not before the supreme court, nor was it passed upon by that court in any way, and as the judgment was in favor of the plaintiff, the pledgee, the point was not involved in the decision, but it is cited in note to 79 Am. Dec. 506, on measure of damages for conversion of pledge by pledgee.

62 Cal. 373-376. CAREY v. BROWN.

A mortgagor is estopped from denying the validity of a sale under a deed of trust, containing a provision that recitals in a deed made thereunder shall be conclusive evidence of the truth of the facts recited, when there is no evidence offered, p. 375.

Cited in *Bent etc. Co. v. Whitehead*, 25 Colo. 359, 71 Am. St. Rep. 144, but holding such recitals not conclusive, and rule of caveat emptor to apply; note to 8 Am. St. Rep. 923, as to stipulations as to rules of evidence; 19 Am. St. Rep. 295, as to sales and conveyances by trustees,

and see *Sacramento Bank v. Alcorn*, 121 Cal. 382, sustaining validity of such deeds, on rule of stare decisis.

62 Cal. 377-385. PEOPLE v. HAMILTON.

Upon a challenge for implied bias a juror cannot be asked whether he believes the defendant guilty or not guilty, but if the challenge be for actual bias this question may be put, pp. 381, 383.

Cited in *People v. Plyler*, 126 Cal. 381, as modifying *People v. Car Soy*, 57 Cal. 102; *People v. Brown*, 72 Cal. 392, holding that a juror who admits having a fixed opinion may be questioned to ascertain its extent and character on a challenge for actual bias; *People v. Brittain*, 118 Cal. 412, holding that a juror could not be asked how many murder cases he had sat on as a juror.

Insanity as a Defense must be established by defendant by a preponderance of evidence, p. 384.

Cited in *People v. Travers*, 88 Cal. 238, stating the rule as to insanity as a defense; *People v. McNulty*, 93 Cal. 443, adopting the language of *People v. Travers*, supra; *Giebel v. State*, 28 Tex. App. 172, giving the rule in Texas; *State v. Novak*, 109 Iowa, 744, 745, discussing general rules as to construction of instructions; *Hurst v. State*, 40 Tex. Cr. App. 387, quoting *Giebel v. State*, 28 Tex. Cr. App. 151; notes to 36 Am. Dec. 410, on burden of proof; 97 Am. Dec. 176, on burden of proof when insanity is set up.

62 Cal. 385-394. MONTGOMERY v. MERRILL.

Foreclosure Suit, in which no deficiency judgment is asked against the mortgagor is not stayed by the mortgagor's insolvency, p. 392.

Cited in *Bradford v. Dorsey*, 63 Cal. 124, holding that, notwithstanding insolvency, an action to foreclose a mechanic's lien must be commenced within ninety days after the lien is filed.

62 Cal. 394-398. OCCIDENTAL BUILDING AND LOAN ASSOCIATION v. SULLIVAN.

Penalties and Forfeitures must be created by unambiguous language. A stockholder, under a by-law which provides that, for failing to pay his monthly installments or interest, he shall pay a fine of ten per cent per month upon the amount of his indebtedness, is not chargeable with a fine on the interest in arrear on a secured loan, p. 398.

Cited in *Winchester v. Howard*, 139 Cal. 450, noted under *Askew v. Ebberts*, 22 Cal. 264; *Roberts v. American Building Assn.*, 62 Ark. 585, 54 Am. St. Rep. 314, holding that fines must be reasonable in amount, equitable, and be prescribed in precise and unequivocal terms; note to 69 Am. Dec. 153, on fines and forfeitures.

By-laws cannot be read into a mortgage so as to change its terms,
p. 398.

Cited in note to 69 Am. Dec. 158, on by-laws.

62 Cal. 399-400. **DOVE v. NUNAN.**

Exemptions from Execution.—In order to exempt horses from sale and sale the owners must be of the character specified in subsection 6 of section 690 of the Code of Civil Procedure, and must habitually earn their living by the use of such horses, p. 400.

Cited in *Murphy v. Harris*, 77 Cal. 195, holding the requirement as to "habitually earning his living" was imperative; *Wildner v. Ferguson*, 42 Minn. 114, 18 Am. St. Rep. 497, holding that an agent selling goods by sample was not within the provisions of a statute exempting the wages of laboring men from garnishment; *Edgecomb v. Creditors*, 19 Nev. 153, holding that a livery stable keeper could not claim exemption under the term "other laborer" in respect of two horses; note to 91 Am. Dec. 698, as to meaning of "team" in exemption laws; note to 58 Am. St. Rep. 307, 308, as to meaning of "teamster."

62 Cal. 401-406. **HORGAN v. AMICK.**

Crops on homestead are only exempt under section 690 of the Code of Civil Procedure to the amount of two hundred dollars, p. 406.

Disputed in *Morgan v. Rountree*, 86 Iowa, 252, 45 Am. St. Rep. 236, holding that proceeds derived from the use of the homestead while it remains such are exempt to the head of the family. Cited in *In re Hoag*, 97 Fed. 544, construing similar Wisconsin statutes; *Coates v. Caldwell*, 71 Tex. 22, 10 Am. St. Rep. 727, holding that an unpicked cotton crop on a homestead was exempt from execution, but that portion of the crop which had been picked was not exempt; note to 45 Am. St. Rep. 239, on the subject generally.

62 Cal. 407-410. **FARMERS' UNION v. THRESHER.**

Writ of Prohibition will not be issued to restrain a sale for taxes, the duties of the tax collector being merely ministerial, p. 410.

Cited in *Hobart v. Tillson*, 66 Cal. 211, to the like effect; *State v. Superior Court*, 15 Wash. 674, 55 Am. St. Rep. 911, holding that the writ would issue to restrain the superior court from proceeding without or in excess of jurisdiction. Distinguished in *People v. Hiram House*, 4 Utah, 381, holding that under the organic law of Utah, writs of prohibition could be issued to arrest the doing of ministerial acts; *Winsor v. Bridges*, 24 Wash. 543, construing local constitution and statutes as to original jurisdiction to issue the writ.

62 Cal. 411-413. **PEOPLE v. MITCHELL.**

For counsel to state or argue on a fact not proven or sought to be

proven, is in effect to place unsworn evidence before the jury, and is ground for reversal, p. 412.

Cited in *People v. Molina*, 126 Cal. 507, but holding argument not improper under evidence; *People v. Lee Chuck*, 78 Cal. 329, giving exemplification of the rule; *People v. Smith*, 121 Cal. 362, reversing conviction therefor; *McDonald v. People*, 126 Ill. 156, 9 Am. St. Rep. 551, including in the ruling allusions made in argument to a person in no manner connected with the case; note to 9 Am. St. Rep. 559, on misconduct of counsel in argument, when ground for reversal.

62 Cal. 413-415. ESTATE OF LOSHE.

When a claim has been presented and allowed, and is subsequently attacked on settlement of the final account, it is for the contestant to disprove the claim, p. 415.

Cited in *Weihe v. Statham*, 67 Cal. 84, holding that the allowance of a claim by the administrator and the judge is not conclusive on the heirs; *Estate of Swain*, 67 Cal. 642, and *Estate of More*, 121 Cal. 639, holding that in such case it is for the heirs to show the invalidity; *Estate of Moulllerat*, 14 Mont. 251, holding further that a creditor may oppose the allowance of the claim of another creditor; and distinguished in same case, p. 259, in dissenting opinion of Harwood, J., arguing that after allowance of a claim by the administrator and the judge, it was only open to contest by the heirs and their representatives.

62 Cal. 416-419. MECHANICS' FOUNDRY v. RYALL.

Continuing Trespass.—An injunction will not be granted to restrain an act for which the law provides a remedy, p. 419.

Retrial of same case, 75 Cal. 601, sustaining and extending the ruling; *Gardner v. Stroeve*, 81 Cal. 151, holding that an injunction cannot issue to prevent a past act.

62 Cal. 419-426. CAPITAL BANK v. REEL.

Conflicting Evidence.—When there is evidence, though conflicting, to support the verdict of the jury, it will not be disturbed, p. 425.

Approved in *Pico v. Cohn*, 78 Cal. 387.

When the holder of a note has attached sufficient property of the makers to secure the payment, and releases it without consent of the surety, the liability of the surety is discharged, p. 426.

Cited in note to 31 Am. St. Rep. 752, on rights of accommodation makers.

62 Cal. 426-440. HILL v. FINIGAN.

Pledgee purchasing the pledged property has title of sale ratified by pledgor, and no consideration is required for the ratification, p. 439.

Cited in *Hill v. Finigan* (being an appeal on second trial of same case), 77 Cal. 274, 11 Am. St. Rep. 283, defining a sufficient ratification; notes to 79 Am. Dec. 502, on pledgee's remedy by non-judicial sale of the pledge; and p. 503, on sale by pledgee under power of sale.

62 Cal. 440-442. BARRETT v. SIMMS.

Homestead set apart in insolvency cannot be subsequently sold by order of the court, p. 442.

Cited in *Dacey v. Harris*, 65 Cal. 362, holding the same as to property on which a homestead had previously been declared by the insolvent; *Lubbock v. McMann*, 82 Cal. 230, 16 Am. St. Rep. 111, defining the effect of a judgment and of a levy on homestead.

62 Cal. 442-448. HAWLEY v. CAMPBELL.

Discharge in insolvency frees from partnership as well as personal debts, p. 447.

Cited in *Diesbach v. Creditors*, 63 Cal. 187, as having established this point.

62 Cal. 448-464. HARMON v. PAGE.

Statute of Limitations does not begin to run against a stockholder until a call is made, or there is an evident dissolution of the company and a relinquishment of business, pp. 463, 464.

Cited in *Crofoot v. Thatcher*, 19 Utah, 230, 75 Am. St. Rep. 733, holding action not barred.

Defense of statute of limitations cannot be raised by demurrer, unless the fact that would put the statute in motion is affirmatively averred in the complaint, p. 464.

Cited in *Wise v. Williams*, 72 Cal. 548; *Wise v. Hogan*, 77 Cal. 189, *Jenness v. Bowen*, 77 Cal. 311, *Pleasant v. Samuels*, 114 Cal. 38, all to same effect.

A suit in equity will lie at instance of a single creditor to compel stockholders to pay up the amount of stock contracted for, unaffected by any other remedy which the creditor may have, p. 463.

Cited in *Sacramento Bank v. Pacific Bank*, 124 Cal. 150, on point that such remedy is concurrent with that on statutory liability; *Welch v. Sargent*, 127 Cal. 84, discussing parties and distribution of fund in such actions; *Tatum v. Rosenthal*, 95 Cal. 134, 29 Am. St. Rep. 99, to the point that other creditors need not be joined as plaintiffs; *Baines v. Babcock*, 95 Cal. 589, 29 Am. St. Rep. 161, holding that the right to proceed in equity was not superseded by section 322 of the Civil Code; *Kimball v. Richardson Kimball Co.*, 111 Cal. 396, extending the equitable relief to a suit in intervention by a judgment creditor to postpone a prior attachment obtained by an insolvent stockholder in same corpora-

tion; note to 43 Am. Dec. 695, on suits in equity against stockholders for debts of corporation; notes to 43 Am. Dec. 701, 702, 703, on remedy to enforce liability concurrent in law and equity; note to 90 Am. Dec. 295, on creditor's bills and proceedings in equity in aid of execution; notes to 3 Am. St. Rep. 807, on unpaid subscriptions subject to garnishment, *idem*, pp. 810, 811, on equitable jurisdiction to compel payment of unpaid subscriptions; *idem*, p. 814, on obligation of creditor to exhaust legal remedies against corporation before proceeding in equity against stockholders.

Mining Stockholders' Liability depends upon the contract, express or implied, to pay up a certain amount of stock; a mere power of assessment for mining purposes is not assets of a mining corporation, p. 460.

Cited in *San Joaquin Co. v. Beecher*, 101 Cal. 78, holding that the ruling that the court could not compel the levy of an assessment on stockholders in a mining corporation for payment of corporate debts was confined strictly to mining corporations.

Statute of Limitations does not begin to run against a stockholder until a call is made, or there is an evident disbandment of the company and a relinquishment of business, pp. 463, 464.

Cited in *Thompson v. Savings Bank*, 19 Nev. 174, 3 Am. St. Rep. 883, to same effect. But *Semble*: on insolvency of the corporation; note to 3 Am. St. Rep. 828, on statute of limitations.

62 Cal. 464-466. EX PARTE JORDAN.

Police Court No. 2 of San Francisco.—Act of March 7, 1881, creating this court, is constitutional and the court is legally established, pp. 465, 466.

Cited in *People v. Toal*, 85 Cal. 337, holding that a provision in a city charter establishing a police court is invalid.

62 Cal. 466-468. SMITH v. SMITH.

A finding that acts of cruelty have inflicted grievous mental suffering states a conclusion of law, but does not find any fact, p. 468.

Approved in *Franklin v. Franklin*, 140 Cal. 608, reversing judgment for insufficiency of findings; *Waldron v. Waldron*, 85 Cal. 258, because the infliction of grievous mental suffering is not the equivalent of extreme cruelty in a legal sense.

62 Cal. 468-473. PEOPLE v. TAMKIN.

Threats as Justification.—When threats are admissible in evidence, p. 470.

Approved in *People v. Thomson*, 92 Cal. 511. Cited in note to 61

Am. Dec. 53, on threats by deceased, admissibility in evidence; *idem*, pp. 55 and 56, on communicated threats.

Threats Without Apparent Design to carry them into effect are not sufficient to justify homicide, p. 470.

Cited in *Lynch v. State*, 24 Tex. App. 365, 5 Am. St. Rep. 893, holding that the manifesting act must show an immediate intention; note to 74 Am. St. Rep. 719, 724.

62 Cal. 479-482. **HUERSTAL v. MUIR.**

Appeal from Judgment for Contempt lies only for excess of jurisdiction in the amount of fine, and when there are facts which can only be brought up on a statement on appeal, p. 480.

Overruled in *Tyler v. Connolly*, 65 Cal. 30, holding that there is no appeal from contempt judgments.

62 Cal. 482-483. **PEOPLE v. GRIGSBY.**

Murder—Definition.—Unlawful killing with malice aforethought should not be charged as murder in the first degree, as it implies that unlawful killing without malice is murder of the second degree, p. 483.

Cited in *State v. Wong Fun*, 22 Nev. 341, holding that a failure to notice the statutory conditions in the definition of murder of the first degree makes the instruction erroneous.

62 Cal. 484-488. **FESSENDEN v. SUMMERS.**

Sections 3108 and 3117 of the Civil Code contain the law as to indorsers of notes. *Semble*, sections 2787 and 2807 apply to cases where the party in terms contracts as a guarantor, p. 487.

Cited in *Fisk v. Miller*, 63 Cal. 368, deciding how and when the payee of a note may become an indorser; *Chapin v. Rich*, 77 Cal. 478, holding that a guarantor who is also an indorser is entitled to demand or notice; *Loustalot v. Calkins*, 120 Cal. 690, holding that the maker and indorser of a note may be joined as parties defendant in same action. Distinguished in *Southern California Bank v. Wyatt*, 87 Cal. 617, as not applicable, when the surety signed as a joint maker; nor, as in *First National Bank v. Babcock*, 94 Cal. 104, 28 Am. St. Rep. 97, to instruments not negotiable. Cited in note to 56 Am. Dec. 359, on indorsement of negotiable paper by one not a holder or payee.

62 Cal. 492-493. **MORGAN v. MILLER.**

What constitutes immediate delivery and change of possession, and renders the sale good as against creditors of the vendor, p. 493.

Cited in *Rosenbaum v. Hayes*, 10 N. Dak. 324, noted under *Montgomery v. Hunt*, 5 Cal. 366; *Murphy v. Braase*, 3 Idaho, 551, determin-

ing sufficiency of delivery of mortgaged horses which were in possession of agister.

Note.—The opinion in this case contains no statement of the facts upon which the decision depends; the only statement is to be found in the head note. Cited in *Banning v. Marleau*, 101 Cal. 241, as an authority to guide the lower court on a new trial on the point of sufficient delivery and change of possession; note to 97 Am. Dec. 347, on sufficient delivery.

62 Cal. 493-495. PEOPLE v. AH FOOK.

Bribery of Official.—The offense is complete by the offer, without tender or production of money, p. 495.

Cited in *People v. Markham*, 64 Cal. 162, 49 Am. Rep. 704, holding that a police officer who received money as a consideration for his promise not to make a certain arrest was guilty of receiving a bribe; notes to 97 Am. Dec. 711, on definition of bribery, and p. 713, on attempt to bribe.

62 Cal. 496-503. BOSTWICK v. McEVOY.

When the trust is satisfied at the time when a sale and conveyance under the deed is made, equity will compel the trustee to reconvey, p. 501.

Cited in *Adams v. Lambard*, 80 Cal. 435, holding that equity would enforce a trust to reconvey on the contingency happening.

When notes are placed in escrow, the conditional delivery becomes absolute on the happening of the condition, and takes effect from the date of the delivery in escrow, p. 499.

Cited in *Davis v. Clark*, 58 Kan. 106, 108, sustaining the principal case; *Gammon v. Bunnell*, 22 Utah, 427, holding such delivery retroactive.

Conveyance of Legal Title to a Trustor who has sold and conveyed the equitable title enures for the benefit of, and passes the legal title to, the purchaser, p. 501.

Cited in note to 79 Am. Dec. 192, on subsequently acquired title.

The administrator of a deceased debtor may be joined with the surviving debtor in an action on a note, but any judgment must be made payable "de bonis testatoris," p. 502.

Cited in note to 68 Am. Dec. 762, on death of joint contractor.

Modification of Judgment may be made at any time by the court while it has physical control of its records, where the record furnishes the data by which to amend, p. 502.

Cited in *People v. Greene*, 74 Cal. 404, 5 Am. St. Rep. 452, holding that

a judgment void on its face may be set aside by the court rendering it at any time after entry; *Dickey v. Gibson*, 113 Cal. 34, 64 Am. St. Rep. 326, where the court amended a decree one month after entry by adding a description of property omitted by inadvertence and mistake; *Seamman v. Bonslett*, 118 Cal. 97, 62 Am. St. Rep. 230, and note 233, holding that where resort must be had to evidence outside the record notice of a motion to amend the judgment is required under section 473 of the Code of Civil Procedure.

Foreclosure May Cover a note, one of several, which was not due at the commencement of the action, but became due before the rendition of the judgment, p. 502.

Cited in *Orange etc. Bank v. Duncan*, 133 Cal. 256, noted under *Hawkins v. Hill*, 15 Cal. 500; note to 76 Am. Dec. 500.

Defense of Suretyship cannot be set up for the first time on appeal, p. 503.

Cited in *Bull v. Coe*, 77 Cal. 62, 11 Am. St. Rep. 240, holding that a release of a surety by discharge of the principal is new matter and must be pleaded.

62 Cal. 503-505. PEOPLE v. AH LUCK.

Conflicting Instructions, which could not operate to prejudice the defendant, are not ground for reversal, p. 505.

Approved in *Dennison v. Chapman*, 105 Cal. 458. Cited in *Smiltson v. S. P. Co.*, 37 Or. 104, noted under *People v. Velarde*, 59 Cal. 457.

62 Cal. 506-507. PEOPLE v. CENTRAL PACIFIC COMPANY.

Mandamus.—Writ cannot be granted by default, p. 506.

Followed in case of same title, 62 Cal. 507. Cited in note to 89 Am. Dec. 742, pleadings, in mandamus.

62 Cal. 508. PEOPLE v. HARVEY.

Mandamus.—The supreme court has no original jurisdiction of a proceeding to try the title to an office, p. 508.

Cited in *Kennedy v. Board*, 82 Cal. 493, in the dissenting opinion of Fox, J., who held that mandate was not the proper remedy to compel the board to admit plaintiff to the position of principal teacher, to which he claimed the right; *State v. Smith*, 49 Neb. 759, holding that the title to an office cannot be tried by mandamus.

62 Cal. 514. WAKELEE v. DAVIS.

Time for Vacating Judgment, which is not applicable, and not void on its face, is limited to six months after the making of the order, p. 514.

Followed in *McPherson v. Davis*, 62 Cal. 515. Approved in *Moore v. Superior Court*, 86 Cal. 496, as to an order in probate proceedings.

62 Cal. 515-516. ROEDING v. PERASSO.

Findings not Responsive to Issues are ground for reversal of the judgment, p. 516.

Cited in *Drainage District v. Crow*, 20 Oreg. 538, holding that all the material issues must be passed upon; and *Potwin v. Blasber*, 9 Wash. 466, to same effect.

62 Cal. 516-518. HEWES v. CARVILLE COMPANY.

Appeal.—Undertaking may be filed before the notice of appeal, pp. 517, 518.

Overruled in *Little v. Jacks*, 68 Cal. 346, where the reverse is held the correct ruling, but note the citation of the principal case here misstates the facts and the ruling.

Appeal.—Notice may be filed after service, p. 517.

Cited in *San Francisco etc. Co. v. State*, 141 Cal. 358, 359, and holding main case not overruled on this point.

62 Cal. 523-524. PEOPLE v. DYE.

Appeal—Misconduct of Jury.—When the affidavits and counter-affidavits of jurors are contradictory, the judgment of the lower court that there was no misconduct will be upheld, p. 523.

Cited in *People v. Goldenson*, 76 Cal. 352, as authority for ruling that the jurors' affidavits were allowable and conclusive, but see the principal case, p. 523; *People v. Murray*, 94 Cal. 217, 28 Am. St. Rep. 114, holding that an allegation of misconduct of the jury might be rebutted by the evidence of the jury themselves, and their affidavits were admissible (this decision is founded on that of *People v. Goldenson*, supra, as to which see supra); *People v. Biles*, 2 Idaho, 107, to the same effect.

Insufficient Statement in Bill of Exceptions.—When it contains a general statement that each party "introduced evidence to sustain the issue on their respective parts," an objection that the verdict is contrary to the evidence is untenable, p. 524.

Cited in *Territory v. Neilson*, 2 Idaho, 589, holding that the presumption is that the bill of exceptions contains all the evidence bearing on the objections made.

62 Cal. 524-534. EX PARTE BERNERT.

Sentence in Excess of that authorized by statute or ordinance, whether valid pro tanto not decided, pp. 530, 531.

Wrongly referred to in *Ex parte Moon Fook*, 72 Cal. 11, as having been a decision on the effect of an excessive sentence.

Sentence Below the minimum renders the judgment void, pp. 529, 530.

Overruled in *In re Reed*, 143 Cal. 635, holding such judgment not void and defendant not entitled to release on habeas corpus; *Ex parte Cox*, 3 Idaho, 534, 537, where court imposes sentence greater than provided for by law, judgment is void, and prisoner will be discharged on habeas corpus. Doubted in *Ex parte Soto*, 88 Cal. 626, 627, and held not to apply to section 1446 of the Penal Code, and that under it the police judge had power to pass an alternative sentence of imprisonment at a lower rate than one day for each dollar of fine. Cited in same case, p. 630, in dissenting opinion of Garboutte, J., approving the ruling of the principal case, and holding that the prevailing opinion was practically a repeal of the statute; note to 55 Am. St. Rep. 265, on validity of sentences below the minimum.

Judicial Notice—Gambling.—Courts will not take judicial notice that "pool" necessarily involves gaming for money or value, p. 531.

Cited in note to 89 Am. Dec. 697, on judicial notice—matters of common knowledge.

62 Cal. 534-536. EX PARTE CRITTENDEN.

Contempt of Court is a specific criminal offense, and the imposition of a fine is a judgment in a criminal case (citing *New Orleans v. Steamship Co.*, 20 Wall. 392, p. 535).

Cited in *Ex parte Hollis*, 59 Cal. 408, holding that the judgment of contempt may be reviewed on habeas corpus; *Matter of Tyler*, 64 Cal. 438, holding that a person adjudged guilty of contempt may pay the fine in money or in imprisonment; same case in concurring opinion of Morrison, C. J., and *Myrick and McKinstry, JJ.*, p. 439, holding that the court could enforce payment of the fine by ordering imprisonment until payment, at the rate of two dollars for each day's imprisonment; *Tyler v. Connolly*, 65 Cal. 30, holding that a judgment for contempt was not appealable. Referred to in same case, p. 32, in concurring opinion of Morrison, C. J., as having followed *New Orleans v. Steamship Co.*, *supra*, and approving principle there stated. Cited in *In re Buckley*, 69 Cal. 3, to the like effect, in an original proceeding to punish for contempt of the Supreme Court; *Ex parte Henshaw*, 73 Cal. 495, to the like effect, and holding that one who continues to exercise the functions of a public office, after being adjudged a usurper thereof, is guilty of a contempt of court. Approved in *Ex parte Abbott*, 94 Cal. 334. Cited in *Ex parte Gould*, 99 Cal. 362, 37 Am. St. Rep. 59, where the contempt was a refusal to testify on the hearing of a charge of contempt for disobedience to an injunction; *Teller v. People*, 7 Colo. 451,

Notes Cal. Rep.—196.

holding that there is no appeal from a judgment of contempt; *Ex parte Robertson*, 27 Tex. App. 632; 11 Am. St. Rep. 211, to the point that the court can direct imprisonment until the fine is paid, irrespective of statute.

62 Cal. 538-542. EX PARTE CASINELLO.

A San Francisco ordinance prohibiting the deposit of rubbish and garbage, except in a locality designated by the superintendent of streets, is a valid exercise of the police power and constitutional, pp. 539, 542.

Cited in *Odd Fellows' Cam. Assn. v. San Francisco*, 140 Cal. 231, noted under *Ex parte Shrader*, 33 Cal. 284; *Sanitary etc. Works v. California etc. Co.*, 94 Fed. 699, affirming power of city to contract with one person for removal of garbage and authorizing collection of fixed rate therefor; *Ex parte Heilbron*, 65 Cal. 610, and applied in an ordinance prohibiting slaughter houses in Sacramento; *In re Linehan*, 72 Cal. 116, applied to an ordinance prohibiting the keeping of more than two cows within certain portions of the city; *Ex parte Fiske*, 72 Cal. 128, applied to a San Francisco ordinance prohibiting the alteration or repair of wooden buildings within designated fire limits; *McCloskey v. Kreling*, 76 Cal. 512, to the same effect; *Ex parte Taylor*, 87 Cal. 95, applying the ruling to an ordinance of the city of San Jose, prohibiting the obstruction of sidewalks; *In re Flaherty*, 105 Cal. 564, applying the ruling to an ordinance of the city of Redlands forbidding the beating of drums, without permission, on the traveled streets of the city. Note: The court was divided on the question of delegation of power. Note to 47 Am. St. Rep. 547, on quarantine and health laws and regulations.

62 Cal. 543-544. BLISS v. SUPERIOR COURT.

An appeal operates as a stay only of orders or judgments which command or permit some act to be done, p. 544.

Cited in *Rogers v. Superior Court*, 126 Cal. 187, 188, noted under *Merced etc. Co. v. Fremont*, 7 Cal. 130; *Dewey v. Superior Court*, 81 Cal. 69, holding that a prohibitory injunction remained in full force, but a mandatory injunction was stayed by the appeal; *Elliot v. Whitmore*, 10 Utah, 243, holding that when the effect of the decree was to take property from one person and deliver it to another, the appeal ought to stay the proceedings; also in same case, in dissenting opinion of Miner, J., p. 245, arguing that the injunction in the case was a preventive and not a mandatory injunction, and it was therefore in the discretion of the lower court to refuse a stay.

62 Cal. 545. NEWMAN v. SUPERIOR COURT.

Certiorari will not be granted when there is a remedy by appeal, p. 545.

Cited in *Stuttmeister v. Superior Court*, 71 Cal. 323; *Noble v. Superior Court*, 109 Cal. 527, both to the same effect; *Ramsey v. Pettengill*, 14 Oreg. 209, holding that the statute was intended to supply a remedy where none existed in the first instance, and not to supplement one lost through the laches of the party himself.

62 Cal. 545-548. HOKE v. PERDUE.

Levee Districts are public corporations, the validity of whose existence cannot be collaterally attacked, p. 547.

Cited in *Irrigation District v. De Lappe*, 79 Cal. 363, including reclamation districts in the ruling; *Morrison v. Morey*, 146 Mo., 561, noted under *People v. Reclamation Dist.*, 53 Cal. 346.

Allegation of Probable Result of damage if certain works are not enjoined, not sufficient reason for granting an injunction, pp. 547, 548.

Cited in *Lorenz v. Waldron*, 96 Cal. 250, saying that nothing, short of a reasonable probability of injury is sufficient to warrant an injunction; *Rockford Watch Co. v. Rumpf*, 12 Wash. 651, follows the principal case as to an allegation that a party would sell real estate unless restrained.

62 Cal. 548-556. PEOPLE v. JACKSON.

School Land Warrant.—A location of land under a school land warrant in 1853 is ineffective because the land was then unsurveyed and not subject to selection, p. 553.

Overruled in *Roberts v. Columbet*, 63 Cal. 24, holding that the act of Congress of July 23, 1866, vested the legal title in the locator.

62 Cal. 557-568. PEOPLE v. HENRY.

Police Judge is a judicial officer of a municipality, and not one of those mentioned in section 10 of article 22 of the constitution, p. 557.

So, also, in *In re Guerrero*, 69 Cal. 100, as to the mayor of the city of Los Angeles, and in *State v. Connors*, 27 Fla. 337, as to a county sheriff having duties belonging to the former office of city marshal; note to 72 Am. Dec. 183, on officers of cities and counties whether or not civil or state officers.

62 Cal. 558-561. WITTENBROCK v. BELLMER.

New Trial.—The reversal of a motion granting a new trial as to some of the parties, becomes the law of the case on a second appeal, and operates as a reviver of the original judgment as between those parties and the moving party, p. 560.

Distinguished in *Williams v. Mining Association*, 66 Cal. 196, that the ruling was not applicable to an appeal where some of the parties

had not been served with notice of appeal, and that any modification of the judgment could not affect the rights of those parties; *Pierce v. Birkholm*, 110 Cal. 672, holding that an order granting a new trial suspends but does not vacate the judgment until the finality of the order is determined; *United States v. Crooks*, 116 Cal. 45, holding that in a suit against several defendants a notice of appeal by one was ineffectual unless served on all the codefendants as well as plaintiff, and a new trial could not be granted; *People v. George*, 2 Idaho, 850, holding that a new trial was not a proper remedy to obtain a rehearing on an issue of law.

Marshaling Securities.—A bankrupt pledgee and mortgagor for the same debt has the right, as against his assignee in bankruptcy, and mortgagee, to have the pledge first sold, so as to reduce the lien on the mortgage and his personal liability, p. 561.

Note to 69 Am. Dec. 160, on loans and their incidents.

63 Cal. 562. PEOPLE v. HARTMAN.

On a trial for larceny, evidence of the commission of another theft at another time is ground for reversal, p. 562.

Cited in *Williams v. Casebeer*, 126 Cal. 86, applying rule in action for malicious prosecution; *People v. Carpenter*, 136 Cal. 393, noted under *People v. Barnes*, 48 Cal. 551. Distinguished in *People v. Cunningham*, 66 Cal. 672, holding that the test of admissibility is the connection between the offenses in the mind of the criminal. Approved in same case, p. 676, by Thornton, J., in his opinion in department (which was overruled on a rehearing in bank). Distinguished in *People v. Smith*, 106 Cal. 81, holding that where two persons are killed at the same time and place, and apparently in the same transaction, evidence as to the circumstances of the killing of one is admissible on the trial for the killing of the other.

62 Cal. 563-575. TREADWELL v. YOLO COUNTY.

Election Law.—All elections for county and township officers are to be held in November of the even numbered years, pp. 564, 565.

Cited by Myrick, J., in his concurring opinion in *Staudt v. Election Commissioners*, 61 Cal. 324, as applicable to elections under the Hartson act of March 7, 1881.

Repeal of Statute by Implication.—The rule laid down, p. 564.

Cited in *Sponogle v. Curnow*, 136 Cal. 585, holding statute so repealed; *Chamode v. Rose*, 70 Cal. 192, holding that the Los Angeles Irrigation act of 1874 repealed the statute of May 15, 1854; *Hanley v. Sixteen Horses*, 97 Cal. 184, holding that an act of 1878, concerning animals trespassing, being in conflict with a prior act of 1874 on the same subject, repealed that act; *Dillon v. Bickell*, 116 Cal. 114, approving the

ruling of the principal case as to the County Government Act of 1891, and section 4109 of the Political Code as amended in 1881.

62 Cal. 580-602. SAN FRANCISCO GAS LIGHT CO. v. DUNN.

Mandamus will lie to compel the auditor to allow a bill which the board of supervisors has power to approve and has approved; his duty in such case is ministerial, p. 595.

Cited in *Contra Costa Water Co. v. Breed*, 139 Cal. 434, granting writ for auditing of water bills under facts stated; *Hunt v. Broderick*, 104 Cal. 315, to same point and effect. Distinguished in *Higgins v. San Diego Water Co.*, 118 Cal. 555, holding that the ruling of the principal case did not apply where the city itself was contesting the claim, and was not precluded from showing that an amount allowed in pursuance of a void contract is in excess of reasonable value.

Contract for Over Two Years by supervisors of San Francisco is prohibited by the act of April 3, 1876, p. 586.

Distinguished in *McBean v. City of Fresno*, 112 Cal. 170; 53 Am. St. Rep. 198, showing that the ruling of the principal case was based on the express limitation in the act of 1876, and not of universal application.

Board of Supervisors of San Francisco may, independently of contract, decide to pay for gas supplied, and a resolution allowing, passing, and ordering paid a claim is a fresh contract to pay the sum allowed, p. 588.

Cited in *Higgins v. San Diego Water Co.*, 118 Cal. 555, holding that the city of San Diego could be held to pay the reasonable value of the use of a water plant which it had actually enjoyed.

Municipal Corporations.—Supervisors may make contract for gas supply extending over a number of years, p. 585.

Cited in *Doland v. Clark*, 143 Cal. 181, applying rule to contract for fire alarm and police telegraphic system.

62 Cal. 602-610. COFFEY v. GREENFIELD.

Motion for Nonsuit must state precisely the grounds on which the mover relies, p. 608.

Cited in *Silva v. Holland*, 74 Cal. 531, to same effect; *Miller v. Luco*, 80 Cal. 261, where a motion on the ground "that plaintiffs had failed to prove a sufficient case" held insufficient; *Belcher v. Murphy*, 81 Cal. 41, to the like effect; *Shain v. Forbes*, 82 Cal. 582, where, on a claim for services rendered as attorney, it was held error to grant a nonsuit on the ground that there was no evidence of any employment to render the specific services; *Bronan v. Drabaz*, 93 Cal. 650, holding that the only ground on which the ruling on a motion for nonsuit can be re-

viewed is that specifically stated when the motion is made; *People v. Sansome*, 98 Cal. 239, applying the ruling of the principal case to a motion for new trial in a criminal case; *Frank v. Bullion etc. Co.*, 10 Utah, 45, noted under *Poehlman v. Kennedy*, 48 Cal. 201; *Lewis v. Silver etc. Co.*, 22 Utah, 53, noted under *Kiler v. Kimball*, 10 Cal. 268; *Wright v. Fire Insurance Co.*, 12 Mont. 477, sustaining the ruling of the principal case; *First National Bank v. Laughlin*, 4 N. Dak. 402, to same effect as *Bronan v. Drobaz*, *supra*, the court saying: "Naming the grounds operates to exclude all other grounds"; *Tanderup v. Hanson*, 8 S. Dak. 377, to same effect as to a motion to direct a verdict for defendant.

Intervenor must support his claim by proper averments in the petition, p. 610.

Smith v. Gale, 144 U. S. 519, defining the objects to be sought by intervention and how they must be shown.

Deed Obtained by Guardian in fraud of the rights of his wards is void, p. 609.

Cited in note to 75 Am. Dec. 448, on personal liability of guardian.

62 Cal. 611-613. **ROGERS v. MAHONEY.** Confirmation in Bank of the opinion rendered in same case in Department, p. 612.

Exception to Charge must be sufficiently specific to indicate to the court the alleged errors, p. 613.

Cited in *Cockrill v. Hall*, 76 Cal. 195, to same effect; *Frost v. Grizzly Bluff Co.*, 102 Cal. 527, to same effect; as also *Geary v. Parker*, 65 Ark. 525; noted under *McCreery v. Everding*, 44 Cal. 246; note to 85 Am. Dec. 125, on exceptions must point out specific portions of charge excepted to.

62 Cal. 613-614. **ESTATE OF DEAN.**

An order setting aside a decree settling the final account and decreeing distribution is not appealable, p. 614.

Cited in *Estate of Murphy*, 128 Cal. 340, and *Estate of Tuohy*, 23 Mont. 307, noted under *Estate of Calahan*, 60 Cal. 232; *Lutz v. Christy*, 67 Cal. 457, holding the like in case of an order refusing to set aside; *Estate of Ward*, 83 Cal. 620, to same effect; *Estate of Moore*, 86 Cal. 59, where substitution of a trustee held not appealable; *Estate of Walkerly*, 94 Cal. 353, where an order denying a motion to vacate a previous order held not appealable; *Estate of Smith*, 98 Cal. 639, where an order permitting the amendment of a statement on motion for new trial held not appealable.

62 Cal. 616-617. **PEOPLE v. McLANE.**

Mandamus.—Writ will not be granted when there is a plain, speedy, and adequate remedy at law, p. 617.

Cited in note to 89 Am. Dec. 730, on the law of mandamus.

62 Cal. 618-622; 45 Am. Rep. 663. MARTIN v. THOMPSON.

Replevin.—An action cannot be maintained to recover grain sown and harvested by defendant on land to which he claims title, and of which he had adverse possession, p. 619.

Followed in *Martin v. Durand*, 62 Cal. 623. Cited in *Hines v. Good*, 128 Cal. 40, 79 Am. St. Rep. 23, and note 24, applying rule to house severed from land; *Martin v. Thompson*, 63 Cal. 4, holding that a mortgagee who is entitled to immediate possession may intervene in an action by a third person against the mortgagor to recover the same property; *Smith v. Cunningham*, 67 Cal. 263, saying that replevin cannot be made the vehicle of testing title; *Emerson v. Whitaker*, 88 Cal. 148, to same effect; *Johnston v. Fish*, 105 Cal. 422, 45 Am. St. Rep. 55, holding that one in adverse possession under a claim of title and pending an action of ejectment is entitled to dispose of the crops during the period of his possession; *Hooker v. Latham*, 118 N. C. 187, to same effect as *Smith v. Cunningham*, supra, note to 89 Am. Dec. 429, on assumption, and *idem*. 431, on trial of title incidentally in transitory actions.

Refusal to allow amendment of complaint is not reversible where record does not show that proposed amendment was presented or that notice of motion pointed out precise amendment which plaintiff would ask leave to make, p. 622.

Approved in *Kleinclaus v. Dutard*, 147 Cal. 252, applying rule in action to enforce verbal trust.

62 Cal. 623-641. BRICKELL v. BATCHELDER.

Note by Married Woman jointly with her husband made prior to July 1, 1874, does not bind her, p. 640.

Referred to in rehearing of same case, 62 Cal. 640, also in *Batchelder v. Brickell*, 75 Cal. 374, holding that a modification of the original, direction there should be no personal judgment against the married woman, did not vacate the decree nor the sale made thereunder.

Power of Sale, arising on a default in payment of interest, entitles the mortgagee to foreclose for the whole principal, p. 637.

Cited in *Phelps v. Mayers*, 126 Cal. 550, holding action maintainable for principal, under terms of note sued on; *Maddox v. Wyman*, 92 Cal. 675, to same effect, where the note is payable by installments, and the mortgage gives a power of sale on failure to pay any installment.

Right to Compound the Interest in arrear does not prevent the exercise of power of foreclosure, p. 631.

Cited in *Clemens v. Luce*, 101 Cal. 435, to same point.

62 Cal. 641-646. SAN FRANCISCO GAS CO. v. BRICKWEDEL.

Municipal Indebtedness.—Section 18 of article 11 of the constitution

provides that no indebtedness or liability incurred in any one year shall be paid out of the income of any future year, p. 642.

Cited in *Shaw v. Statler*, 74 Cal. 259, holding that the ruling arises by necessary implication, although the constitutional provision refers in terms to the incurring of indebtedness and not expressly to its payment; *Schwartz v. Wilson*, 75 Cal. 505, 506, applies the rule to a claim against a county for supplies. Distinguished in *Lewis v. Widber*, 99 Cal. 413, holding the constitutional provision did not apply to the salary of a public officer whose office was created and salary fixed by law. Cited in *McGowan v. Ford*, 107 Cal. 184, holding, besides, that the board of supervisors had no jurisdiction to carry an indebtedness over and make it payable out of the revenue of the next fiscal year; *Smith v. Broderick*, 107 Cal. 648, 48 Am. St. Rep. 170, holding that the constitutional provision could not be evaded by a consent to the entry of a judgment; *Weaver v. San Francisco*, 111 Cal. 322, applying the ruling to a claim for labor and materials supplied to the fire department; *McBean v. City of Fresno*, 112 Cal. 164, 53 Am. St. Rep. 194, holding that under a contract, for a purpose authorized by the city charter, for over two years, the sole liability created was that which arose from year to year in separate amounts as the work was performed; *Bradford v. San Francisco*, 112 Cal. 547, held any taxpayer could sue to restrain the levy of a municipal tax for the payment of an indebtedness incurred in a previous year; *Pacific Undertakers v. Widber*, 113 Cal. 202, 203, extending the ruling to a contract for burial of the indigent dead; *Higgins v. San Diego Water Co.*, 118 Cal. 527, to same effect; S. C. 535, in concurring opinion of Beatty, C. J., holding that the ruling of the principal case was mere dictum; that the true meaning of the section was that the county or municipality could only make valid contracts and incur liabilities to the extent of the revenue provided in advance for their discharge; that such contracts only were valid and all others were utterly void; *Montague v. English*, 119 Cal. 227, approving the ruling of the principal case; *Higgins v. City of San Diego*, 131 Cal. 298, holding available the unused balances in special funds; *Thelss v. Hunter*, 4 Idaho, 793, 794, city indebtedness incurred, during one fiscal year cannot be paid from income or revenue of future fiscal year, unless fund is especially provided for that purpose and collected in such future year; *City of Indianapolis v. Wann*, 144 Ind. 187, holding that, under the Indiana laws, all contracts and agreements and all obligations of a municipal corporation made in advance of existing appropriations were absolutely void. Distinguished in *Western Town Lot Co. v. Lane*, 7 S. Dak. 7, as not applying to a state where there is no such constitutional provision as in California; *Mason v. Purdy*, 11 Wash. 599, as not applicable to the state of Washington, where the contrary rule prevails; *Eidemiller v. Tacoma*, 14 Wash. 383, to the like effect. Mentioned in note to 76 Am. Dec. 537, as having

cited *People v. Seymour*, 16 Cal. 332. Cited in note to 44 Am. St. Rep. 236, on municipal indebtedness.

Taxes are Debts, within the meaning of section 82 of the consolidation act of San Francisco, pp. 644, 645 (concurring opinion of Thornton, J.).

Cited in note to 42 Am. St. Rep. 655, on recovery of personal judgment for taxes.

All Persons are Presumed to Know the Law, p. 642.

Cited to same effect in *Murphy v. Clayton*, 118 Cal. 102.







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SUPREME COURT.

R. F. MORRISON, Chief Justice.

DEPARTMENT ONE.

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S. B. McKEE, Associate Justice.

E. M. ROSS, Associate Justice.

DEPARTMENT TWO.

J. D. THORNTON, Presiding Justice.

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J. W. MCCARTHY	Clerk.
JOHN S. WILLIAMS	Deputy Clerk.
JOHN KILSBY	Deputy Clerk.
FRANK MYERS	Deputy Clerk.
W. S. LEAKE	Deputy Clerk, Sacramento.
J. T. GAFFEY	Deputy Clerk, Los Angeles.
THOS. F. O'CONNER	Secretary and Librarian.
FRANK T. MEAGHER	Secretary.
HENRY C. FINCKLER	Bailiff.

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ORGANIZATION OF SUPREME COURT.

CONSTITUTION, ARTICLE 6, SECTION 2.

§ 2. The Supreme Court shall consist of a chief justice and six associate justices. The court may sit in departments and in bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions hereinafter contained in relation to the court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited the judgment shall be final. No judgment by a department shall become

final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties, and exercise the powers of the chief justice during such absence or inability to act.

SUPERIOR COURT JUDGES.

A. M. CRANE.....	Oakland, Alameda.
W. E. GREENE.....	Oakland, Alameda.
NOBLE HAMILTON.....	Oakland, Alameda.
N. D. ARNOT, Jr.....	Markleville, Alpine.
CURTIS H. LINDLEY.....	Jackson, Amador.
P. O. HUNDLEY.....	Oroville, Butte.
C. F. GOTTSCHALK.....	San Andreas, Calaveras.
E. A. BRIDGFORD.....	Colusa, Colusa.
THOMAS A. BROWN.....	Martinez, Contra Costa.
JAMES E. MURPHY.....	Crescent City, Del Norte.
GEORGE E. WILLIAMS.....	Placerville, El Dorado.
S. A. HOLMES.....	Fresno, Fresno.
J. P. HAYNES.....	Eureka, Humboldt.
JOHN A. HANNAH.....	Independence, Inyo.
B. BRUNDAGE.....	Bakersfield, Kern.
RODNEY J. HUDSON.....	Lakeport, Lake.
JAMES W. HENDRICK.....	Susanville, Lassen.
V. E. HOWARD.....	Los Angeles, Los Angeles.
HENRY M. SMITH.....	Los Angeles, Los Angeles.
T. J. BOWERS.....	San Rafael, Marin.
J. M. CORCORAN.....	Mariposa, Mariposa.
ROBERT McGARVEY.....	Ukiah, Mendocino.
CHARLES H. MARKS.....	Merced, Merced.
G. F. HARRIS.....	Alturas, Modoc.
R. M. BRIGGS.....	Bridgeport, Mono.
MARCUS P. WIGGIN.....	Bridgeport, Mono.
JOHN K. ALEXANDER.....	Salinas City, Monterey.
WILLIAM C. WALLACE.....	Napa City, Napa.
JOHN CALDWELL.....	Nevada, Nevada.
B. F. MYERS.....	Auburn, Placer.
G. G. CLOUGH.....	Quincy, Plumas.
T. B. McFARLAND.....	Sacramento, Sacramento.

JOHN W. ARMSTRONG.....	Sacramento, Sacramento.
JAMES F. BREEN.....	Hollister, San Benito.
HORACE C. ROLFE.....	San Bernardino.
WILLIAM T. McNEALY.....	San Diego, San Diego.
TIMOTHY H. REARDEN.....	San Francisco.
ROBERT FERRAL.....	San Francisco.
JOHN HUNT, Jr.....	San Francisco.
J. F. SULLIVAN.....	San Francisco.
M. A. EDMONDS.....	San Francisco.
F. W. LAWLER.....	San Francisco.
T. K. WILSON.....	San Francisco.
JOHN F. FINN.....	San Francisco.
JAMES V. COFFEY.....	San Francisco.
F. M. CLOUGH.....	San Francisco.
D. J. TOOHEY.....	San Francisco.
JAMES G. MAGUIRE.....	San Francisco.
A. VAN R. PATTERSON.....	Stockton, San Joaquin.
W. S. BUCKLEY.....	Stockton, San Joaquin.
D. S. GREGORY.....	San Luis Obispo City and County.
LOUIS McMURTRY.....	San Luis Obispo City and County.
E. F. HEAD.....	Redwood City, San Mateo.
D. P. HATCH.....	Santa Barbara, Santa Barbara.
DAVID BELDEN.....	San Jose, Santa Clara.
FRANCIS E. SPENCER.....	San Jose, Santa Clara.
JAMES H. LOGAN.....	Santa Cruz, Santa Cruz.
AARON BELL.....	Shasta, Shasta.
A. J. HOWE.....	Downieville, Sierra.
EDWIN SHEARER.....	Yerka, Siskiyou.
JOHN M. GREGORY.....	Fairfield, Solano.
JACKSON TEMPLE.....	Santa Rosa, Sonoma.
JOHN G. PRESSLEY.....	Santa Rosa, Sonoma.
A. HEWELL.....	Modesto, Stanislaus.
PHILIP W. KEYSER.....	Sutter and Yuba Counties.
C. P. BRAYNARD.....	Red Bluff, Tehama.
T. E. JONES.....	Weaverville, Trinity.
WILLIAM W. CROSS.....	Visalia, Tulare.
JOHN F. ROONEY.....	Sonoma, Tuolumne.
J. D. HINES.....	San Buenaventura, Ventura.
E. R. BUSH.....	Woodland, Yolo.

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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

FROM JANUARY, 1883, TO JUNE, 1883, INCLUSIVE.



63 CAT.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

[Department One.— January 2, 1888.]

**S. B. MARTIN, RESPONDENT, v. A. THOMPSON,
JOSEPH WATERMAN, INTERVENOR, APPELLANT.**

INTERVENTION.— A mortgagee of personal property who is entitled by the terms of his mortgage to immediate possession may intervene in an action by a third person against the mortgagor to recover the specific property, and his right to intervene is not affected by the plaintiff's taking possession of the property at the commencement of the action on giving a bond as provided by the statute.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

Defendant raised a crop of grain on land held by him adversely to plaintiff, and mortgaged the growing crop to the intervenor. Plaintiff as owner of the land replevied the crop as soon as harvested. The mortgagee asked leave to intervene. His application was denied and he appealed.

Curtis H. Lindley, and Arthur Rodgers, for Appellant, cited Horn v. Volcano Water Co. 13 Cal. 62; Speyers v. Ishmels, 21 Cal. 287; Gradwohl v. Harris, 29 Cal. 154; Stich v. Gardner, 38 Cal. 610; Coburn v. Smart, 53 Cal. 742; Coffey v. Greenfield, 55 Cal. 382; Robinson v. Fitch, 26 Ohio St. 659; Heyland v. Badger, 35 Cal. 404; Butler v. Miller, 1 N. Y. 497.

Mich. Mullany, for Respondent, cited Civ. Code, §§ 2969, 2972; *Waterman v. Grun*, 59 Cal. 142; *Goodyear v. Williston*, 42 Cal. 11.

PER CURIAM.—The question here to be determined is whether a mortgagee of personal property, entitled by the terms of his mortgage to the immediate possession, can intervene in an action brought by a third person against the mortgagor for the specific property, where the plaintiff has taken possession at the commencement of the action, upon giving bond as provided by the statute.

As between plaintiff and defendant the present is like the case of *Martin v. Thompson*, 82 Cal. 618.

It seems to be held by the court below that intervenor's lien and right of possession was lost when he filed his petition, because, prior to that date plaintiff had removed the grain from the mortgagor's farm. But the chapter of the Civil Code which treats of mortgages of personal property (§§ 2955, 2972), substitutes the record of the mortgage for the actual delivery and continued change of possession in case of other transfers required by § 3440. The purpose of the actual delivery, in the one case, and of the record or registry in the other, is to give notice to those who shall deal with the vendor or mortgagor, and § 2972 only provides that the lien of a mortgage on a growing crop shall cease when the crop is removed from the premises of the mortgagor — as against *creditors* or innocent *purchasers* from the mortgagor. There is nothing in the letter of the Code which demands such construction of § 2972 as that the lien shall be lost as a consequence of the tortious removal of the crop by a third person.

When the crop was removed by plaintiff intervenor was entitled to its immediate possession. True, defendant was in the actual possession, and was authorized to recover the property as against a trespasser who should remove it. While either the mortgagee entitled to the immediate possession, or the mortgagor in actual possession, would have been entitled to bring an action of trespass (or trover, or our statutory action) against one wrongfully interfering with the property, a recovery by one would be a bar to an action by the other. So, here, the defendant and intervenor cannot *both* take judgment against the

plaintiff for a recovery of the property, or its value. In this form of action all parties are actors, seeking affirmative relief. Who should have the property in dispute, or its value? The defendant is entitled to recover it from the plaintiff, but the intervenor is entitled to it both as against the plaintiff and defendant. It is a proper case for intervention. (Code Civ. Proc. § 387.)

Judgment reversed and cause remanded for a new trial, with direction to the court below to allow such amendments to the pleadings, properly applied for, as may be just and proper.

Hearing in Bank denied.

[Department One.— January 2, 1883.]

IN THE MATTER OF THE ESTATE OF GIOVANNI
SBARBORO, DECEASED.

PROBATE OF WILL — PETITION TO REVOKE — LIMITATION — POWER OF COURT.—

A petition to revoke the probate of a will, if the parties are under no disability, must be filed within a year after the entry of the decree admitting the will to probate. The clerk of the court is the only person with whom the petition can be filed, and it must be delivered to him before the year expires. Presenting it to the judge out of court for the purpose of having a citation issued upon it is not enough. It must be filed with the clerk, and if not so filed prior to the expiration of the year, the decree becomes conclusive and absolute. An order subsequently made by the court directing the clerk to file it as of a day within the year cannot be sustained.

APPEAL from certain orders and a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

John M. Burnett, and *E. D. Sawyer*, for Appellants.

The presentation of the petition for the revocation of the probate of the will to the judge at his private residence, on the 2d day of December, 1879, and his retention of the same for examination, and his delivery thereof to the clerk, on the 3d day of December, was not the filing in the court in which the will was heard, as required by the statute, and that therefore

said petition was not filed within one year after the probate of the will. (Code Civ. Proc. § 1327; *Tregambo v. Comanche Mill and Mining Co.* 57 Cal. 501; *Engleman v. State*, 2 Ind. 91; Bouvier Law Dictionary, word "file"; *Lamson v. Falls*, 5 Ind. 309.)

The clerk is the custodian of the papers, and alone can mark them filed.

Aug. D. Splivalo, and R. W. Hent, for Respondents.

There is no law or provision that a paper which has to be filed in court should be delivered for filing to the clerk rather than the judge. The authorities say that the words "judge" and "court" are synonymous. (*Michigan R. R. Co. v. N. Ind. R. R. Co.* 3 Ind. 239; *Gold v. Vermont C. R. R.* 19 Vt. 478; *McClure v. McClurey*, 52 Mo. 173.)

Petitioners herein did present an unfiled petition for action, and the moment the judge took it into his possession it was filed in court; it was taken official possession of and considered with the other papers in the case, and upon this filed petition the order of citation was issued by the court. (*Tregambo v. Comanche M. & M. Co.* 57 Cal. 501; *Engleman v. State*, 2 Ind. 91; *Bishop v. Cook*, 13 Barb. 326; *Lamson v. Falls*, 6 Ind. 309.)

The last case is to the point. It says: "To file a paper is considered an exhibition of it to the court, and the clerk's office in which it is filed represents the court for that purpose."

McKEE, J.— This appeal is from certain orders and a judgment entered in a proceeding for revocation of the probate of the last will and testament of G. Sbarboro, deceased.

Proceedings for the revocation of the probate of a will must be commenced in the court in which the will was proved, within one year after the probate. (§ 1327, Code Civ. Proc.) If the validity of the will or its probate be not contested within that time, the validity and probate become final and conclusive upon all parties interested in the estate, except infants and persons of unsound mind. (§§ 1333, 1908, Code Civ. Proc.) Proceedings for contesting the probate of a will are a suit in the nature of an action by parties interested in the estate against the administrator, with the will annexed, or the executor of the

will, the legatees, devisees, and heirs of the estate, and they are commenced by filing a petition in the court in which the will was proved. A petition is filed by delivering it to be filed to the officer of the court who is entitled to receive it for that purpose, and to the custody of it after it has been filed. The clerk of the court below was the only person entitled to the custody of the petition. As custodian of the papers of a cause, he was, therefore, the only person to whom the petition could have been presented for filing, and when presented it was his duty to receive and indorse it filed. As matter of fact the petition in the case was delivered to the clerk of the court for filing about nine o'clock A. M. of the 3d day of December, 1879; but the decree of the court admitting the will to probate had been entered on the 2d day of December, 1878, and the "year" within which the probate could be contested had run at midnight of December 2, 1879; therefore the petition was not filed in time, and the validity of the will and its probate became final and conclusive upon the petitioners — there being no legal disabilities. However, the clerk indorsed the petition as follows: "Filed by order of court Dec. 2, 1879" But the indorsement was made on the 4th day of December, 1879, under the following order made by the court on the same day: "It is by this court ordered that the clerk of this court mark the said petition filed as of December 2, 1879, and that he make and enter the said order as of the same day." That order was made upon proof to the satisfaction of the court that between the hours of seven and eight o'clock P. M. of December 2, 1879, the petition, before it was filed or presented to the clerk for filing, had been presented to the judge of the court at his private residence, for an order for the issuance of a citation upon it, and for the purpose of examining it, so as to determine whether the petitioners were entitled to the order, the judge retained the petition in his possession until the morning of the 3d day of December, 1879, when he took it to the office of the clerk of the court, and about nine o'clock A. M. on that day delivered it with his order for the issuance of a citation thereon, to one of the deputy clerks of the court, in the clerk's office, and verbally directed him to file the same as of the 2d day of December, 1879; but the clerk did not, at the time of receiving the petition from the judge, file

it, because the attorneys for the administrator with the will annexed, being present, objected; and on the 4th day of December, 1879, the court heard the objection and overruled it, and made the order requiring the clerk to indorse the petition filed as of the 2d day of December, 1879, which was accordingly done. The court afterwards refused to set aside its order, and denied a motion made to correct the indorsement of the filing by the clerk so as to show the true date of the filing, but upon the trial found the facts as to the presentation and filing of the petition upon which its order was made.

The ruling and order of the court were erroneous. As the petition had not been, in fact, filed in the court within the "year," it was too late to file it at all; and the court could not legally, after the expiration of the time, by order, relieve the petitioners from the legal consequences of their own laches or delay. Time was of the essence of the proceedings commenced by the petitioners. The provisions of the law directing the proceedings to be had and the time within which they might be commenced were, in that regard, imperative, not directory, for the law declared the effect of not commencing them in time — it made the thing which the proceedings were intended to assail conclusive and unassailable; and the court in which the proceedings were begun had no authority by order or otherwise to direct that to be done, which had not, in fact, been done, or to adjudge that which the law pronounced conclusive to be invalid and void.

Presenting an unfiled petition to the judge of a court for the purpose of obtaining from him an order for a citation upon it, is not filing it in court, nor the equivalent of filing it. It is no part of the duty of a judge to receive a petition in a cause for filing, or to file it, or to make an order for its filing, or for issuing a citation upon it, unless some law expressly requires of him the performance of such a duty. There was no law which required of the judge of the court in this case performance of any one of those acts. The duty of filing the petition, and issuing citation upon it, when filed, was cast by law upon the clerk of the court. (§ 1328, Code Civ. Proc.) Being purely ministerial acts, they had to be done within the time prescribed by law; and as they were not done by the proper officer, the

rights of parties which had attached and become fixed by reason of their non-performance could not be disturbed. It was, therefore, error for the court by its order to direct the clerk to indorse on the petition that it had been filed on a day when it was not, in fact, filed nor delivered to him for filing. The order to that effect should have been set aside and the petition itself dismissed.

Judgment and orders reversed and cause remanded.

McKINSTRY, J., and ROSS, J., concurred.

Hearing in Bank denied.

[Department One.— January 2, 1883.]

M. J. O'CONNOR, APPELLANT, v. LORENZO FOGLE,
RESPONDENT.

SUBJECTMENT — EVIDENCE — STATUTE OF LIMITATIONS — PAYMENT OF TAXES.—

The plaintiff claimed under a patent from the State. More than five years elapsed between the issuing of the patent and the commencement of the action. The defendant pleaded the Statute of Limitations, and relied upon an adverse possession commencing before the patent issued. It appeared from the evidence that the plaintiff had paid the taxes upon the land. The court instructed the jury as to the proof required to make out an adverse possession, and that in addition to the fact of possession and its adverse character, it was necessary for the defendant to show that the taxes had been paid by him. The jury rendered a verdict in favor of the defendant. *Held*, (1) that the statute could not commence to run until the issuing of the patent; (2) that the possession of the defendant, even if sufficient in other respects, was not adverse because of his failure to pay the taxes.

APPEAL from the judgment of the Superior Court of the county of Los Angeles, and from an order refusing a new trial.

The facts are sufficiently stated in the opinion of the court.

Bicknell & White, for Appellant.

William D. Gould, James H. Blanchard, and Brunson & Wells, for Respondent.

McKEE, J.— This appeal is from the final judgment and order denying a motion for a new trial in this case. The action was ejectment. By the record it appears that the plaintiff claimed

a right of entry to the demanded premises through a patent which had been issued by the State of California, April 24, 1874, to the immediate grantor of the plaintiff. The patent vested in the patentee title to the land, and, as his grantee, the plaintiff was entitled to recover possession unless his cause of action was barred by the Statute of Limitations. That was the defense interposed to the action by the following answer:—

“And for a further and separate answer and defense the defendant alleges that he has been in the quiet, peaceful, and exclusive possession of said land in the plaintiff's complaint described, holding and claiming the same adversely to said plaintiff, and adversely to all other persons for more than five years before the commencement of this suit, to wit, ever since prior to September 1, 1870, and that neither the plaintiff, nor either of his ancestors or ancestor, predecessor, or grantors was ever seized or possessed of the said land, or any portion of the same within five years before the commencement of this action, or at all.”

The evidence given upon the issue raised by this answer tended to prove that the defendant entered on the land in the year 1870, as a qualified pre-emptor. At that time the land was part of the public domain of the United States within this State. While residing on the land with his family, the defendant, in December, 1870, filed his declaratory statement in the United States land office in the district within which the land was situated. When he filed this statement the township had been surveyed by the United States authorities, the survey was approved, and the plat of the survey had been filed in the proper United States land office. Subsequent, however, to the filing of the township plat, and of the declaratory statement, the land was listed to the State of California, in fulfillment of a selection, which had been made by the State prior to the United States surveys of the land; and on April 24, 1874, the State issued the patent to the plaintiff's grantor. Against the listing of the land to the State the defendant protested, and contested the title of the State; but the United States authorities decided the contest against him, and in December, 1876, canceled his declaratory statement. Yet the defendant continued to reside with his family on the land, as before the

issuance of the patent, and has since continuously resided thereon, claiming title to it against the plaintiff and others; but his claim of title was not founded upon any instrument in writing, judgment, or decree of a competent court; it was founded only on what was claimed to have been an adverse possession of the land for the statutory time. Of course, if there was a sufficient adverse possession to put in motion the Statute of Limitations the time of the statute began to run in favor of the defendant only from the date of the patent to the plaintiff; it did not run against the United States nor the State. (*Davis v. Davis*, 26 Cal. 46; *Johnson v. Van Dyke*, 20 Cal. 228; *Beach v. Gabriel*, 29 Cal. 580; *Sabichi v. Aguilar*, 43 Cal. 291; *Manley v. Howlett*, 55 Cal. 94.) From the date of the patent to the commencement of the action there was a period of seven years, and the question is, Was the possession of the defendant during that time adverse?

To constitute such a possession in favor of one who does not claim under color of title, land is deemed to have been possessed and occupied in the following cases only:—

“ 1. Where it has been protected by a substantial enclosure.

“ 2. Where it has been usually cultivated or improved.

“ *Provided, however*, that in no case shall adverse possession be considered established, under the provision of any section or sections of the Code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, State, county, or municipal, which have been levied and assessed upon such land.” (§ 325, Code Civ. Proc.) That was the law in force at the commencement of the action, upon the subject of adverse possession; and to entitle the defendant to its benefits he was bound to show a compliance with its provisions. According to the uncontroverted evidence of the defendant himself, he failed to show an adverse possession, for the land was not protected by a substantial enclosure; nor has it been exclusively cultivated by the defendant; nor has he paid the taxes upon the land; on the contrary, it is an uncontroverted fact that the plaintiff has paid the taxes every year.

Upon the subject of his occupation, the defendant, upon his examination as a witness in his own behalf, testified that he had built a house, dug several wells, and made some corrals on the

land after he had entered on it as a pre-emptor; that since then he had continuously resided upon it, "claiming it all as a pre-emptor of government land, adversely to everybody," and cultivated a portion of the tract, at no time exceeding twenty or twenty-five acres, for several years. Assuming that such an occupation, without an actual enclosure of the tract, would be sufficient, yet, as the defendant failed to pay the taxes on the land, he has not performed the acts required by the Statute of Limitations. In consequence of that failure, there was no such adverse possession taken and held by him, with the requisites and circumstances specified in the Code, as entitled him to the benefit of the Statute of Limitations. Therefore, in law, he is to be regarded as a mere trespasser. The verdict was therefore against the evidence, and the instructions of law given by the court, and should have been set aside.

Judgment and order reversed, and cause remanded.

ROSS, J., and MCKINSTRY, J., concurred.

[Department One.—January 2, 1883.]

JOHN L. MOORE, APPELLANT, v. EDWARD M. JONES
ET AL., RESPONDENTS.

HUSBAND AND WIFE — COMMUNITY AND SEPARATE PROPERTY — CONVEYANCE TO WIFE — PRESUMPTION.— Real estate conveyed to a married woman for a money consideration expressed in the deed is presumed to be community property, but this presumption is not conclusive. It may be overcome by evidence that the purchase was made with her separate money, and such evidence is admissible against a purchaser from the husband after the death of the wife.

10. — DEPOSIT — AGENCY — TRUST.— Money of the wife deposited with the husband, and mingled by him with the moneys of other persons in his possession, does not lose its character as her separate money. In such a case the husband becomes the agent and trustee of the wife and not merely her debtor. Property purchased in her name and at her request by the husband acting as her agent, and paid for out of her portion of the common fund thus created, is her separate property.

11. — DECLARATIONS OF THE HUSBAND.— For the purpose of showing that the money used in making the purchase was the separate money of the wife, declarations of the husband made prior to the conveyance by him are competent evidence.

12. — FINDING — SUFFICIENCY OF EVIDENCE.— The court below found in substance that the purchase was made, and the property improved with money belonging to the wife as her separate estate. *Held*, that under this finding the property must be regarded as the separate estate of the wife; and on a review of the evidence, *held further*, that it was sufficient to support the finding.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was brought by the purchaser from the husband to quiet title. The facts are stated in the opinion of the court.

Shafter, Parker & Waterman, for Appellant.

1. The defendants must establish the fact beyond reasonable controversy that the money which was paid to Sullivan and to the fund commissioners was her separate estate, or the property must be deemed common. (*Gamber v. Gamber*, 18 Pa. St. 363; *Stanton v. Kirsch*, 6 Wis. 341.)

2. The whole case shows that Mrs. Jones was simply her husband's creditor, no trust existing between them. (7 R. I. 481; *Gibson v. Foote*, 40 Miss. 788; *Northington v. Faber*, 52 Ala. 45; *Rowland v. Blumer*, 58 Ala. 193; *Taney v. Wilson*, 68 Md. 493; *Thomas v. Thomas*, 45 Miss. 263; *Shaeffer v. Fithian*, 26 Ohio St. 262; *Logan v. Hall*, 19 Iowa, 501; *Roach v. Bennett*, 24 Miss. 104; *Peck v. Brummagin*, 31 Cal. 447.)

3. The effect of commingling the money was to make it the property of Jones. (*Vreeland v. Administrators*, 16 N. J. Eq. 523; *Glover v. Alcott*, 11 Mich. 479; *Meyer v. Kinzer*, 12 Cal. 247; *Pixley v. Huggins*, 15 Cal. 131; *Ramsdell v. Fuller*, 28 Cal. 42; *Riley v. Pehl and wife*, 23 Cal. 71; *McDonald v. Badger*, 23 Cal. 394; *Tustin v. Faught*, 23 Cal. 237.)

4. There were many errors committed by the court below in admitting testimony. (1) Admitting Jones' statement as to the person for whom he was buying the premises; (2) similar statements testified to by Mrs. O. A. Phelps, made not on the land nor as part of the act of purchase or payment. (*McFadden v. Ellmaker*, 52 Cal. 348.)

A. N. Drown, and *W. H. L. Barnes*, for Respondents.

McKEE, J.—In this case it appears that on the 28th of February, 1858, John Sullivan, being in possession of the lot of land in controversy, sold and conveyed it to Mary R. Jones by a deed which recited a consideration of two thousand seven hundred and twenty-five dollars. The grantee named in the

deed was at the time the wife of Edward Jones. Under the deed she and her husband entered into possession of the lot, and fenced it and built upon it a dwelling-house, in which the family resided. While in possession application in the name of the wife was made to the commissioners of the funded debt of the city and county of San Francisco, for title to the lot, under the provisions of an act of the legislature of California, approved April 14, 1862; and the commissioners conveyed the lot in the name of Mrs. Jones by a deed reciting a consideration of five hundred dollars. On the 7th of January, 1864, Mrs. Jones died, leaving surviving her her husband and three children — one of whom has since died, and the other two are the defendants and respondents in this case.

On the 12th of April, 1865, the surviving husband conveyed the premises by deed to the plaintiff and appellant, who brought the action in this case against the children to quiet his title to the lot.

From the fact that the Sullivan deed and the deed by the commissioners of the funded debt were made during coverture, in the name of the wife, the presumption arises that the property thus acquired was community property, which, upon the death of the wife, belonged, without administration, to the surviving husband, who had the right to dispose of it (§ 1401, Civ. Code); but that was a controvertible presumption, subject to be rebutted by proof that the consideration moneys, recited in the deeds, were paid out of the separate funds of the wife; and the plaintiff as purchaser of the property from the husband, who was not named in the deed, took with notice that the purchase money may have been paid by the wife, with the moneys belonging to her separate estate, and that the property was the separate property of the wife. Of course a contestant of the presumption that property thus acquired is community property must overcome that presumption by satisfactory proof to the contrary; hence it was incumbent on the defendants to establish that the moneys which were paid to Sullivan and the fund commissioners for the lot were of the separate estate of their mother to whom the deed was made during coverture.

The court found that the moneys with which the lot was purchased and improved were the separate estate of Mrs. Jones.

That fact being established, the land and premises were her separate estate; and as she died intestate, and seized of them at her death, they descended to her heirs — her surviving husband and three children — and were vested in them in the following proportions: One third thereof in Edward Jones, the surviving husband, and two ninths in each of the three children — the death of one of the children afterwards leaving the entire two thirds interest in the surviving children; therefore, the plaintiff by his deed from Edward took only an undivided one third interest in the property.

It is, however, claimed that the evidence was insufficient to sustain the finding and decision of the court, that the property was purchased with the separate funds of Mrs. Jones, and that it became her separate estate; but we think the proof abundantly established both. It was clearly established that Mrs. Jones had received, during coverture, from the estate of her father, Jacob S. Moore, deceased, over twenty thousand dollars in coupons and bonds, bank certificates and drafts, the moneys realized from which she deposited with her husband. At the same time the husband was in the habit of receiving moneys from many parties, which he kept with the money of his own and of Mrs. Jones mixed indiscriminately in his safe; and when the property in controversy was purchased, he paid for it with money withdrawn from the mixed fund. But the purchase was made for her and in her name, and the purchase money was paid out of her separate funds by the husband, as her agent, "at her desire and request," and it was in effect a payment made by herself. (*Drais v. Hogan*, 50 Cal. 121.) The fact that the husband had commingled her money with the moneys of other persons did not divest her of her rights to her separate fund. It was in the hands of the husband as her agent and trustee, who was entitled by law to the control and management of it. Commingling it with the money of others did not destroy it as her separate property, nor change the relation of trustee and *cestui que trust* as to its custody, to that of debtor and creditor. "Money has no ear marks, and for that very reason the mingling of trust with private funds can injure no one. The value being the same, and it being matter of the most perfect indifference whether parties get the same or other coin, so they get the

sum to which each is entitled, there can result no injury to any one. Common sense will not discuss the question of identity, when nothing useful can result from its determination." (*Gunter v. Janes*, 9 Cal. 660; *Lathrop v. Bampton*, 31 Cal. 17.)

There was no error in admitting in evidence declarations made by the husband to the different witnesses, that the money with which the property was purchased belonged to the wife as her separate property. The declarations to that effect to the witness Sullivan, from whom the property was purchased, at the time of the purchase, were part of the *res gestæ* (*People v. Vernon*, 35 Cal. 49; § 1850, Code Civ. Proc.); and those made to the other witnesses were admissible as the declarations of a grantor made in relation to the property, while holding title to it against the plaintiff as his grantee. (§ 1849, Code Civ. Proc.; *Ingersoll v. Truebody*, 40 Cal. 603; *Stanley v. Green*, 12 Cal. 148; *McFadden v. Ellmaker*, 52 Cal. 348.)

Judgment and order affirmed.

Ross, J., and McKINSTRY, J., concurred.

[Department Two.— January 5, 1882.]

JACKSON L. DENNIS ET AL., APPELLANTS, v. JOHN WINTER, RESPONDENT.

SALE BY AN ADMINISTRATOR — PROCEEDINGS — COLLATERAL ATTACK.— Proceedings in the course of administration with reference to the sale of land belonging to the estate of a deceased person cannot be collaterally attacked except for want of jurisdiction in the court.

ID.— PETITION.— Defects in the petition arising from a failure to state fully the facts giving the court jurisdiction and showing the sale to be necessary will not invalidate the subsequent proceedings, if such defects are supplied by the proofs at the hearing, and the general facts showing the necessity for the sale be stated in the decree directing it to be made.

ID.— RETURN OF SALE — ORDER OF CONFIRMATION — RECITAL.— No title passes until the sale is reported to and confirmed by the court. The report must be made under oath, but a recital in the order of confirmation that it was so made is conclusive as against a collateral attack.

APPEAL from a judgment of the Superior Court of the county of Yolo, and from an order refusing a new trial.

The action was ejectment. The facts are sufficiently stated in the opinion of the court.

G. P. Harding, and R. Clark, for Appellants.

C. P. Sprague, C. H. Garoutte, and J. Craig, for Respondent.

MORRISON, C. J.— It appears from the evidence in this case that the land sued for was owned by one B. S. Dennis, under whom plaintiffs claim title as heirs, and that it was sold under an order of the Probate Court, the defendant becoming the purchaser. The questions in the case involve the regularity and validity of the proceedings in the Probate Court, culminating in a sale and the execution of a deed to the purchaser by the administrator of the estate of B. S. Dennis, deceased. The defendant had judgment in the court below.

It will not be necessary, and it is not our intention to examine all the questions presented on the appeal, but we will content ourselves with an examination of such points as we consider determinative of the case.

The first point made relates to the sufficiency of the petition upon which the order of sale was made. It is important to bear in mind that this is not an appeal from a judgment or order of the Probate Court, made in the course of administration, but it is a collateral attack upon the proceedings had in that court. If, therefore, the court (which was in that proceeding one of general jurisdiction) had *jurisdiction* to make the orders attacked and to take the proceedings resulting in the sale of the land, its judgment and orders must be treated, for the purposes of the present case, as conclusive of the matters determined by them.

Does the record show facts sufficient to give the court jurisdiction? We think it does. Section 1537 of the Code of Civil Procedure designates the facts which such a petition must contain, and an examination of the petition, the sufficiency of which we are now considering, will show that it (aided as it is by the order of sale) substantially complies with the requirements of the Code. If the petition does not set forth all the facts showing the sale to be necessary, and giving the court jurisdiction, such failure will not invalidate the subsequent proceedings "if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the decree."

(§ 1537, Code Civ. Proc.) The order of sale contained a full recital of the facts, showing that the case was a proper one for the sale of the real estate of the deceased.

The next point is that the return of sale was not verified, as required by § 1517 of the Code of Civil Procedure. That section declares that "no sale of any property of an estate of a decedent is valid unless made under order of the Superior Court, except as otherwise provided in this chapter. All sales must be, under oath, reported to and confirmed by the court before the title to the property sold passes."

It is not necessary for us to determine whether a failure to make a return of the sale under oath would affect the validity of the title in a *collateral* attack upon the judgment, because we have in this case a recital in the order confirming the sale that *the return of the sale was duly verified by affidavit*. This recital is conclusive in the present case, and a finding of fact to the contrary does not in any manner affect the conclusiveness of the recital in the decree. The fact was not a jurisdictional one, and the principle applicable to the inconclusiveness of statements or recitals in judgments, *conferring jurisdiction*, does not apply. (*McKinlay v. Tuttle*, 42 Cal. 570.)

What we have already said disposes of the objections to the order and notice of sale. The matters complained of were mere irregularities at the most, and do not affect the title acquired by the defendant. In this collateral attack such objections cannot prevail.

Judgment and order affirmed.

MYRICK, J., and THORNTON, J., concurred.

[In Bank.—January 9, 1883.]

THE PEOPLE, RESPONDENT, v. VICENTE GARCIA,
APPELLANT.

EVIDENCE—DYING DECLARATION.—It is not necessary that each witness testifying to a dying declaration should definitely fix the belief of the person making the declaration that death was imminent. The sense of impending death may be shown by one witness, and the declaration proved by another.

ID.—STATEMENTS BY ACCOMPLICE.—Statements made by an accomplice to an arresting officer, respecting the knife with which the murder was committed, are admissible, notwithstanding the defendant on trial was not immediately connected therewith.

APPEAL from a judgment of the Superior Court of Ventura County.

The defendants, Romualdo Olivas and Cirildo de Jesus Soso, were jointly informed against for the murder of Estanislau. The defendants demanded a separate trial, and Olivas was found guilty and sentenced to imprisonment for life. The information against Soso was dismissed, and he was made a witness for the prosecution, and the defendant Garcia was convicted and sentenced to be hanged.

At the trial of the defendant the court admitted the testimony of S. M. W. Easley, under sheriff, as to statements made to him by Olivas at the time of his arrest as follows: "That he (Olivas) had lost his knife some weeks before, and that when he came into town Mrs. Chewanos brought this knife (a large bowie) and gave it to him, and he did not know how the blood stains came on there."

Easley then told Olivas that Soso had told them all about the killing, and that Garcia had done the killing, and that Soso and Olivas were present. Olivas then said: "He went to bed that night (the night of the murder) at Chewanos' house, and the next morning when he got up Soso brought this knife, and gave it to him bloody."

The remaining facts are stated in the opinion of the court.

Hall & English, Bledsoe & McKeeby, and A. A. Oglesby, for Appellant.

A. L. Hart, Attorney-General, and J. M. Brooks, District Attorney, for Respondent.

PER CURIAM.—The objection that it does not appear that the declaration of the deceased as to the person who inflicted the wound was made under a sense and belief of impending death, is not well taken. At least one witness testified that he stated, before any declaration regarding the infliction of the wound, that he would die; it is not necessary that each witness testifying to the declaration shall also by his testimony definitely fix the belief of the person making the declaration; the sense of impending death may be shown by one witness, and the declaration proved by another. The statement made to the witness Elmore, "In case you turn me I will die," taken with the other testimony, does not tend to show a hope or expectation of recovery.

We see no error in the ruling as to the evidence of the witness Easley prejudicial to the defendant.

Judgment affirmed.

McKINSTRY, J., and Ross, J., dissent. We think the testimony of *Easley* as to statements of *Olivas* was clearly inadmissible.

SHARPSTEIN, J., did not participate.

[In Bank.—January 12, 1883.]

EX PARTE JOHN COX ON HABEAS CORPUS.

CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWER.—The Act of the 4th of March, 1881, relating to the Board of State Viticultural Commissioners, and providing that the officer therein mentioned shall have power, subject to the approval of the board, to make and enforce rules and regulations in the nature of quarantine for certain purposes, in so far as it declares that a willful violation of the quarantine regulations of the board shall be a misdemeanor, amounts to a delegation of legislative power, and is unconstitutional. The legislature had no authority to confer upon the officer or board the power to declare what acts shall constitute a misdemeanor.

Young & Young, for Petitioner.

W. A. Anderson, W. J. Tuska, S. H. Dwinelle, contra.

PER CURIAM.—The petitioner was convicted of a misdemeanor, consisting of the violation of a rule and regulation of the Board of State Viticultural Commissioners. The powers attempted to be exercised by the officers and commissioners are specified in the Act of March 4, 1881. (Stats. 1881, p. 51.)

The act declares that the officer shall have power, subject to the approval of the board, to declare and enforce rules and regulations in the nature of quarantine, to govern the manner of, and restrain or prohibit the importation into the State and the distribution and disposal within the State, of infected vines, cuttings, and empty fruit boxes, etc.; the act also declares that a willful violation of the quarantine regulations of the board shall be a misdemeanor.

For the purpose of local legislation, legislative functions may be conferred upon and exercised by municipal corporations; but the act before us is in no sense a conferring of powers for municipal purposes. The legislature had not authority to confer upon the officer or board the power of declaring what acts should constitute a misdemeanor. The legislative power of the State is vested in the Senate and Assembly. (Const. art. iv., § 1.) That power could not, as to the case before us, be delegated to the officer or board. The act before us does not say it shall be unlawful to import, distribute, or dispose of infected articles, but it attempts to confer upon the officer and board the power to so declare. (Cooley on Const. Lim. p. 141, and cases cited.)

The petitioner is discharged.

[In Bank.—January 12, 1888.]

RETURN ROBERTS, RESPONDENT, v. CLEMENTE
COLUMBET, APPELLANT.

EJECTMENT — STATE PATENT — SCHOOL LAND LOCATION.—The action was brought to recover land claimed by the plaintiff under a State patent issued in September, 1875, upon an application made in December, 1874. The only defense set up in the answer was a general denial. In October, 1853, the defendant located upon the land a school land warrant issued under an act of the legislature passed on the 3d of May, 1853, to provide for the disposition of the five hundred thousand acres of land donated to the State by the United States. At the time of the location, the land was a part of the public domain of the United States, and had not been surveyed. The survey was made in 1866, and thereupon the State selected certain lands, including the demanded premises, in part satisfaction of the five hundred thousand acre grant. In 1870 the lands so selected were listed to the State by the Commissioner of the General Land Office with the approval of the Secretary of the Interior. *Held*, that the location was valid as between the State and the defendant, that as soon as the land was listed to the State the title passed to the defendant, and that proof of the facts on which the title rested was admissible under a general denial.

APPEAL from a judgment of the late District Court in and for the county of Santa Clara.

Moore, Laine & Leib, for Appellant.

McKisick & Rankin, for Respondent.

SHARPSTEIN, J.—Ejectment. The plaintiff claims title to the demanded premises under a State patent issued to him September 17, 1875, upon an application made by him December 1, 1874.

The defendant claims under a State five hundred thousand acre land warrant location, made in October, 1853, under an act of the State legislature, approved May 3, 1852, providing for the disposal of the five hundred thousand acres of land donated to the State by the United States.

The land was not surveyed by the United States until 1866, and in 1867 the proper agent of the State selected and located the demanded premises (and other lands), in part satisfaction of the five hundred thousand acre grant made to the State by the act of Congress, which land was listed to the State by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, in 1870.

If the land in controversy had been surveyed by the United



after the lands embraced within their locations had been surveyed by the United States. Unless that act contravened some law of the United States it amounted to a contract between the State and any person, who, in accordance with its provisions, located a school land warrant upon any government land before the same had been surveyed. In other words, the State undertook and promised for a sufficient consideration to convey to such locator the land upon which he located his warrant, if the United States should at any time thereafter convey such land to the State. We are unable to discover any reason why the State could not make such a contract. And if it could its contract with a private person must be construed precisely as it would be if both parties were private persons. (*Davis v. Gray*, 16 Wall. 203; *Hall v. Wisconsin*, 13 Otto, 5.)

In the case before us the State, in 1852, sold a school land warrant which, in 1853, was located upon the land sued for in this action. In 1866 said land was surveyed by the United States, and in 1870 listed to the State in part satisfaction of the five hundred thousand acre grant. In 1874 the respondent made application to purchase said land with a school land warrant, and said application was approved by the Surveyor-General, and in pursuance thereof a patent was issued to respondent in 1875. Both purchases were made with school land warrants—one in 1853 and the other in 1874. The first was made in strict conformity with the provisions of a statute of the State then in force. But it is claimed that that statute, so far as it provided for the disposition of any part of the five hundred thousand acre grant before such part had been surveyed by the United States, was void. And this position is supported by the cases of *Hastings v. Devlin*, 40 Cal. 358; *Hastings v. Jackson*, 46 Cal. 243; *People v. Jackson*, filed June 16, 1881. And although this question was not necessarily involved in *Terry v. Megerle*, 24 Cal. 609; *Megerle v. Ashe*, 27 Cal. 322; *Grogan v. Knight*, 27 Cal. 516; *Smith v. Athearn*, 34 Cal. 506; *Collins v. Bartlett*, 44 Cal. 371; or *Churchill v. Anderson*, 53 Cal. 212, there are expressions to be found in each of them which indicate that the views of the court were then in harmony with the decision in *Hastings v. Jackson*, *supra*.

But we think this case distinguishable from *Hastings v. Dev-*

lin, supra. In that case both locations were made prior to the passage of the act of Congress of July 23, 1866, entitled "An act to quiet land titles in California," the first section of which provides "that in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said State."

In that case there had been a *valid* location as well as an *invalid* one made upon the land before the passage of said act. Congress could not and did not attempt to invalidate valid sales made by the State prior to the passage of said act. It simply confirmed to the State lands which had been previously selected by the State and disposed of by it to purchasers in good faith. If a valid selection and sale had been made before the passage of that act, the title of the purchaser in good faith required no confirmation, and could not be affected by any act of Congress or of the State legislature. This is too clear to admit of argument, and illustrates the difference between that case and this. In this case the State made the selection and disposed of the land to the appellant, a purchaser in good faith, before the passage of the act confirming to the State lands so selected and disposed of by it. And it does not appear that at the date of the passage of the act of July 23, 1866, there was any claim to the land adverse to that of the appellant herein. So that the appellant was in a position to reap the full benefit which that act conferred upon purchasers who, prior to the passage of said act, had purchased in good faith of the State lands donated to it by the United States.

The question upon which the decision of the case must turn is whether the appellant is in a position to defend his right of possession as against the respondent in an action of ejectment, under an answer containing nothing more than a general denial. If the legal title to the demanded premises had vested in the appellant before the commencement of the action, he could have shown that fact under the general denial.

The act of Congress to which we have referred characterizes the transaction between the State and the appellant as a disposi-

tion of the land in controversy by the former "under her laws" to the latter. Congress in that act treats the lands to which it refers as *disposed* of by the State, and confirms and ratifies that disposition. Was not that sufficient to vest the legal title in the appellant? At the date of the passage of that act of Congress the title was undoubtedly in the United States. But the State "under her laws" had "disposed of the same" to a purchaser "in good faith," and Congress in effect said to the State, "Inasmuch as you have done this, the United States will confirm said land to you."

The provision of the act of Congress is not so clearly worded as it might have been, but the intention, obviously, was to confirm the disposition which the State had made of lands to purchasers in good faith under the laws. And we must construe it according to the intention of Congress. And thus construed, it doubtless vested in those who had prematurely purchased from the State lands donated to it by the United States, the legal title to such lands.

In the Act of July 23, 1866, Congress starts out with the declaration "that in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress, and has *disposed* of the same to *purchasers in good faith under her laws*, the lands so selected shall be and hereby are confirmed to said State." The intention clearly was to place the purchaser in the same position that he would have occupied if the State, at the time of his purchase, had held the title to the land purchased. And this view is strengthened by a clause in the third section of the act, where such a purchaser is referred to as "the holder of the State title."

Sections 2 and 3 of the act do not in any way qualify the first clause of section 1. The confirmation contained in the first section is not made to depend upon a compliance with any of the provisions of the sections which follow it. The latter simply point out the methods by which the State may have the land listed to it by the Commissioner of the General Land Office. But it is nowhere enacted that neglect or failure to comply with those provisions shall in any way affect the grant contained in the first section.



[In Bank.—January 13, 1883.]

THE PEOPLE, RESPONDENT, v. HERMAN SCHMIDT,
APPELLANT.

MURDER — INSUFFICIENCY OF INFORMATION — MALICE AFORETHOUGHT.—Malice aforethought is a necessary ingredient in the crime of murder, and should be alleged in the indictment or information, either expressly or by words equivalent in their import.

APPEAL from a judgment of the Superior Court of Butte County.

The facts are sufficiently stated in the opinion of the court.

Reardan & Freer, and J. C. Gray, for Appellant.

A. L. Hart, Attorney-General, for Respondent.

SHARPSTEIN, J.—The appellant was tried and found guilty of murder of the first degree upon an information which alleged that he committed the crime of murder as follows: "The said Herman Schmidt, on the 24th day of June, 1882, at the county of Butte, and State of California, and before the finding of this information, wilfully, unlawfully and feloniously, did shoot, kill, and murder M. Schmidt, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of California."

"Murder is the unlawful killing of a human being with malice aforethought." (Pen. Code, § 187.) Malice aforethought is a necessary ingredient in the crime of murder, and should therefore be alleged in the indictment. (*People v. Urias*, 12 Cal. 325; *People v. King*, 27 Cal. 507; *People v. Bonilla*, 38 Cal. 699.)

"Words used in a statute to define a public offense need not be strictly pursued in the indictment or information, but other words conveying the same meaning may be used." (Pen. Code, § 958.) And in *People v. Vance*, 21 Cal. 400, it was held that the words "wilfully, maliciously, feloniously and premeditatedly," were equivalent in their import to "malice aforethought." But the words "maliciously" and "premeditatedly" do not occur in this information, and those are the very words, and the



[In Bank. — January 12, 1883.]

R. McCREERY, RESPONDENT, v. E. A. FULLER, ET AL.,
APPELLANTS.

JUDGMENT — STIPULATION — ESTOPPEL. — The judgment of a court of competent jurisdiction is binding and conclusive between the parties and their privies as to all matters within the issues, and determined by it, and a judgment entered upon a stipulation of the parties after issue joined has the same effect as if the action had been tried on the merits.

APPEAL from a judgment of the Superior Court of the county of Los Angeles, and from an order refusing a new trial.

The facts are sufficiently stated in the opinion of MR. JUSTICE MCKEE.

R. M. Widney, for Appellants.

W. D. Gould, and *J. H. Blanchard*, for Respondent.

MCKEE, J.— This case arises out of an action of ejectment. From the record of the case it appears that the demanded premises were selected by the State of California, on the 22d of April, 1868; that on the 29th of December, 1869, the plaintiff McCreery entered upon them and filed his declaratory statement in the proper United States land office on the 28th of November, 1871. But on the 24th of November, 1871, the Secretary of the Interior of the United States had approved the selection which had been made by the State; and the United States, by patent of that date, conveyed the land to the State. After obtaining the patent the State sold the land to one M. Keller, and issued to him a certificate of purchase for the same, which was afterwards confirmed by an act of the legislature entitled, "An act for the relief of purchasers of State lands," approved March 27, 1872; and on the 4th of March, 1874, Keller obtained from the State a patent for the land.

Claiming to be owner in fee, Keller on the 24th of April, 1874, commenced an action of ejectment against McCreery to recover possession. By his answer to the complaint in that action the defendant denied the ownership of Keller, and affirmatively alleged that the patent issued to the plaintiff by the State of California, and under and by virtue of which his pretended



versed, it is decisive of the rights of parties to the subject-matter of the action whether it was right or wrong. Where issues are made in a case and decided, whether with or without trial, the judgment is conclusive between the same parties, in any subsequent action for the same cause, as to all questions which were directly involved within the issues made, and which were, or might have been presented and decided (*Le Guen v. Gouverneur*, 1 Johns. Cas 436; *Stockton v. Ford*, 18 How. 418; *Mallony v. Horan*, 49 N. Y. 11; *McClurg v. Condit*, 27 Minn. 45); and such questions cannot be again contested between the same parties in the same or any other court. (*Hopkins v. Lee*, 6 Wheat. 109; *Russell v. Place*, 94 U. S. 606.) As *res adjudicata* the judgment is binding on all tribunals, and conclusive between the parties and those deriving title under them, as to the validity of the certification of the land over to the State, and of the patent thereto issued by the United States to the State, and of the patent granted by the State to Keller upon which the judgment was founded. By the certification and patent the title to the land passed from the United States to the State of California. (*Grinnel v. R. R. Co.* 103 U. S. 742.) Thereafter the authorities of the United States were without jurisdiction over it. The title which had vested in the State, and passed from the State to Keller, the plaintiff in the judgment, could not be divested, except by judicial proceedings to cancel or rescind the patent for fraud, mistake, or misconstruction of the law under which it was issued. (*O'Connor v. Frasher*, 56 Cal. 499, and cases cited.) No executive officer of the United States had authority to recall or rescind the patent, or to issue one to another party for the same tract. (*Moore v. Robbins*, 96 U. S. 530.) The proceedings taken by McCreery in the land department of the United States, which culminated in a patent to him for the same land, subsequent to the acquisition of the title by the State, and to the judgment against him founded upon that title, were therefore void, and conferred upon him no title.

It follows that the judgment and order must be reversed and the cause remanded, with direction to the court below to enter judgment for defendants.

THORNTON, J.— I concur in the judgment on the ground that

the judgment in *Keller v. McCreery* is conclusive against the plaintiff, and determinative of the cause in favor of Fuller, who derives title under Keller by conveyance subsequent to the rendition of the judgment above mentioned.

MORRISON, C. J., concurred in the judgment, and in the opinion of Mr. Justice THORNTON.

McKINSTY, J., concurred in the judgment.

[Department One. — January 16, 1883.]

MARY A. WILLARD, ADMINISTRATRIX, RESPONDENT, v.
E. H. ARCHER, ET AL., APPELLANTS.

VERDICT — IMMATERIAL DEFECT — VACATING JUDGMENT.— In an action against two defendants, the jury returned a general verdict for the defendant, and a judgment for costs was entered thereon in favor of both defendants. The court subsequently vacated the judgment because of the defect in the verdict. *Held*, that the defect was immaterial, and that the court erred in vacating the judgment.

APPEAL from an order of the Superior Court of Yolo County.

The facts are stated in the opinion of the court.

J. Lambert, for Appellants.

Ball, Craig & Harding, for Respondent.

PER CURIAM.— Plaintiff brought suit against E. H. and John Archer for damages for an alleged breach of a certain lease of land. The answer of the defendants was a general denial, the complaint being unverified. The case was tried before a jury, and a general verdict rendered for *defendant*. Thereupon, and on the 11th of March, 1882, judgment was entered in favor of the defendants, E. H. and John Archer, for costs. There was no motion for a new trial, but on the 29th of May the plaintiff moved the court to vacate the judgment on the ground that the verdict was for *defendant*, whereas the judgment entered was for the *defendants*. The court below granted the motion, and vacated the judgment, for the reason assigned in the motion.

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It ought not to have done so. Undoubtedly the jury pronounced on the issues against the plaintiff. Having done so, the defendants were entitled to costs as a matter of law. The error or defect in the verdict in using the singular instead of the plural of the word, "defendant," did not affect any substantial right of the plaintiff, and was not, therefore, any ground for disturbing the verdict. (Code Civ. Proc. § 475.)

This case is not like *People v. Sepulveda*, 59 Cal. 342. That was a criminal case in which there were two defendants jointly indicted and jointly tried, and the verdict returned was: "We, the jury, find defendant" guilty. As it could not be ascertained from the verdict which one of the two defendants on trial had been found guilty, the verdict was held void for uncertainty.

Order reversed.

[Department One. — January 16, 1882.]

**WOLF CERKEL, APPELLANT, v. M. WATERMAN ET AL.,
RESPONDENTS.**

CONVERSION.—The defendants, who were commission merchants in San Francisco, sold a quantity of wheat, supposing it to be the property of one Williams, and paid over the proceeds to him. The wheat belonged to the plaintiff, and the action was brought to recover its value. The supposition of the defendants as to the ownership of the wheat grew out of the circumstances under which they received it, but the mistake was not caused by any act of the plaintiff. On a review of the facts, *held*, (1) that the defendants were not justified in supposing that the wheat belonged to Williams; (2) that even if they were such a supposition does not exempt them from liability to the plaintiff for selling his wheat and paying the proceeds to another.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

Walter Van Dyke, and Wendell & Kelley, for Appellant.

G. F. & W. H. Sharp, for Respondents.

ROSS, J.—The findings we think too favorable to the defendants in view of the evidence. Nevertheless, as, in our opinion,



of the plaintiff, and against the defendants, in accordance with the prayer of the complaint.

McKEE, J., and McKINSTRY, J., concurred.

[Department One.—January 16, 1883.]

IN THE MATTER OF THE ESTATE OF H. S. BURTON, DECEASED.

PROBATE PROCEEDINGS — HOMESTEAD.— The setting apart of a homestead in the course of probate proceedings has no effect upon the title to the land, and an adverse claim of title cannot be interposed to defeat an application for that purpose.

10. — PRACTICE — FINDINGS. — The widow of the deceased applied to the court to set aside a homestead for the use of the family. Appraisers were appointed, and made their report, but its confirmation was objected to on the ground that the land was not a part of the estate. After a hearing the court sustained the objection, set aside the report, and dismissed the petition. The applicant requested findings, but none were filed. *Held*, that she was entitled to findings, and that it was error to enter judgment without them.

APPEAL from a judgment of the Superior Court of the county of San Diego, and from an order refusing a new trial.

S. Heydenfeldt, A. B. Hotchkiss, and A. Brunson, for Appellant.

Leach & Parker, for Respondent.

McKEE, J.—Maria H. Burton, widow of H. S. Burton, deceased, petitioned the Probate Court of San Diego County, in which administration of the estate of the decedent was pending, for a homestead to be set apart for the use of the family of the deceased, out of the Jamul Ranch, in that county, on which she resided with her children since the death of her husband. The ranch had been inventoried and appraised as part of the estate of the deceased.

Appraisers who had been appointed by the court for that purpose, filed their report that they had set apart, out of the ranch, a homestead, by metes and bounds, including the family residence, for the use of the family of the deceased. But on the filing of the report, objections to its confirmation were made by



the law the court would deal with it only as an asset of the estate. Being inventoried and appraised as such, the property was subject to the jurisdiction of the court in the administration of the estate; and in setting apart a portion of it for a homestead for the widow and children of the deceased, it would simply withdraw such portion from the other assets as exempt by law from the claims of creditors. (*Rich v. Tubbs*, 41 Cal. 84; *Schadt v. Heppe*, 45 Cal. 434.) But neither the inventory of the ranch as property of the estate, nor the withdrawal of a portion of it from the estate for a homestead, would affect or adjudicate the question of title as between parties claiming title to the ranch itself. As has been said in the *Estate of Moore*, 57 Cal. 437, a probate homestead is not an estate, either at law or in equity; any question, therefore, as to the title of the property out of which the homestead may be set apart must be tried and determined in another forum. (*Estate of James*, 28 Cal. 417; *Estate of Orr*, 29 Cal. 101; *Estate of Delaney*, 37 Cal. 176.)

Judgment and order reversed, and cause remanded for further proceedings.

McKINSTRY, J., and ROSS, J., concurred.

[Department One. — January 16, 1883.]

W. W. HOLLISTER, APPELLANT, v. L. E. SHERMAN, TAX
COLLECTOR, RESPONDENT.

**TAXATION — REGENTS STATE UNIVERSITY — PROPERTY EXEMPT FROM TAXES —
ASSESSMENT — SALE — DEED — INJUNCTION.**— All property administered by the regents of the State University is exempt from taxes, and a deed of the tax collector on a sale of property so administered under an assessment against the regents would be void on its face. No cloud upon the title would be created by the deed, and an injunction will not be granted to prevent the sale.

APPEAL from a judgment of the Superior Court of the county of Santa Barbara.

The action was brought to enjoin the sale of certain land under an assessment for State and county taxes for the fiscal year 1881-82. The plaintiff was the owner of the land, but prior to the assessment he mortgaged it to the regents of the

State University to secure the payment of a loan of fifty thousand dollars made by them from the funds appropriated to the support of the university. The land was assessed to the regents and valued at fifty thousand dollars, the aggregate amount of the taxes being one thousand dollars. The complaint was demurred to, and the demurrer sustained. The plaintiff declined to amend, and judgment was entered in favor of the defendant.

John B. Mhoon, for Appellant.

W. C. Stratton, and *J. H. Kincaid*, for Respondent.

PER CURIAM.—We can see no difference as to ownership between property taken by the regents of the university “by grant, gift, devise, or bequest” (Pol. Code, § 1415, sub. 7), and other property administered by them. If any, all such property is exempt from taxation. The mortgage to secure the money loaned by the regents to plaintiff was not, therefore, subject to taxation. As the mortgage was assessed to the regents of the university, the tax deed would show the assessment was void. The deed would cast no cloud upon plaintiff’s title, since in an action brought upon it by the purchaser the present plaintiff would not be called upon to introduce any evidence, but the purchaser must fail on his own showing. (*Grimm v. O’Connell*, 54 Cal. 521.)

Judgment and orders affirmed.

[Department One.—January 16, 1883.]

SAMUEL B. MARTIN, RESPONDENT, v. MARTIN
DURAND, ET AL., APPELLANTS.

LISC LANDS — STATE SELECTION — ACT OF CONGRESS.— A selection of land made by the State in lieu of a sixteenth or thirty-sixth section, such land having been certified over to the State prior to the passage of the Act of Congress of March 1, 1877, commonly known as the Booth Act, is confirmed by that act, although the land in lieu of which the selection was made was at the time of the selection included within the final survey of a Mexican grant, and the land selected was at the same time within what was claimed to be the limits of a Mexican grant, but finally excluded therefrom.

PLEADING — DAMAGES — USE AND OCCUPATION — FINDING.— In an action of ejectment a general averment of and prayer for damages in a specified sum for the unlawful withholding of the premises are sufficient to support a judgment for damages, at least in the absence of a special demurrer or objection to the evidence on the subject; and a finding as to the value of the use and occupation of the premises, no attack being made upon it in the court below, is conclusive as to the amount of the damages.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was ejectment. The plaintiff claimed under the State, and a judgment was rendered in his favor.

Mich. Mullany, for Appellants.

L. Aldrich, and *E. D. Wheeler*, for Respondent.

Ross, J.— Upon the question of *title* the inquiry to be made is: Was a State selection made in lieu of a sixteenth or thirty-sixth section, and which had been certified over to the State prior to the passage of the Act of Congress of March 1, 1877, commonly known as the Booth Act, confirmed by that act, when the land in lieu of which the selection was made was, at the time of the selection, included within the final survey of a Mexican grant, and when the land selected was at the same time included within the claimed limits of a Mexican grant, although finally excluded therefrom? We answer yes, by virtue of the second section of the Act of March 1, 1877.

As is well known, the sixteenth and thirty-sixth sections of land in each township in California were granted to the State for school purposes by the Act of Congress of March 2, 1853. (10 U. S. Stats. 244.) By the seventh section of that act indemnity was provided for such sections, or parts thereof, as might be lost to the State by reason of settlement at the time of survey, or because of reservation for public uses, or of being taken by private claims. Experience showed that many of the sections granted by the Act of 1853, were situated within the claimed limits of private grants made by the Mexican government. From the nature and number of those grants and of the proceedings required for their adjudication and the final determina-

tion of their boundaries, proceedings to that end, in most cases, were slow. The State proceeded to make many indemnity selections before it was definitely known whether the lands in lieu of which the selections were made had in fact been lost to the State. These selections were invalid, some for one reason, some for another. Nevertheless, through mistake or inadvertence, they were certified to the State by the land department of the general government. Of course, disputes in regard to the title to such lands were natural and frequent. To solve the difficulty Congress interposed and passed the Act of March 1, 1877. It is entitled "An act relating to indemnity school selections in the State of California," and confirms by its first section to the State, the title to the lands certified to it, known as school selections, which were selected in lieu of sixteenth and thirty-sixth sections lying within Mexican grants, of which grants the final survey had not been made at the date of such selection by the State.

This section, it is apparent, does not cover the case under consideration. But Congress further provided, in the second section of the act, "that where indemnity school selections have been made and certified to said State, and said selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed and the sixteenth or thirty-sixth section in lieu of which the selection was made shall, upon being excluded from such final survey, be disposed of as other public lands of the United States; *provided*, that if there be no such sixteenth or thirty-sixth section, and if the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person; *provided*, that if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land laws of the United States. (19 U. S. Stats. 268.)

By this section Congress confirmed such indemnity school selections as had been made and certified to the State, and which

would fail by reason of the land in lieu of which they were taken not being included within the final survey of a Mexican grant, "*or are otherwise defective and invalid.*"

At the same time provision was made that such confirmation should not apply to mineral lands, etc., nor extend to lands settled upon by any actual settler claiming the right to enter, not exceeding the prescribed legal quantity under the homestead or pre-emption laws; *provided*, that such settlement was made in good faith upon lands not occupied by the settlement or improvement of any other person, and prior to the date of certification of the land to the State by the department of the interior; and provided, further, that the claim of such settler be presented to the register and receiver of the district land office, together with proper proof, etc., within a certain time.

As the facts of the case before us do not bring the defendants within any of the exceptions contained in the act, nothing further need be said in regard to them.

Clearly, such selections as had been made and certified in lieu of sixteenth and thirty-sixth sections, lying within Mexican grants, of which grants the final survey had not been made at the date of the selection by the State, were confirmed; for such is the clear and unequivocal language of the first section of the act of Congress. Clearly, also, such selections as had been made and certified to the State, which should fail by reason of the land in lieu of which they were taken not being included within the final survey of a Mexican grant, were confirmed; for such is the clear and unequivocal language of the second section of the act. Equally clear and unequivocal is the language of section two, in which are confirmed such selections as were made and certified to the State, and which would fail by reason of other defects or invalidities than those previously enumerated. One such invalidity existed in the case under consideration, to wit, the selection of land at the time within the claimed limits of a Mexican grant, but which was finally excluded therefrom. Such defect clearly comes within the letter as well as the intent of the statute, which is a curative act, designed to quiet the possession and confirm the claim of those who in good faith purchased from the State, thinking they thereby got a title, but

who in law did not, and which upon well-settled principles should be liberally construed.

In addition to judgment for the restitution of the premises sued for, the court below gave the plaintiff judgment against the defendants for four hundred and fifty-four dollars and eighty-three cents as damages for their detention; and it is claimed on the part of the appellants that in this there was error; first, because there was no sufficient averment of damage, and secondly, because the plaintiff could not recover against the defendants jointly upon the facts of the case.

To the first of these objections it is sufficient to say that there was a general averment of, and prayer for two thousand dollars damages by reason of the alleged unlawful withholding of the property which—at least in the absence of a special demurrer to the pleading or objection to the evidence of damage—was sufficient. (*Dimick v. Campbell*, 31 Cal. 240.) The waiver alluded to by counsel only extended to such damages as accrued prior to November 1, 1878. (Finding 22.) The court below found the value of the use and occupation of the premises sued for subsequent to that date, to be the sum stated, for which plaintiff was awarded judgment. That finding was not questioned in the court below, and cannot be here; and if the value of the use and occupation of the premises by defendants constituted the damage or a part of the damage sustained by the plaintiff by reason of the unlawful detention, then the judgment for the sum mentioned was right; and of that there can be no doubt. (*Miller v. Myers*, 46 Cal. 535.)

Judgment and order affirmed.

McKEE, J., and McKINSTRY, J., concurred.

Hearing in Bank denied.

[Department One.— January 16, 1883.]

JOHN HEINLEN, PETITIONER, v. W. W. CROSS, JUDGE
OF THE SUPERIOR COURT OF TULARE COUNTY, RE-
SPONDENT.

INJUNCTION — DISOBEDIENCE PENDING AN APPEAL — POWER OF THE COURT.—An appeal from a judgment granting a perpetual injunction does not suspend the injunction during the pendency of the appeal, nor does it deprive the court in which the judgment was rendered of the power to punish a disobedience of the injunction as a contempt. The existence of the power devolves upon the court the duty to entertain a proper application on the subject, and such an application being made to examine the facts, and render a decision thereon.

APPLICATION for a writ of mandamus to the judge of the Superior Court of Tulare County.

The facts are stated in the opinion of the court.

Heinlen & Soderberg, for Petitioner.

D. S. Terry, for Respondent.

Ross, J. — The present petitioner is plaintiff in a certain action which was brought in the Superior Court of Tulare County against the Fresno Canal and Irrigation Company for the recovery of damages, and an injunction perpetually restraining the defendant in the action from diverting, or in any manner interfering with certain waters. After trial final judgment was entered in the action in favor of the plaintiff and against the defendant for eleven thousand dollars damages, and perpetually enjoining the defendant, its agents, employees, etc., from diverting or in any manner interfering with the waters, and for costs of suit. From that judgment an appeal was taken by the defendant to this court, the undertaking on appeal being in the sum of three hundred dollars for costs, besides double the amount of the money judgment.

An agent of the defendant having continued the diversion of the waters notwithstanding the judgment, application in proper form was made on behalf of the plaintiff to the Superior Court for an order on the said agent to show cause at a certain time and place why he should not be punished for contempt of court in disobeying the injunction awarded by the judgment. At the time and place appointed for the purpose, the agent of the

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defendant in the action appeared with his counsel and stated to the court that since the entry of the judgment the defendant had continued to divert the waters by the same means and to the same extent as before, but by no other means and to no greater extent, which statement being assented to by the plaintiff, the court dismissed the proceedings and discharged the agent on the ground that the process of contempt was a proceeding in the action, and that by the appeal all proceedings under the judgment had been stayed.

Had the action of the court below been in the exercise of a judicial discretion, of course mandamus would not lie to compel the court to proceed in the matter. But it is perfectly manifest that the action of the court in dismissing the proceeding was based on a supposed want of power occasioned by the appeal and the incidental stay of proceedings wrought by the execution of the undertaking on appeal. If the injunction was not suspended by virtue of the appeal, it was the duty of the court to have inquired into the facts, and to have brought its judgment to bear upon them. (*Merced Mining Company v. Fremont*, 7 Cal. 130.) Did the appeal suspend the injunction?

It was claimed for the respondent that it did by virtue of § 949 of the Code of Civil Procedure. But that section, so far as this question is concerned, is substantially the same as § 356 of Parker's Cal. Prac. Act, which was in force when the case of the *Merced Mining Company v. Fremont*, *supra*, was decided, and substantially the same as § 342 of the New York Code. (Wait's N. Y. Code, § 342.) In *Merced Mining Co. v. Fremont*, this court held that the execution of the undertaking contemplated by § 356, of the former Practice Act, did not have the effect of suspending the injunction — the court saying: "When a party is restrained by injunction, he is not injured in contemplation of law, as he is already secured by the undertaking. If, on the contrary, an appeal, with an undertaking of three hundred dollars, would have the effect of staying the injunction itself, then the plaintiff would have no remedy, and the writ be idle. It would entirely destroy the usefulness of this writ. A stay of proceedings, from its nature, only operates upon orders or judgments commanding some act to be done, and does not reach a case of injunction."

As already said, the New York statute is substantially the same as ours so far as concerns the question under consideration. And in a late case in that State, reported in 71 N. Y. 430, the court of appeals said: "The order of the judge was in substantial compliance with the statute, and stayed 'all proceedings on the part of the plaintiff in execution of the judgment.' But this did not affect the validity or effect of the judgment pending the appeal, so far as it bore upon and restrained the action of the defendant, its servants and agents. It did not absolve them from the duty of obedience and permit them to do that which the judgment absolutely prohibited, and the doing of which would, as adjudged by the court, cause irreparable mischief to the plaintiff, or an injury which could not certainly be compensated in damages. The statute does not, and the judge's order staying the plaintiff did not and could not, derogate from the efficiency of the judgment in its operation upon, and effectually restraining all acts by the defendant in violation of its mandate. The court should have and doubtless has the power, notwithstanding an appeal, especially as long as the action is pending in the same court upon an appeal from the special to the general term, to command respect for its judgments and obedience to its mandates until they are reversed. This power is essential to the administration of justice, and to the respect which courts of justice have a right to demand from suitors. It would seem to be preposterous that a party could, by the mere order of the court staying his hands from executing a judgment not yet executed, be deprived of the whole fruit of the judgment by the lawless act of the defeated party pending an appeal, without remedy, that he must stand by, and without possibility of redress, see the subject-matter of the litigation destroyed, so that if he succeeds in affirming the judgment it will be a barren victory. If the respondent here is right in its contention, pending an appeal from a judgment staying waste, which if committed will destroy the freehold, the appellant in simply staying the plaintiff's proceedings on the judgment may with impunity do the very act forbidden and destroy the freehold. This would be to give the latter injunction, staying action by the one party upon the judgment, effect, as working a dissolution of the permanent and general injunction before granted, restraining the other party from doing

any act affecting the subject of the litigation. The judgment, so far as it enjoined the defendant, needed no execution. It acted directly without process upon the defendant, and the stay only operated to prevent the collection of the costs awarded." (See also *Hicks v. Michael*, 15 Cal. 107; *Ortman v. Dixon*, 9 Cal. 23; *State v. Chase*, 41 Ind. 356; *High on Injunction*, 2d ed., § 1698.)

Let the peremptory writ issue.

MORRISON, C. J., and McKINSTRY, J., concurred.

[Department One.— January 16, 1883.]

JANE MARTEL, RESPONDENT, v. JAMES MEEHAN,
EXECUTOR, ET AL., APPELLANTS.

UNLAWFUL DETAINER — EXECUTOR OF DECEASED PERSON. — The executor of a deceased person, who succeeds to the possession of leased premises held by the deceased at the time of his death but makes default in the payment of rent, is not within the provisions of § 1661 of the Code of Civil Procedure, and a summary action for an unlawful detainer as defined by that section cannot be brought against him.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

A. A. Pardow, for Appellants.

Section 735 of our Code of Procedure authorizing trebling damages is penal, and no action can be maintained against an executor as such on a penal statute. (*Eustace v. Jahns*, 38 Cal. 3.)

The executor is not in the employ of any superior other than the Probate Court. (*Eustace v. Jahns*, 38 Cal. 22.)

Moses G. Cobb, for Respondent.

As to appellant's first point that the statute is penal under which judgment was given in this case, and therefore no action can lie thereunder against an executor as such, we say the assertion is entirely gratuitous and not supported by any authority.

The action is *unlawful detainer*, and is founded on the conventional relation of landlord and tenant. (§ 1161, Code Civ. Proc.; *Johnson et al. v. Cheley*, 43 Cal. 299; *Owen v. Doty*, 27 Cal. 502; *Walls v. Preston*, 28 Cal. 225; Taylor's L. and T. § 720, 7th Ed.)

After service upon the lessee, or his legal representative, of the written demand provided for in § 1161, Code Civ. Proc., the lessee or his representative becomes a *tenant at sufferance*. (*Uridias v. Morrell*, 25 Cal. 31; *Hauzhurst et al. v. Lobree*, 88 Cal. 563.)

McKINSTRY, J.—The action was brought under the chapter of the Code of Civil Procedure which treats of summary proceedings for obtaining possession of real property.

The complaint alleges that on or about the 30th of May, 1879, plaintiff, by a written agreement and lease, leased, demised, and let to William Meehan, now deceased, certain premises (described) in the city and county of San Francisco: "To have and to hold said premises to the said William Meehan, now deceased, at the monthly rent of two hundred dollars, payable monthly in advance on the 10th day of each and every month thereafter in advance, in gold coin of the United States." That on the 27th day of September, 1879, William Meehan died testate. That his will was duly probated, and letters testamentary on his will were duly issued to said James Meehan on the 13th of February, 1880, who, on that day, duly qualified and still is executor of the estate. That James Meehan, "executor as aforesaid," is plaintiff's tenant of the premises, and defendant, Jacob L. Solomon, is a sub-tenant therein, and occupies a portion thereof.

That by virtue of said agreement and lease William Meehan, now deceased, entered into the possession and occupation of said demised premises, and said James Meehan, executor of the estate of the said William Meehan, deceased, continues to hold the same as tenant of said plaintiff; and said Jacob L. Solomon continues to hold as a sub-tenant of said James Meehan, executor as aforesaid, and is in occupation of a portion of said premises. That, pursuant to the terms of said agreement and lease, there became due on the 10th day of February, 1880, from said

defendant James Meehan, the executor of the estate of said William Meehan, deceased, to said plaintiff for rent of said premises, the sum of nine hundred and fifty dollars, gold coin (being aggregate of rents due from October 10, 1879, to February 10, 1880).

That on the 17th day of February, 1880, notice and demand in writing was duly given and made by said plaintiff to said defendants, and for and requiring the payment of said rent then due, amounting to the said sum of nine hundred and fifty dollars, or the possession of said demised property, but said defendants neglected and refused for the space of three days after notice and demand so given and made, and still neglect and refuse to pay said rent or surrender possession. That James Meehan, executor as aforesaid, unlawfully holds over, etc., by reason whereof plaintiff has sustained damages in the sum of nine hundred and fifty dollars, etc.

The prayer of the complaint is that plaintiff have restitution of the premises and judgment "against said James Meehan, executor as aforesaid," for the sum of nine hundred and fifty dollars, amount of rent due, and for the accruing rents; that the amount found due "may be trebled," and also for costs, etc., and that said lease "under which said James Meehan, executor of the estate of William Meehan, deceased, holds, be forfeited."

The defendant, James Meehan, executor, demurred to the complaint on the grounds, (1) the court has no jurisdiction of the subject-matter, or (2) of the person of defendant; (3) the complaint does not state facts sufficient, etc.; (4) a defect of parties defendant — an executor cannot be made defendant in an action in forcible or unlawful entry or detainer; (5) misjoinder of parties defendants for the reason stated in four (4).

Section 1161 of the Code of Civil Procedure reads: "A tenant of real property for a term less than life is guilty of unlawful detainer; (2) where he continues in possession, *in person or by sub-tenant*, without permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice in writing," etc.

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Prior to an amendment of the statute by the insertion of the words "or the successor in estate of his landlord," it was held that the right to remove a tenant by summary proceeding like the present was conferred upon the conventional landlord alone, and not upon his successor in the estate. (*Reay v. Cotter*, 29 Cal. 168.) The proceeding is statutory and can be resorted to only in the cases, and by and against the parties, mentioned in the statute. The executor of the last will and testament of a decedent, who in his lifetime was tenant, is not such person or a sub-tenant; yet it is only when the tenant continues in possession, "in person or by sub-tenant," that the action can be maintained.

Such is the letter of the section of the Code. The landlord when he lets his property must be presumed to anticipate the possible contingency of the tenant's death during the term of the lease, and to know, in that event, he will not be entitled to resort to the extraordinary remedy here asserted. There is no good reason why the language of the Code should be strained so as to uphold a judgment against an estate, in the nature of a penalty, for *three times* the amount which would be due for rent if the tenant had lived.

The demurrer should have been sustained.

Judgment reversed and cause remanded with directions to sustain demurrer to complaint.

Ross, J., and McKee, J., concurred.

Hearing in Bank denied.

[Department One.— January 16, 1883.]

B. T. WILLIAMS, RESPONDENT, v. A. P. MORE,
APPELLANT.

*** ATTORNEYS AT LAW — PARTNERSHIP — EMPLOYMENT.** — The employment of one member of a firm of attorneys is ordinarily an employment of the firm, and the client is not affected by an understanding between the partners, without his assent or knowledge, that each should act and receive compensation separately in the particular business to which the employment relates.

APPEAL from a judgment of the Superior Court of the county of Ventura, and from an order refusing a new trial.

Flournoy, Mhoon & Flournoy, and Brunson & Wells, for Appellant.

J. Homer, and W. T. Williams, for Respondent.

PER CURIAM.—At least a portion of the professional services for which a recovery in this case was had were rendered while the plaintiff was a law partner of W. T. Williams. He was such a partner when the contract of the 1st of March, 1879, was entered into. Ordinarily, when one member of a firm is employed the firm is employed, and the employer is entitled to the services of all the members of the firm. The understanding between the partners in this case, that, as respects the particular cases in which the services in question were rendered, each partner was to act as an individual, and charge and receive compensation therefor as an individual, certainly cannot affect the defendant in the absence of his knowledge of and assent to such arrangement. Such knowledge and assent are not shown in this case. As the case is now presented, when More employed the plaintiff he employed the firm of which plaintiff was a member, and when More paid one member of that firm for services rendered by the firm, he paid both members of it for those services.

Judgment and order reversed, and cause remanded for a new trial.

[Department One. — January 16, 1883.]

F. S. SMITH, APPELLANT, v. ROBERT HILL,
RESPONDENT.

LANDLORD AND TENANT — RIGHT OF RE-ENTRY — UNLAWFUL DETAINER. — When a right of re-entry is reserved in a lease, and such right has accrued, three days' notice must be given, as provided in §§ 1161 and 1162 of the Code of Civil Procedure, before a summary proceeding can be instituted against the tenant for an unlawful detainer.

APPEAL from a judgment of the Superior Court of Sacramento County.

The action was brought under the provisions of the Code relating to forcible entries and forcible and unlawful detainer. The complaint was demurred to, and the demurrer sustained. The facts are stated in the opinion of the court.

L. S. Taylor, for Appellant.

Grove L. Johnson, for Respondent.

Ross, J.—The lease under which the defendant entered into the possession of the premises was from one Baker, and was “for the term of two years next ensuing from the 1st day of September, 1877, with the privilege to said defendant for an additional term of three years, to commence on the 1st day of September, 1879, at the monthly rent of forty dollars per month, payable monthly in advance”; and it was provided in the lease that if Baker should sell the premises during the terms therein mentioned, the lease should thereupon terminate, and the premises be at once surrendered to Baker. Defendant availed himself of the additional term stipulated for in the lease. On the 15th day of July, 1882, Baker sold and by deed conveyed the premises to the plaintiff. The rent being, according to the terms of the lease, payable monthly, in advance, it had previous to the sale been paid to Baker for the month of July, 1882. On the last day of that month Baker gave the defendant notice in writing that he had sold and conveyed the premises to the plaintiff, and demanding that defendant surrender them to plaintiff. On the next day, August 1st, the plaintiff made a similar demand on defendant, both of which demands were refused, and the next day, August 2d, this action was commenced for the unlawful detention of the property.

The demurrer was properly sustained, for the reason that the three days’ notice required by the Code was not given.

Section 791 of the Civil Code provides: “Whenever the right of re-entry is given to a grantor or lessor in any grant or lease, or otherwise, such re-entry may be made at any time after the right has accrued, upon three days’ notice, as provided in §§ 1161 and 1162, Code of Civil Procedure.”

Judgment affirmed.

McKINSTRY, J., and McKEN, J., concurred.

[Department One. — January 16, 1883.]

GEORGE K. PORTER, RESPONDENT, v. THERON W.
HOPKINS ET AL., APPELLANTS.

INJUNCTION — UNDERTAKING — DAMAGES. — Reasonable counsel fees for obtaining the dissolution of an injunction are allowable as damages in an action on the undertaking, but fees for other services rendered by counsel in the injunction suit are not allowable.

COSTS — MEMORANDUM — WHEN TO BE FILED. — In the provision of the Code prescribing the time within which a memorandum of costs must be filed the decision referred to is the finding of facts and conclusions of law signed by the court and filed with the clerk as the basis of the judgment.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was brought on an undertaking for an injunction. The facts are stated in the opinion of the court.

McElrath & Ellis, for Appellants.

B. S. Brooks, for Respondent.

McKee, J.—By the undertaking in suit the defendants undertook to pay such damages as might be sustained by reason of the issuance of an injunction, if it should be finally decided by the court that the parties in whose behalf the writ was issued were not entitled to it.

The writ was issued out of one of the late District Courts of the city and county of San Francisco in a suit in equity brought by Egbert Judson et al. against George K. Porter et al. to perpetually enjoin the latter from prosecuting certain actions at law then pending for the recovery of some real estate which was then in controversy between the parties to the suit. It was admitted by the pleadings in the case in hand that the plaintiff Porter was the sole party interested in the prosecution of the actions enjoined, and on the trial the court found that he had incurred and paid out, for the services of counsel in and about the dissolution of the injunction, the sum of one thousand dollars; and he had been also compelled to pay as a further counsel fee the sum of two hundred dollars, for services rendered in procuring from the court, out of which the injunction had been

issued final judgment that the plaintiffs in the injunction suit were not entitled to the writ.

These were the only two items of damages considered and allowed by the court, and the question arises, Are the defendants liable on their undertaking for each of these items?

Upon the final decision by the court that the plaintiffs were not entitled to the writ of injunction, a cause of action accrued, according to the terms of the undertaking, to recover such damages as had been sustained by reason of the injunction.

Reasonable and necessary counsel fees expended in obtaining a dissolution of the injunction are properly allowable as damages in a suit upon the undertaking. (*Wilson v. McEvoy*, 25 Cal. 172; *Prader v. Grimm*, 28 Cal. 11.) The services, for which the plaintiff incurred and paid out one thousand dollars, were rendered by his counsel on two motions made to dissolve the injunction, and on appeal from the last order refusing to dissolve it to the Supreme Court, where the order was reversed with direction to the lower court to dissolve the injunction. The services upon these motions were necessary, the charge for them was reasonable, and it was paid by the plaintiff. The finding to that effect is fully sustained by the evidence, and the sum was properly allowed.

But the allowance of the additional sum of two hundred dollars for the alleged services of counsel in obtaining a final judgment in the case, that the plaintiffs were not entitled to the injunction, was erroneous.

The record shows that after the final order for the dissolution of the injunction the case was tried on its merits and a judgment entered for the plaintiff; but on appeal to the Supreme Court from the judgment it was reversed and the cause remanded for a new trial. Before a new trial was had the plaintiffs declined further to prosecute the suit, and moved the court to dismiss it; that motion was resisted by defendants, and the court denied it, but the court did dismiss the action after deciding that the injunction had been improperly issued. Resistance to the plaintiffs' motion was unnecessary, because the dismissal of the action upon that motion, following the dissolution of the injunction and the decision of the case by the Supreme Court, would have been equivalent to a final decision that the plaintiff was not entitled

to the injunction, even if the previous dissolution did not have that effect, and would have operated as a breach of the undertaking on injunction upon which the defendants would have become liable to respond in damages. (*Dowling v. Polack*, 18 Cal. 626; *Leese v. Sherwood*, 21 Cal. 164; *Fowler v. Frisbie*, 37 Cal. 34.)

But liability could not be enforced against them for any other counsel fees or damages than the reasonable and necessary fees expended in obtaining a dissolution of the injunction. After dissolution the cause itself still existed, independent of the writ of injunction; and the expense of services rendered after the dissolution in the cause itself, or in resisting a motion to dismiss the cause, was not damages sustained by reason of the writ; attorney's fee for services rendered in the case after dissolution of the injunction was therefore improperly allowed. (*Elder v. Sabin*, 66 Ill. 131; *Wilson v. Haecker*, 85 Ill. 349; *Robertson v. Robertson*, 58 Ala. 68; *Bustamente v. Stewart*, 55 Cal. 115.)

There was no error in refusing to strike out the memorandum of costs.

Section 1033 of the Code of Civil Procedure requires the party in whose favor judgment is rendered to file and serve a memorandum of his costs and disbursements within five days after notice of the decision of the court when the case is tried without a jury. The decision referred to is the finding of facts and conclusions of law, signed by the court and filed with the clerk as the basis of the judgment entered. (§§ 632, 633, *supra*.) In the case in hand the memorandum was filed within five days after the filing of the "decision," and it was filed in time.

Judgment and order reversed and cause remanded unless the plaintiff remits two hundred dollars of the judgment. Upon remitting that amount in the court below the judgment as modified will stand affirmed.

Ross, J., and McKINSTRY, J., concurred.

Hearing in Bank denied.

[Department One.—January 16, 1883.]

THOMAS MORAN, RESPONDENT, v. DANIEL ABBEY
ET AL., PHILIP HEFFNER, APPELLANT.

NEW TRIAL — NEWLY DISCOVERED EVIDENCE. — A new trial will not be granted on the ground of newly discovered evidence, if the evidence might have been produced at the trial by the exercise of reasonable diligence. This rule held to be applicable to evidence of a conversation between the plaintiff and one of the defendants previous to the trial, the plaintiff being the moving party, and giving as the reason for not producing the evidence that he had forgotten the conversation.

WITNESS — EXAMINATION — LEADING QUESTIONS — JUDICIAL DISCRETION. — On the direct examination of a witness, leading questions may be allowed by the court in the exercise of a sound discretion, and the action of the court in that respect can only be reviewed so far as to determine whether its discretion has been abused. No abuse of discretion appearing a new trial cannot be granted on the ground that the court erred in allowing such questions.

ID. — PARTY TESTIFYING ON HIS OWN BEHALF — CROSS-EXAMINATION. — The plaintiff was examined as a witness on his own behalf, and testified fully in relation to the matters in controversy. On cross-examination, he was asked as to certain statements on the subject claimed to have been made by him as a witness in another case. This was objected to on the ground that the record in the case had not been produced. The court overruled the objection. *Held*, that the production of the record was unnecessary, and that the objection was properly overruled.

JUDICIAL DETERMINATION — HOW PROVED — STRIKING OUT ANSWER OF WITNESS. — A judicial determination, being a matter of record, must be proved by the record itself, and it is not error to strike out the oral statement of a witness as to what the determination was.

IMMATERIAL ERROR NO GROUND FOR A NEW TRIAL. — Where the answer of a witness to a question asked is improper, but no harm could have resulted from it, a refusal by the court to strike the answer out is an immaterial error, and no ground for a new trial.

PROMISSORY NOTE — PAYMENT. — The payment of a promissory note by a third person at the request of the maker to an agent holding it for collection extinguishes the note, and cannot afterwards be treated as a purchase. The obligation to pay being discharged, a subsequent transfer of the note by the payee to the person making the payment will not revive it.

VERDICT — SUFFICIENCY OF THE EVIDENCE — CHARGE TO THE JURY. — The case was tried by a jury, and the verdict being against the plaintiff, he moved for a new trial, which was granted. In support of the motion, he relied partly upon insufficiency in the evidence, and errors claimed to have been committed by the court in its charge to the jury. After reviewing the evidence and examining the charge in connection with the pleadings and circumstances of the case, *held*, that the verdict was in accordance with the evidence, and that there was no substantial error in the charge.

APPEAL from an order of Superior Court of the county of Butte granting a new trial.

The action was brought on a promissory note given by the defendants, Abbey and Heffner, to one Hancock. The contro-

versy at the trial was between the plaintiff and Heffner, Abbey having been discharged in bankruptcy. The additional facts are stated in the opinion of the court.

J. M. Burt, Jo. Hamilton, and John W. Turner, for Appellant.

Gray & Gale, for Respondent.

MCKEE, J.— This case has been before the court on a former appeal. (58 Cal. 165.) Upon the going down of the remittitur from the decision then rendered, a re-trial was had in the lower court which resulted in a verdict for the defendant, Heffner; but upon a motion for a new trial made by the plaintiff, upon a statement of the case and two affidavits of newly discovered evidence, the court set aside the verdict. Whether that was done upon the grounds of newly discovered evidence, or of any of the specifications of error contained in the statement does not appear by the record.

But the newly discovered evidence related to an alleged conversation between the plaintiff and Heffner about the promissory note upon which the action was brought; and the affidavits concerning it were made by the plaintiff himself and one Wilson, both of whom had testified as witnesses in the case. In his affidavit the plaintiff deposes to “absolute forgetfulness” of the conversation, until it had been recalled to his memory by Wilson after the rendition of the verdict. Wilson, however, had not forgotten it, and could have testified to it at the trial, if he had been questioned at all about the subject; but he was not. Yet, as the evidence was obtainable by the exercise of ordinary diligence, the neglect or omission of the plaintiff to draw it from the witness by a proper course of examination, is no ground for a new trial. It is well settled that a new trial will not be granted because new evidence has been found which was known to a witness at the trial of the case, and might have been obtained from him by due attention. (*Bond v. Cutler*, 7 Mass. 205; *McIntire v. Young*, 6 Blackf. 496.)

The issues in the case which were submitted to the jury comprised “payment and satisfaction” of the note in suit, and fraud in obtaining a qualified indorsement of the note from the payee after it had been paid; and it is urged that the verdict of

the jury was properly set aside, because of errors committed by the court during the trial of the cause in overruling objections to questions propounded to witnesses, in admitting and excluding testimony, and in giving instructions to the jury.

Four or five specifications of error relate to rulings made by the court in denying objections by counsel for plaintiff to leading questions asked by counsel for Heffner, in the direct examination of his witnesses. But these are not errors for which a new trial will be granted. We are not aware of any case in which a verdict has been set aside for the reason that leading questions, although objected to, have been allowed to be put to a witness. (*Green v. Gould*, 9 Allen, 466; *Hopkinson v. Steel*, 12 Vt. 582; *Parsons v. Huff*, 38 Me. 187; *Mershoi v. Hobensack*, 22 N. J. 372.) And the reason is that the examination of a witness in the trial of a case is a matter within the sound discretion of the trial court, who may, in the exercise of that judicial discretion, allow or disallow leading questions. (§§ 2044-2046, Code Civ. Proc.) A matter resting in judicial discretion is not reviewable in an appellate court; it is only the abuse of such a discretion of which we will take cognizance. In this case no such question is presented by the record.

It has been also urged that the court erred in permitting the defendant, against the objections of plaintiff's counsel, to cross-examine the plaintiff upon matters of record, without producing the record itself. But the objections made were not tenable because the cross-examination related to the testimony which, it was claimed, the plaintiff had given while under examination in a court of record, and not to any record of the court. The cross-examination had developed the fact that Abbey, the principal maker of the note in suit, had been adjudicated a bankrupt before the maturity of the note; that the plaintiff had become possessed of all the available property of the bankrupt before the act of bankruptcy; and that he had been cited to appear in the Bankruptcy Court to answer under oath what property or effects of the bankrupt he had in his possession or under his control; and the object of the cross-examination objected to evidently was to show that the plaintiff had, while under examination in the Bankruptcy Court, produced or presented the promissory note in suit to that court, and testified that he had paid

it for Abbey at his request. As sworn statements or admissions of the plaintiff relevant to the issues of payment and fraud, which were on trial, the evidence was proper, and the examination of the plaintiff for that purpose was unobjectionable.

Nor was it error for the court to strike out the oral statement of the plaintiff in response to his counsel as to the determination by the Bankruptcy Court of the contest between him and the creditors of Abbey. Whatever judgment or order had been made by the court, as the result of the plaintiff's examination, in awarding to the plaintiff the property involved in that contest, was a matter of record provable only by a production of the record itself.

The next exception which is the subject of a specification of error relates to the refusal of the court to strike out the answer of a witness to a question which had been put to him. The witness had given testimony tending to prove that Abbey, the maker of the note, and the plaintiff came together to the bank, where the note had been left for collection, to take up the note, and that the witness, after receiving from the plaintiff the money due upon the note, surrendered it. Upon being asked "To whom?" he answered: "I supposed I was surrendering it to Abbey." It was that answer which the court, upon motion of the plaintiff, refused to strike out.

The ruling, if error, was not a substantial one. The fact in question was the identity of the person to whom the note was surrendered after the money for it had been paid. All the facts and circumstances attending the entire transaction had been given in detail by the witness; and after his answer as to the surrender of the note he testified that he received the money, laid the note upon the counter for the party to take possession of it, and his impression was that the plaintiff took it up from the counter, and he and Abbey then went away. This left the question upon the circumstances connected with it, for the jury, whose duty it was to draw the proper inferences from them, and the plaintiff had the full benefit of the proof. So that if there was any error in the refusal to strike out the answer it was harmless, and would not justify directing a new trial.

This brings us to a consideration of the grounds of litigation in the case as it was submitted to the jury under the instructions

of the court. As has been already stated, the principal subject of controversy was, whether the transaction by which the plaintiff obtained possession of the note in suit amounted to a purchase or payment of the note. The note was given on the 30th of December, 1875, payable one year after date, to the order of George Hancock, at the banking house of Rideout, Smith & Co., in Oroville, and was left by the owner in the bank for collection. Before it matured, Abbey, the principal maker of the note, had turned over by sale or otherwise, all his available property to the plaintiff; this property comprised one hundred and sixty acres of land, upon which Abbey resided with his family; one thousand six hundred head of sheep, including several hundred head which belonged to his wife; seventy-five hogs, and "ten, fifteen, twenty or thirty tons of hay"; and on October 24, 1876, Abbey became a voluntary or involuntary bankrupt. But his creditors had attached the property which had been turned over to the plaintiff, and between them and him a contest arose, in which he was cited to appear in the Bankruptcy Court for examination, under oath, touching the property or effects of Abbey, which he had in his possession or under his control. Before he appeared in obedience to the citation he obtained possession of the note in suit. In getting it he knew all about the note, the parties to it, and the legal relations existing between them. He himself testified that he knew — and it was admitted at the trial of the case — that the note had been given to secure payment of a sum of money which Abbey had borrowed for his exclusive use and benefit; that Heffner signed it as a joint maker for the accommodation of Abbey, and that, as between Hancock, the payee of the note, and Abbey, Heffner was a surety only. Knowing these things, and having acquired from Abbey possession of the property about which he was engaged in a contest with the creditors of Abbey, the plaintiff before appearing in the contest entered into a transaction with Abbey about the note, which is best shown by his own testimony: "A few days before the transaction Abbey spoke to me about taking up the note. He told me there was a note in the bank made by him, and that he was trying to raise money but had failed, and asked me if I had any money to loan. I told him I had. He says he would like to

get that note out of the bank before any costs would be put on him. . . . I took up the note at his request. I knew Hancock, the payee of the note. I did not go to see him about purchasing it. . . . I went to the bank without seeing Hancock, the owner of the note, at all, and took the note out of the bank. . . . I paid the note, took possession of it, took it home, put it into my safe, and let it lay there three years, until, before commencing this suit, I went upon the advice of my lawyers, and got Hancock to indorse it. At first Hancock refused to indorse, because he had got his money, but afterwards, on being assured that a qualified indorsement would not injure him, he consented."

From this testimony alone it is evident that in the transaction there was no concurrence or privity on the part of the payee of the note and the plaintiff. Both were, as to the transaction, strangers to each other. There was therefore no sale of the note, and no obligation on the part of the payee, arising out of the transaction, which entitled the plaintiff to a transfer. As a friend of Abbey and at his request, the plaintiff advanced the money to take up the note. He and Abbey were therefore the only parties to that transaction. The legal effect of the transaction was to extinguish the obligation of the note; and the only obligation which arose from the transaction was on the part of Abbey.

It has been argued, however, that "if there was no contract of sale by reason of a want of mutual consent between the plaintiff and the payee of the note, then, for the same reason and under the same rule of law, there was no payment; and that it follows as a necessary conclusion that the note, being neither paid nor purchased, still existed, and belonged to Hancock until he indorsed it to the plaintiff."

But payment of a promissory note is not a contract; it is performance of the obligation arising out of the promise to pay. Any one of the several parties to a joint contract, or any one in his behalf and at his request, or with his consent, may perform the obligation; and when performance has been offered or made, and the money accepted, the obligation becomes extinguished. The parties to the contract are no longer bound to each other by the *vinculum legis* of right and duty. The duty being dis-

charged the right ceases to exist; and the contract itself, though preserved in form, is no longer the subject of sale or transfer. When therefore the plaintiff, at the request of Abbey and for his benefit, took up the note, the contract was discharged, and the qualified indorsement of it by the payee, three years afterwards, was ineffectual as a transfer. The verdict of the jury was therefore according to the evidence and the law.

In the charge of the court to the jury we find no substantial error. Considered as a whole, in connection with the evidence and the pleadings, and construed with reference to the subject-matters in controversy, and the claims of parties before the court, it was substantially correct. It fairly presented the case to the jury, and there was nothing in it calculated to mislead the jury. There were therefore no grounds for a new trial.

Order reversed.

McKINSTRY, J., and ROSS, J., concurred.

[In Bank. — January 23, 1883.]

THE PEOPLE, RESPONDENT, v. PATRICK BARRY,
APPELLANT.

PERJURY — MATERIALITY OF TESTIMONY. — Where a witness has given testimony material to the issue, and in answer to a question as to whether he had not previously made a statement different from the testimony then given, he denies having done so, the answer affects his credibility as a witness, and a charge of perjury may be founded upon it.

Id. — ERRONEOUS INSTRUCTION. — The court charged the jury in effect that if the defendant knowingly, wilfully, intentionally, and falsely testified that it was Y. and not K. who fired the first shot, and did, for the purpose of misleading the jury, give testimony contradictory to statements before made, falsely and wilfully, the accusation was fully made out. *Held*, that the question as to who did in fact fire the first shot was not the issue before the jury; they were to determine whether the defendant testified falsely in denying that he had on a previous occasion stated that K. fired the first shot; and the charge being calculated to mislead the jury was therefore erroneous.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

W. H. Webb, for Appellant.

A. L. Hart, Attorney-General, and Geo. W. Tyler, for Respondent.

MORRISON, C. J.—An information was filed against the defendant charging him with the crime of perjury, and a conviction being had an appeal has been taken to this court.

The defendant filed a demurrer to the information, which was overruled by the court; and the first question presented for our consideration relates to the sufficiency of the information.

By § 118 of the Penal Code it is provided that "Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury."

Bishop in his work on Criminal Procedure, vol. 2, § 901, says: "The elements of this offense to be alleged and proved are—

- "1. A judicial proceeding or course of justice;
- "2. The defendant having been sworn to give evidence therein;
- "3. His testimony;
- "4. Its falsity;
- "5. Its materiality to the issue or point of inquiry."

An examination of the information upon which the defendant was tried and convicted will show that it contains all of the elements above stated as constituting perjury at common law.

It is averred therein that the case of *The People v. Isaac M. Kalloch*, charged with the murder of one Charles De Young, was on trial in the Superior Court of the city and county of San Francisco, a court having jurisdiction thereof; that on the trial the defendant was called, duly sworn and examined, as a witness on behalf of the defense; that on said trial he gave certain evidence, which is set forth in the information; that such evidence was false; that the defendant knew at the time it was given that it was false; and lastly that it was material to the issue or inquiry. The materiality of the false evidence upon which the charge of perjury was predicated is questioned on the appeal, and we will briefly consider it.

On the trial of Isaac M. Kalloch for the murder of Charles De Young, it became a material inquiry in the case whether or not De Young fired a shot at Kalloch before the latter fired at De Young, and on that trial Barry testified that he did. He was then asked if he (Barry) had not stated in a conversation at a designated time and place, and in the presence of certain persons named, that upon the occasion of the shooting of De Young he, the said defendant Barry, saw Kalloch fire the first shot? He denied having made such statement. Was this a material inquiry, and could a false oath in respect to such a matter amount to perjury?

The evidence of Barry that De Young fired the first shot was most important and material, as it tended to establish a plea of justification set up and urged on behalf of Kalloch, as a defense to the homicide with which he was charged. For the purpose of impeaching the witness it was certainly competent for the prosecution to prove that the defendant had, on an occasion prior to the trial, made the statement imputed to him, and before this could be done it was required of the prosecution to lay a foundation for such impeachment. This could only be done by calling the attention of the witness to the contradictory statement and interrogating him respecting it. It therefore became a matter material to the credibility of the witness; it was a circumstance material to the issue or point of inquiry, and a false oath respecting it was perjury.

In the case of *Wood v. People of the State of New York*, 59 N. Y. 123, it is said: "The indictment does not allege that either of the statements was material, nor do they appear to have been so on a comparison of the statements with the issues in the pleadings or by any extrinsic proof. It is not necessary that the false statements should tend directly to prove the issue in order to sustain an indictment. *If the matter falsely sworn to is circumstantially material or tends to support and give credit to the witness in respect to the main facts, it is perjury.*" And it is equally perjury if the false evidence tends to *discredit* the witness. To the same effect is the rule laid down by the Supreme Court of Massachusetts in the case of *Commonwealth v. David Thompson*, 12 Mass. 225.

In the case of *Rex v. Giepe*, 1 Ld. Raym. 256, it was

said, "that it is not necessary to appear in an information for perjury to what degree the point in which the man is perjured was material to the issue, for if it is but circumstantially material it will be perjury. . . . So if a witness swears to the credit of another witness, if it be false it will be perjury if it conduce to the proof of the point in issue."

It appears to us to be plain, both on principle and authority, that the question whether the defendant Barry had made the statement, respecting which he was interrogated, and which statement he denied having made, was material to the case on trial, and that a false oath concerning the same involved the crime of perjury.

But the judgment will have to be reversed for error in the charge of the court to the jury. The following is a part of it:—

"I charge you that if you believe from the testimony beyond a reasonable doubt that there was such trial in due course of law of said Kalloch in this court, and that defendant in such trial was a witness duly sworn in the cause, and that he did testify in the cause, and did in such testimony wilfully, falsely, and knowingly convey to the jury in such case, intentionally, the idea and impression and belief according to his testimony that it was not said Kalloch but was said De Young who fired the said first shot, and this was done knowingly, wilfully, and intentionally, and falsely, for the object, reason, and intent, and to the end that said jury should be misled by his testimony that it was said De Young and not Kalloch who fired the first shot, . . . and the defendant in that case and for that purpose and to that end did give such testimony inconsistent with and contradictory to such alleged statements before made, or alleged to have been made, did give it falsely, knowingly, and wilfully, then I charge you that the accusation of the information against him for the alleged perjury is as fully made out as if the precise words had been proved before you."

The court did not keep in view the charge on which the defendant was being tried. The accusation contained in the information was not that on the trial of Kalloch the defendant swore falsely as to who fired the first shot, but it was simply a charge that the defendant on that trial denied that he had on a previous occasion stated that Kalloch fired the first shot. The

question as to who did in fact fire the first shot was not the charge upon which he was being tried.

Conceding, therefore, for the purpose of the argument that the defendant did, in his testimony, wilfully, falsely, and knowingly convey to the jury on such trial the impression and belief that it was not Kalloch but De Young who fired the first shot, yet he could not have been convicted of perjury therefor on that information, because that was not the false oath with which he was charged. The charge of the court was clearly erroneous; it was calculated to mislead the jury, and on plain and well-established rules of law it becomes our duty to reverse the judgment.

Judgment and order reversed and cause remanded for a new trial.

THORNTON, J., MYRICK, J., ROSS, J., and SHARPSTEIN, J., concurred.

McKEE, J., concurred in the judgment.

Rehearing denied.

[Department Two.— January 23, 1883.]

**JOHN C. KING, ASSIGNEE IN INSOLVENCY, RESPONDENT,
v. C. N. FELTON ET AL., C. N. FELTON, APPELLANT.**

PLEADING — MISJOINDER OF PARTIES DEFENDANT.— A complaint against several defendants, some of whom do not appear to be necessary or proper parties, is demurrable for a misjoinder of parties defendant.

Id. — INSUFFICIENCY.— In an action by the assignee of an insolvent debtor, the fact of an assignment must be alleged in the complaint. If not so alleged, the complaint will be insufficient.

APPEAL from a judgment of the Superior Court of the county of San Bernardino.

Waters & Gibson, for Appellant.

Henry M. Willis, and *C. W. O. Rowell*, for Respondent.

PER CURIAM.— The demurrer of the defendant Felton should have been sustained.

First — There was a misjoinder of parties defendant. From the case as presented by the complaint it is not apparent to us why either the Riverside Land and Irrigating Company or S. C. Evans was joined with the defendant Felton. There is no statement of fact showing that either of them was a necessary or proper party; the facts stated apply alone to Felton as a defendant. The demurrer was sustained as to the Riverside Land and Irrigating Company; it should have been sustained as to Evans.

Second — The complaint does not state facts sufficient to constitute a cause of action. The plaintiff sues as assignee in insolvency of one Sayward.

There is no averment that an assignment was ever made. Section 17 of the Insolvency Act of 1880 requires that an assignment of the insolvent's property shall be executed, which assignment shall vest the title of the property in the assignee. It is alleged in the complaint that Sayward "is now the owner," etc. If, at the time of commencing the action, Sayward was the owner, the plaintiff was not; if, on the other hand, an assignment had been properly executed, Sayward was not the owner, and plaintiff was.

Other errors appear in the transcript, such as insufficiency of findings on the issues presented; but as the case is here determined on the pleadings, those errors are not for decisive consideration.

Judgment reversed and cause remanded, with instructions to sustain the demurrer of the defendant Felton, with leave to plaintiff to amend.

[Department One.—January 24, 1888.]

JOHN KELLY, RESPONDENT, v. WILLIAM TEAGUE
ET AL., APPELLANTS.

LANDLORD AND TENANT — BREACH OF COVENANT — UNLAWFUL DETAINER.—If a tenant of leased premises remain in possession after the breach of a covenant on his part contained in the lease, which cannot subsequently be performed, an action may be brought against him for an unlawful detainer without notice to perform the covenant.

PLEADING — COUNTER-CLAIM.—A summary proceeding against a tenant for an unlawful detainer is not a proper case for a counter-claim.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was a summary proceeding for an unlawful detainer. The answer set up an indebtedness from the plaintiff to the defendant Teague as a counter-claim. The additional facts are stated in the opinion of the court.

J. C. Bates, for Appellants.

W. S. Goodfellow, and *Jarboe & Harrison*, for Respondent.

MORRISON, C. J.—The complaint in this case alleges that on the 10th day of February, 1875, plaintiff leased to defendant Teague a certain lot of land in the city of San Francisco for the term of ten years, at a monthly rental of fifty dollars; that the lease contained a covenant on the part of the lessee to pay "all the taxes and assessments that should be levied upon said premises during the term"; that defendant entered into possession of the premises under the lease on the 1st day of March, 1875, and has held the possession ever since either in person or by sub-tenant; that taxes and assessments to the amount of \$152.88 were levied upon the premises for the fiscal year ending June 30, 1882; that said sum became due and was payable on the 26th day of December, 1881; that defendants failed to pay the taxes and assessments prior to the 28th day of March, 1882, and by reason of such failure the premises were sold for taxes and assessments due thereon. The complaint further alleges that on the 13th day of April, 1882, the plaintiff served on each of the

defendants a notice in writing, requiring them within three days after the service of the notice to perform the condition contained in the lease, or deliver up to the plaintiff the possession of the premises. The answer denies generally all the averments in the complaint, and also sets up a counter-claim. Plaintiff had judgment for restitution of the possession and costs of suit.

The action was brought under § 1161 of the Code of Civil Procedure, and was not a proper case for a counter-claim.

The first point made in defendant's brief is, that the complaint was fatally defective, for the reason that there was no allegation of non-payment of taxes, and the second point is, that the notice was fatally defective because it did not state any amount, or the year for which the taxes were due. Neither of these points is well taken. The complaint is sufficient, and no notice was required. The tenant covenanted to pay the taxes, and the law fixes the time within which taxes must be paid. The defendant was in default, and had broken the covenant of the lease before the notice was received. In the case of *The Opera House v. Bert*, 52 Cal. 471, the court say: "But whether the breach did or did not operate a forfeiture, which would justify *ejectment*, an action in the present form in the county court can be maintained only upon a refusal to perform a covenant which can be performed after breach, and the notice contemplated by the statute." The lease in that case was made in 1875, and the forfeiture insisted upon occurred in August, 1876. The present action is brought under a statute approved April 1, 1878, which was intended, as may be justly inferred, to cover just such a case as the former statute did not embrace.

By § 1161 of the Act of 1878 (sub. 3, Code Civ. Proc.) it is provided that "if the covenants and conditions of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to said lessee or his sub-tenant demanding the performance of the violated covenant or conditions of the lease."

By the provisions of the Code as it now exists, and has existed since April, 1878, the right of action by the landlord against the tenant accrues upon the latter continuing in possession of the demised premises in person, or by his sub-tenant after a neglect or failure to perform any condition or covenant

of the lease, and no notice to him to perform is required if it appears that the covenant or condition cannot afterward be performed by him.

Judgment and order affirmed as of October 30, 1883.

Ross, J., and McKINSTRY, J., concurred.

[Department Two.—January 24, 1883.]

J. C. MERRILL, APPELLANT, v. H. B. WILLIAMS ET AL.,
RESPONDENTS.

CONTRACT — LIABILITY OF AGENTS.—A contract was entered into between J. C. Merrill & Co., the assignors of the plaintiff, and the defendants, as agents for the ship *Tartar*, in relation to certain money in the hands of one Ferris, on which a lien was claimed in favor of the owners of the ship. The existence of this lien was disputed by J. C. Merrill & Co., who also asserted a claim to the money, and the contract provided in substance that in case of a determination adverse to the lien, the money should be paid over to them in part satisfaction of any judgment they might recover in a particular action then pending. Their right to the money being established in the mode contemplated by the contract this action was brought on the theory that the contract bound the defendants personally for its payment. *Held*, that the defendants are not liable, that they contracted merely as agents, and did not assume any personal responsibility for the payment of the money, and that the contract amounted simply to a stipulation on behalf of the owners of the ship to relinquish all claim to the money in case the lien should not be sustained.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

George B. Merrill, and *McAllister & Bergin*, for Appellant.

W. H. L. Barnes, for Respondents.

PER CURIAM.—It appears from the complaint that this action is upon the following agreement in writing, signed by plaintiff's assignors and defendants:—

“1. To ascertain the amount received by Ferris from inward freight on the *Tartar*.

“2. To ascertain the amount collected on account of general average by Ferris.

“3. To ascertain the amount due charterers, under general average, for coals jettisoned during voyage from Australia to San Francisco.

"These above amounts being ascertained, W., B. & Co., agents for owners, do agree with J. C. M. & Co., that in case it shall be determined that the owners of the *Tartar* have no lien or claim prior to Merrill & Co., under the charter party, to said moneys, the same shall be paid over to J. C. M. & Co. in satisfaction of so much of any judgment J. C. M. & Co. may recover against the Austral. & M. S. S. Co., or said Forbes et al., now in suit in the Twelfth District Court (case 18,308)."

Defendants had judgment in the court below, and we think the proceedings should be sustained.

The contract did not impose any personal liability upon the defendants, but was simply an agreement on their part that in a certain event moneys in the hands of Ferris should be paid over to Merrill & Co. As the agents of the *Tartar*, defendants agreed, "in case it shall be determined that the owners of the *Tartar* have no lien or claim prior to Merrill & Co., under the charter party, to said moneys, the same shall be paid over to J. C. M. & Co." Paid over by whom? Not by defendants, because they did not have the money. The contract merely amounts to a stipulation on the part of the defendants that in case no claim or lien should be established in favor of the ship, the defendants, as the agents thereof, would relinquish all claim to moneys collected by and in the hands of Ferris.

Judgment affirmed.

Hearing in Bank denied.

[Department One.—January 25, 1883.]

W. F. FRAZER, APPELLANT, v. W. W. BARLOW ET AL.,
RESPONDENTS.

PLEADING — COMPLAINT — INCONSISTENT ALLEGATIONS — DEMURRER.—In an action to enforce a lien for lumber and materials, some of the allegations of the complaint were inconsistent with statements contained in the notice of the lien, a copy of which was attached to and made a part of the complaint. The defendants demurred for ambiguity and uncertainty, and the demurrer was sustained. The plaintiff declined to amend, and a judgment was entered against him on the demurrer. *Held*, that the objection was well founded, and the demurrer properly sustained.

APPEAL from a judgment of the Superior Court of the county of Sacramento.

L. S. Taylor, for Appellant.

Grove L. Johnson, for Respondents.

PER CURIAM.—Appeal from a judgment upon demurrer entered after plaintiff had declined to amend his complaint.

The action was against three defendants—Barlow, Cronkite, and Ellis—to foreclose a mechanic's lien for a balance due for lumber and materials furnished and used in the construction of a dwelling-house on a lot of land in the city of Sacramento.

The notice of lien was included in and made part of the complaint. The notice contains the statements that Cronkite and Ellis were the reputed owners of the land upon which the house was builded; that the materials which were used in its construction were furnished to Barlow, Cronkite, and Ellis, by the plaintiff. It contains no statement of the date when the building was completed, but it does state that thirty days had not elapsed since the completion of the building. On the other hand the complaint itself alleges that Ellis was the sole owner of the land; that the materials were furnished to Barlow and Cronkite, who had paid the cost of the same, except a balance which remained due and unpaid on the 31st of October, 1881, and that the house in the construction of which the materials were used "was completed November, 1881," and the notice of lien was filed "December 2, 1881." These inconsistent and contradictory statements made the complaint ambiguous, uncertain, and demurrable.

Judgment affirmed.

[In Bank, January 25, 1883.]

HENRY LORENZ ET AL., RESPONDENTS, v. HENRY JACOB, APPELLANT.

EMINENT DOMAIN — CONDEMNATION OF PRIVATE PROPERTY FOR A PRIVATE USE.

— The right of eminent domain is restricted to the taking of private property for public use. It cannot be exercised in favor of the owners of mining claims, to enable them to obtain water for their own use in working such claims, though the intention may also be to supply water to others for mining and irrigating purposes.

APPEAL from a judgment of the Superior Court of the county of Trinity, and for an order refusing a new trial.

The facts are stated in the opinion of the court.

F. P. Dann, for Appellant.

C. E. Williams, for Respondents.

MORRISON, C. J.—Plaintiffs commenced proceedings in this case under § 1238 of the Code of Civil Procedure to condemn certain lands belonging to the defendant, for the purpose of a ditch then under process of construction by them.

It is alleged in the complaint that the plaintiffs are now constructing and completing a ditch for the purpose of carrying water from a certain point on Connor Creek to plaintiff's reservoir on Red Hill in Trinity County, and that the uses for which the water is intended and designed are mining and irrigation. The court below entered a judgment in conformity to the prayer of the complaint, and defendant prosecutes this appeal.

There are two points made by the defendant's counsel which we will briefly consider: *first*, the findings are insufficient to support the judgment; and *second*, the evidence shows that the use for which the property is sought to be taken is a private use.

The following are some of the findings:—

"8. That one of the uses for which the proposed ditch is intended is the sale and rental of water for mining and agricultural purposes.

"9. That the use to which plaintiffs intend to devote the proposed ditch is for the sale, rental, and distribution of water to the mining claims and agricultural land in said Red Hill

Mining District, including mining and agricultural land belonging to said plaintiffs, and is not a purely private use."

At the request of counsel for defendant, the following additional finding was filed by the court:—

" 5. With the exception of plaintiffs' own mine the owners of the different mining claims and agricultural lands mentioned could be served with water by means of ditches already in existence, and have been so served with water in former years. The ditches so used have ample capacity to carry the waters of Connor's Creek, except in times of exceptionally high water. Some of these ditches have fallen into disuse or have been worked away, and with the exception of the Connor ditch, the Jacobs ditch, the Mackey ditch, and the Butcher ditch, none of these ditches have rights of water of any value, either for mining or irrigating purposes. To serve the various claims and agricultural lands with water through these old ditches by letting the water run down Connor's Creek would involve a great waste of water, unless purchasers would take it at all times, night and day."

The conclusion of the court below was: "In conclusion, after a careful examination of the evidence offered, the following appears to be the true state of the case: Plaintiffs are the owners of the most valuable interest of any in the waters of Connor's Creek, which stream is the only one available for working the mines in the Red Hill Mining District. This water they have used for many years past in working their own mines, occasionally renting some to others for mining or irrigating. Plaintiffs cannot work their mine to advantage by means of ditches now in existence, and rather than have their water become worthless, they propose to make a public use of it, in which use, as a part of the general public, they will be entitled to a share. The question is not free from difficulties; but in my judgment the statute should be liberally construed in a mining country; and if it appears that the intended use is a public one to a reasonable extent, the right of way should be granted."

We think that both points are well taken.

The findings are insufficient to show that the use for which the water was intended was a public use, and it clearly appears from the evidence that the main and substantial object of plaint-

iffs is to use the water in working their own mining claims. Private property cannot be taken for such a purpose. (*The Wilmington Canal and Reservoir Company v. Dominguez*, 50 Cal. 505; *Cummings v. Peters*, 56 Cal. 593; *Bankhead v. Brown*, 25 Iowa, 540.)

Judgment and order reversed and the court below is instructed to enter judgment in favor of defendant.

MYRICK, J., MCKINSTRY, J., ROSS, J., and THORNTON, J., concurred.

[Department Two.— January 25, 1883.]

E. A. S. PAGE, RESPONDENT, v. W. B. LATHAM,
APPELLANT.

ATTACHMENT — INDEBTEDNESS SECURED BY MORTGAGE.— Lapse of time is not sufficient to authorize an attachment where a mortgage has been given to secure the payment of the indebtedness on which the action is brought. It cannot be assumed that the Statute of Limitations would be pleaded in action to enforce the security, nor could the statute have run without any fault on the part of the creditor.

APPEAL from an order of the Superior Court of the city and county of San Francisco refusing to discharge an attachment.

The action was brought on two promissory notes executed by the defendant to the plaintiff. At the commencement of the action an attachment was issued against the property of the defendant. The following is a copy of the affidavit on which the attachment issued:—

“ [Title of Court and Cause.]

“ STATE OF CALIFORNIA,
City and County of San Francisco.

“ E. A. S. Page, being duly sworn, says: That she is a plaintiff in the above entitled action; that the said defendant is indebted to her in the sum of fifty-one hundred and ninety-seven dollars in gold coin, over and above all legal set-offs and counter-claims, upon certain express and implied contracts for the direct payment of money, to wit: upon two promissory notes dated November 16, 1871, for fourteen hundred dollars

each and interest thereon, made by defendant to said plaintiff, and the subsequent acknowledgment in writing, and promise of said defendant to pay the said notes and the interest thereon; that such contracts were made and are payable in this State, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge upon personal property; that originally, at the time of the making of said notes, the said defendant executed and delivered to one N. Page a mortgage upon real property purporting to secure the payment of said two notes and the interest, but that said N. Page was not then nor has he since been the holder or the owner of said notes, or either of them, and that said mortgage has become valueless without any fault of this plaintiff, or of the said N. Page, by reason of the lapse of time.

"That the said attachment is not sought, and the said action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the said defendant.

"E. A. S. PAGE.

"Subscribed and sworn to before me this 29th day of March, A. D. 1880.

"SAM'L S. MURPHY, Notary Public."

The defendant moved to discharge the attachment on the ground that the affidavit was insufficient. The court denied the motion.

B. S. Brooks, for Appellant.

Rhodes & Barstow, and *H. Hamilton*, for Respondent.

PER CURIAM.—The motion to dissolve the attachment should have been granted. The only ground stated in the affidavit upon which the plaintiff claims that the mortgage given as security for the payment of the note has become valueless is lapse of time. The plaintiff does not know, nor can he until demurrer or answer, whether or not the plea of the Statute of Limitations will be interposed. If that plea should not be interposed the security would remain. Besides, if a person permits the statutory time to pass, is it not his act? He could have brought his action for foreclosure within the time; if he

omitted to do so it was his own act by which the security became valueless.

Order reversed and cause remanded, with instructions to grant the motion.

Hearing in Bank denied.

[Department Two.—January 25, 1883.]

GABRIEL BOVO, APPELLANT, v. TERESA BOVO,
RESPONDENT.

HUSBAND AND WIFE — DIVORCE — COMMUNITY PROPERTY.— When a divorce is granted on the ground of adultery or extreme cruelty the division of the community property between the parties will not be disturbed on appeal, unless the discretion of the court in that respect appears to have been abused.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are sufficiently stated in the opinion of the court.

P. B. Nagle, and *A. H. Loughborough*, for Appellant.

R. N. Swain, *A. Craig*, and *L. F. Dunand*, for Respondent.

PER CURIAM.—Plaintiff brought his suit for a divorce, charging the defendant with adultery, and defendant, after denying the charge in her answer, filed a cross-complaint praying a divorce from the plaintiff on the ground of extreme cruelty. The court granted a divorce, but upon what ground does not appear in the transcript. Plaintiff appealed, and asks for a modification of the decree.

The point is made that the court awarded the defendant too large a proportion (nearly one half) of the community property. Section 146 of the Civil Code provides that "if the decree be rendered on the ground of adultery or extreme cruelty the community property shall be assigned to the respective parties in such proportions as the court, from the facts of the case and the condition of the parties may deem just."

In view of all the facts of the case, as established by the evidence, we cannot say that the court awarded too large a portion of the community property to the defendant, and therefore we are not prepared to reverse the judgment for abuse of discretion. The circumstances found in the case of *Brown v. Brown*, 60 Cal. 579, were very different from those appearing in the transcript in the present case, and therefore that case is not authority in this. There is no error in the proceedings demanding a reversal.

Judgment and order affirmed.

Hearing in Bank denied.

[Department One.— January 25, 1883.]

J. R. SHARPSTEIN, RESPONDENT, v. PRISCILLA
FRIEDLANDER, APPELLANT.

LAW OF THE CASE — DECISION ON APPEAL.— A decision on appeal, establishing the legal effect of an agreement with reference to a right asserted under it, becomes the law of the case, and cannot be questioned on a second appeal.

TRUST — LIABILITY OF TRUSTEE.— The defendant had possession of a promissory note to which the plaintiff was entitled under an agreement between him and one Isaac Friedlander, deceased, and the action was brought to compel an assignment and delivery of the note to the plaintiff. The note was payable to Isaac Friedlander, who held it at the time of his death, and the defendant obtained possession of it as executrix of his estate. After the commencement of the action the defendant collected the note by off-setting in part a claim which the maker had against the estate, and receiving the balance in money, and thereupon surrendered the note to the maker. A supplemental complaint was filed stating the fact of the collection, and demanding a judgment against the defendant for the amount of the note. *Held*, that the plaintiff was entitled to recover, that the defendant was a trustee for his benefit, and that her duty was to deliver the note to him; that its collection and surrender constituted a breach of trust, and that she was personally liable for the amount.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The agreement on which the action was based will be found in the report of the case on the former appeal — 54 Cal. 58.

Doyle, Barber & Scripture, for Appellant.

McAllister & Bergin, for Respondent.

PER CURIAM.— When this case was before the late Supreme Court, on a former appeal from a judgment upon demurrer to the complaint in the action, 54 Cal. 58, the court announced as the law of the case that the plaintiff had the right to elect to regard the two promissory notes which constituted the subject-matter of the agreement upon which the action was founded, as constituting one entire fund, and to take as his share of the fund the unpaid note which had come into the hands of the defendant, who claimed to hold it as executrix of the estate of Isaac Friedlander, deceased. Defendant therefore held the note for the benefit of the plaintiff, and the action was maintainable against her personally, and not as representative of the estate of Friedlander.

That decision has been challenged on the argument of this appeal; but whatever opinion may be entertained of the original question involved in the action in which the decision was rendered, the decision itself must be regarded as a final determination of the rights of the parties to the promissory note, which was the subject-matter in suit. The plaintiff was entitled to it or its proceeds if collected by the defendant. Holding the note as she did in trust for the benefit of the plaintiff, the defendant had no authority to deal with it as her own, or as an asset of the estate of which she was executrix; she could not use it in payment of her own debt, or of any claim against the estate. Hence, when she, instead of discharging her trust by surrendering the note to the plaintiff, collected it from the maker, she became personally liable for the proceeds thereof; and she was not entitled to off-set the amount by any claim which the maker of the note might have had against the estate.

Judgment and order affirmed.

Hearing in Bank denied.

[Department Two.—January 26, 1883.]

WILLIAM H. BRODRIBB, AN INSANE PERSON, BY H. GOODALL, HIS GUARDIAN, RESPONDENT, v. LUTHER O. TIBBITS ET AL., APPELLANTS.

EVIDENCE — ORDER OF PROBATE COURT — PRESUMPTION.—An order of the late Probate Court of the county of San Bernardino, removing a former guardian and appointing his successor was given in evidence on behalf of the plaintiff. Its admission was objected to on the ground that no notice or citation had been served on the former guardian to show cause why he should not be removed, but it did not appear from the transcript that there was any foundation for the objection in point of fact. *Held*, that in the absence of a showing to the contrary, the court must be presumed to have acted correctly.

APPEAL from a judgment of the Superior Court of the county of San Bernardino, and from an order refusing a new trial.

Luther O. Tibbits, for Appellants.

Paris & Bledsoe, for Respondent.

PER CURIAM.—There are many points attempted to be presented and allegations of error made in the transcript before us, the relevancy or materiality of which are not apparent to us. We see but one point which we deem worthy of notice, and that is in reference to the removal of the former guardian.

On the trial the defendants objected to the admissibility in the evidence of the order of removal, and the appointment of a successor, on the ground that no notice or citation had been served on the former guardian to show cause why he should not be removed. The orders of the court were received in evidence, but are not brought before us; therefore there is nothing in the transcript, except the statement in the objection, showing that he was not served; and in such case we may presume that the action of the court was correct and well founded. The proceedings of the late Probate Court are to be construed in the same manner as the proceedings of courts of general jurisdiction. (§ 98, Code Civ. Proc., before amendments of 1880.)

Judgment and order affirmed.

[Department Two.—January 26, 1883.]**C. H. SEYMOUR, RESPONDENT, v. L. W. WOOD ET AL.,
APPELLANTS.**

DISMISSAL OF ACTION — ORDER VACATING — DISCRETION OF THE COURT.—The dismissal of an action for want of prosecution may be set aside by the court in the exercise of a sound discretion, and to justify a reversal on appeal, there must be a clear and manifest abuse of discretion.

APPEAL from an order of the Superior Court of the county of Nevada.

The dismissal was set aside on the ground of mistake, inadvertence, and excusable neglect.

J. C. Caldwell, and J. N. Thorne, for Appellants.

O. W. Cross, for Respondent.

By the COURT.—The court below dismissed this cause on motion of defendants for want of prosecution, and on a further motion set aside the order of dismissal. An appeal is prosecuted from the last mentioned order. The ruling of the Superior Court was liberal, but we cannot see that it abused its discretion in vacating the order of dismissal. A motion to set aside an order of dismissal is addressed to the sound discretion of the Superior Court, and this court is disposed to sustain the ruling of the court below, unless there is a clear and manifest abuse of discretion. No such clear and manifest abuse exists here, and the order must be affirmed.

So ordered.

[In Bank.—January 26, 1883.]**P. H. NEWBILL ET AL., APPELLANTS, v. J. B. WHITFIELD ET AL., RESPONDENTS.**

EJECTMENT — MINING CLAIM — FINDINGS — SUFFICIENCY OF THE EVIDENCE.—The action was brought to recover possession of a mining claim, and was tried by the court without a jury. Findings were filed, and a judgment entered thereon in favor of the defendants. The plaintiffs moved for a new trial, which was denied. One of the grounds of the motion was insufficiency in the evidence. *Held*, on a review of the evidence, that it was insufficient to support the findings, and that a new trial should have been granted.

LXIII. CAL.—6

APPEAL from a judgment of the Superior Court of the county of San Bernardino, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Harris & Allen, Bricknell & White, and C. H. Larrabee, for Appellants.

Satterwhite & Curtis, Boyer & Gibson, C. W. Rowell, and R. E. Bledsoe, for Respondents.

Ross, J.—The contest on this case is between the claimants of two certain mining claims called, respectively, the Red Jacket and Burning Moscow, situated in Grapevine Mining District, in the Calico Mountains of San Bernardino County. The action is ejectment—plaintiffs claiming the lode in question to be within the lines of the Red Jacket, and the defendants that it is a part of the Burning Moscow.

The fact is not disputed that the plaintiff Newbill discovered the Red Jacket on the 26th day of March, 1881, whatever its lines may be held to be. On that day, in traversing the mountain, he discovered certain veins of rock running in a northwesterly and southeasterly direction, and containing minerals of value, and with the intention of locating a mining claim thereon pursuant to the laws of the United States, and of the local customs and rules of the district, he placed a discovery stake in the ground near the vein, with a written notice signed by him, claiming three hundred feet on each side of the ledge, and running five hundred feet southeasterly and one thousand feet northwesterly along the vein, and stating in the notice that he claimed twenty days within which to mark the boundaries and record his claim—the time claimed being the time allowed by the local rules and customs of the district for that purpose. A few days afterward, and before the 11th day of April, 1881, Newbill again went upon his claim, named it Red Jacket, and commenced to mark its boundaries. For the purposes of our decision we shall assume—what is strenuously denied by the appellants—that the evidence sustains the finding of the court below to the effect that at that time he (Newbill) “erected a stone monument about five hundred feet southeasterly from the

discovery stake and notice aforesaid, with a written notice thereon marked southeastern end of Red Jacket, and at the same time erected another similar stone monument about three feet northerly from the last named monument, and put a written notice thereon, marked northeast corner of Red Jacket."

Owing to sickness, Newbill was obliged to suspend work, and did not do anything further at that time in locating or marking the boundaries. Continuing sick he agreed with his co-plaintiffs—Wallace, Parks, and Ferrell—that they should go upon the ground and complete the location and marking of the boundaries of the claim, in consideration of which they were to have an undivided half of it. Accordingly, on the 12th of April, 1881, Wallace, Parks, and Ferrell went upon the ground and marked out the boundaries of the Red Jacket claim, not, however, in precise accordance with the discovery notice put up by Newbill on the 26th of March, nor in accordance with the subsequent monuments put up by him, and marked as the southeastern end and the northeastern corner of the Red Jacket, but they marked the boundaries so as to extend about six hundred feet along the vein northwesterly, and about nine hundred feet southeasterly from the discovery stake and notice, with a width of a little less than three hundred feet on each side of the vein, and including the discovery stake and notice. Such boundaries were marked by erecting a rock monument at each corner, and at the middle of each end, and at the middle of the north or northeast side line, and placing written notices on each corner monument marked respectively: Northeast corner Red Jacket, northwest corner Red Jacket, southwest corner Red Jacket, and southeast corner Red Jacket, and on the southeast center end monument was placed a written notice of which the following is a copy:—

"NOTICE OF LOCATION OF QUARTZ CLAIM:

"Notice is hereby given to all whom it may concern, that we, G. B. Wallace, H. C. Parks, P. H. Newbill, J. B. Ferrell, citizens of the United States, over the age of twenty-one years, having discovered a vein or lode of quartz or rock, in place, bearing silver and nickel, within the limits of the claim hereby located, have this day, under and in accordance with the Revised Statutes of the United States, chapter six, title thirty-two, located fif-

teen hundred linear feet of this vein or lode, with surface ground six hundred feet in width, situated in Grapevine Mining District, county of San Bernardino, State of California, and known as the Red Jacket Gold and Silver and Nickel Quartz Mining Claim, and extending fifteen hundred feet to monument southeast to center of claim; this is the southeast end of claim; and three hundred feet north, eastern center of Red Cloud, extending northwest fifteen hundred feet to northwest center of Red Jacket from this notice of the discovery or prospect shaft, the exterior boundaries of this claim being distinctly marked by reference to some natural object or permanent monuments, and more particularly described as follows, to wit: Commencing at this notice, and bearing westerly fifteen hundred feet from this notice to a monument on center of claim; thence three hundred feet southwest to north corner of Red Cloud Mine; thence fifteen hundred feet along this line of Red Cloud; thence three hundred feet north to center of claim; thence three hundred (feet) northeasterly to corner; thence fifteen hundred feet northwesterly to monument; thence three hundred (feet) to center of lead; and we intend to hold and work said claim as provided by the local customs and rules of miners, and the mining statutes of the United States.

"Dated on the ground this 26th day of March, 1881.

"Discovered March 26, 1881.

"P. H. NEWBILL, Locator.

Located April 1, 1881.

"P. H. NEWBILL.

"G. B. WALLACE.

"H. C. PARKS.

"J. B. FERRELL."

All of the monuments thus erected by Wallace, Parks, and Ferrell on the 12th of April were, according to the findings of the court below, placed in plain and conspicuous places except the southeast center end monument, on which was placed the notice above copied, which monument, according to the findings, "was not placed in a plain or conspicuous place, but at the bottom of a deep and abrupt declivity or gulch, in an obscure place, where it was not likely to be seen by persons looking for monuments or passing through the country, and it was much

smaller than any of the other monuments mentioned." This finding of the court we think unsupported by the evidence. Neither the testimony of Wiggins, Ray, nor Parks, cited by counsel for respondents sustains it. On the contrary, the testimony of Parks is, that a man going upon the ground to locate mining claims would have been apt to have seen it without tracing the monuments around. "He could have found it if he started to go up the mountain. It is the only pass by which he could get up there, and that notice stood right in the pass. He couldn't miss the monument," said the witness. Moreover, we can conceive of no motive on the part of Wallace, Parks, and Ferrell, or either of them, for putting the notice in an obscure place. The very purpose of posting it was to assert a claim, not to conceal one.

So, also, the evidence is insufficient to sustain the finding of the court below to the effect that the two monuments which the court finds were erected by Newbill prior to April 11, and marked, respectively, southeastern end of Red Jacket, and northeast corner of Red Jacket were to the knowledge of Wallace, Ferrell, and Parks standing and allowed to remain at, and subsequent to the time they marked the boundaries of the Red Jacket on the 12th of April. Not only is there no evidence that they had actual knowledge of such monuments, but it would seem incredible that they would have left them standing as indicating the extent of the Red Jacket, when, at the very same time, they so carefully marked out, and built monuments on other boundaries of that claim, which extended far beyond the monuments which it is said they knowingly left standing.

At all events, when the defendants went on the ground on the 16th and 17th days of July, 1881, they found, or could have found if they had looked, the monuments — eight in number — erected by Wallace, Parks, and Ferrell, on the 12th of April, with the notices above indicated. Those boundaries included the premises in controversy. From them the defendants saw, or ought to have seen, that the ground was appropriated by others, and was not open to location by them.

But it is said for the defendants that they were misled by the two monuments found by the court to have been erected by Newbill prior to April 11. That this was not so is conclusively

shown by the fact that defendants did not *respect those monuments*; for they so located their claim as to embrace ground included within them, as well as within the boundaries marked out by Wallace, Ferrell, and Parks, on the 12th of April.

Judgment and order reversed, and cause remanded to the court below for a new trial.

MORRISON, C. J., McKINSTRY, J., MYRICK, J., and SHARPSTEIN, J., concurred.

[In Bank.—January 26, 1883.]

EDWARD P. COLE, PETITIONER, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, AND JOHN HUNT, JR., ONE OF THE JUDGES THEREOF, RESPONDENTS.

GUARDIAN AD LITEM—POWER TO CONTRACT—COMPENSATION OF ATTORNEY—JURISDICTION OF THE COURT.—A guardian *ad litem* was appointed to bring an action on behalf of certain infants and an insane person. The guardian employed an attorney to prosecute the action, and made a contract with him as to the compensation he should receive. The action was successful, and resulted in a judgment for several thousand dollars. The judgment was afterwards paid, and the money went into the hands of the attorney. The court thereupon made an order fixing the compensation of the attorney without regard to the contract, and requiring him to pay into court the residue of the money. *Held*, that the guardian *ad litem* had no power to make the contract, and that the order was not in excess of the jurisdiction of the court.

CERTIORARI to review an order of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

E. D. Wheeler, for Petitioner.

M. C. Hassett, for Respondents.

MYRICK, J.—A writ of review was granted on the application of petitioner to review the action of the Superior Court had upon the following state of facts:—

Catharine McKeever, an insane woman, and John McKeever, Jane McKeever, and Mary McKeever, minors, by their guardian *ad litem*, Margaret Hayes, commenced an action against the

Market Street Railway Company, to recover damages for the death of Daniel McKeever, the husband of said Catharine, and the father of said minors. The said guardian *ad litem* employed the petitioner, E. P. Cole, Esq., an attorney at law, to commence and prosecute said action as attorney for the plaintiffs. The guardian *ad litem* had no means with which to pay the necessary expenses of the action, including costs and the attorney's fees, and Mr. Cole undertook to, and did pay the costs. Such proceedings were had in the action that on the 9th day of December, 1880, judgment was recovered by the plaintiffs against the railway company for \$6,501.25 damages, with interest, and \$108.50 costs; which judgment, on appeal, was affirmed by this court. Upon the going down of the remittitur an execution was issued February 3, 1882, and on the following day, February 4, the railway company paid to Mr. Cole the sum of \$7,144.26, being the full amount then due for damages, interest, and costs; and Mr. Cole caused satisfaction to be entered. During the pendency of said appeal in this court, to wit, on the 28th day of October, 1881, letters of guardianship of the persons and estates of the said minors were duly issued by the proper court, to wit, the Superior Court of the city and county of San Francisco, to Daniel Sheerin. On the 4th day of February, 1882, the day on which the attorney received the amount of the judgment, the said Daniel Sheerin, as guardian, petitioned the Superior Court in which said judgment had been rendered for an order that Mr. Cole pay the money into court, and that the court fix his proper compensation. An order to show cause was made and served. On the hearing the attorney admitted the receipt of the money, and that he was ready and willing to pay to any person authorized to receive the same, the amount which justly and fairly belonged to the plaintiffs, but objected that the court had no authority to fix the compensation, or to compel him to pay the money into court. The court overruled the objection, and after hearing testimony fixed the full compensation of counsel for the plaintiffs for services and expenses at \$2,500, and ordered that the balance of the amount received be paid into court by two o'clock of February 8, 1882. On the 9th day of February, 1882, Mr. Cole paid into court \$4,644.26, leaving in his hands \$2,500, the amount fixed by the court, and

on the same day the court ordered that \$3,000 of the amount so paid be paid to Sheerin, the guardian of the minors, on his giving a proper bond.

The question for consideration before us is, as to the power of the Superior Court in which the action was pending, and the judgment was obtained, to fix the compensation of the attorney employed by the guardian *ad litem*, and order the balance paid into court. It is proper to remark that the only objection appearing on the part of the attorney is as to the power of the court to make the order. It is urged on his behalf that the court had no power "to take from Mr. Cole's pocket money lawfully in his possession, and that he claimed in good faith to be his own, and transfer it to the custody of the clerk of the court" [we quote from the argument]; that the Constitution of this State guarantees to all the right of trial by jury, and that "no person shall be deprived of life, liberty, or property, without due process of law"; that he had the right to submit to a jury, in a regular action instituted to that end, evidence as to what would be a proper compensation, and to have the determination of the jury thereupon.

By the law of the State, § 1021, Code of Civil Procedure, "the measure and mode of compensation of attorneys and counsellors at law is left to the agreement express or implied of the parties"; and in cases where an attorney is employed by a person capable of making a contract, which shall bind him or those whom he may represent, the attorney may have his action to recover the amount agreed upon in the one case, or the value of the services in the other; and in such cases, the fact of the existence of the contract and the amount agreed upon, or the value may be submitted to a jury. But, in cases where there is no one authorized to make a binding contract, the section of the Code above referred to would not apply. There must be some one on either side authorized to contract, or there is, of course, no valid contract. In *Gurnee v. Maloney*, 38 Cal. 85, this court held that the administrator of the estate of a deceased person could not make a contract for the payment of fees for services to be rendered by an attorney which would bind the estate. It seems to have been conceded in that case that the administrator had power to select an attorney, but such selection would

be made, and the services would be rendered in view of the rule that the proper court [in that case the Probate Court] would have the right to pass upon and determine the proper compensation. In the matter before us neither of the plaintiffs in the action under consideration could have employed an attorney to commence or prosecute the action — neither could have brought the action in his or her own name — each of them was under disability; it was therefore necessary that the action should be brought by a general guardian, or by a guardian *ad litem*. In the case of a general guardian the appointment would have been made after due proceedings under article 2, chapter 14, Code Civ. Proc.; in the case of a guardian *ad litem* the appointment would be made by the court in which the action was pending, or was about to be commenced. It is not necessary to consider, in this case, the powers of a general guardian regarding the employment of an attorney; we are now considering only the powers of a guardian *ad litem*. The guardian *ad litem* is an officer of the court appointing him; his duties are “to represent the infant, insane or incompetent person in the action or proceeding.” (Code Civ. Proc. § 372.) He may, doubtless, employ an attorney to assist him in the prosecution or defense of the action, but he may not make a contract for the payment of compensation which shall absolutely bind the ward or his estate. He is like an agent with limited powers. If he collect the amount of a money judgment recovered by the plaintiff in the action, it should seem that, from the nature of his office, he may be compelled to an accounting by the court from which he received his authority. The court is, in effect, the guardian — the person named as guardian *ad litem* being but the agent to whom the court, in appointing him (thus exercising the power of the sovereign State as *parens patriæ*) has delegated the execution of the trust; and through such agent the court performs its duty of protecting the rights of the infant or incompetent person. His powers are certainly no greater than those of a general guardian. Like the latter he may be allowed a credit for moneys advanced or paid out of the fund collected, as reasonable compensation for the expenses, and for the services of an attorney. But he has no power by specific agreement with the attorney to fix such compensation absolutely. An attorney

accepting employment, and rendering services under such circumstances, must rely upon the subsequent action of the court in ascertaining and adjudging proper compensation. He cannot determine the amount, nor can he retain what he or the guardian *ad litem* may deem a proper sum, leaving it to the general guardian to sue for the excess. There is no place here for the doctrine of an implied promise upon a *quantum meruit*. The presumption of a promise is rebutted by the fact that the guardian had no power to contract in such manner as to bind the assets of the ward except conditionally. The attorney performing legal services for the infant aids the court in carrying out its duty of protection; he is not only an officer of the court in the general sense, but is the special agent through which the court acts; in this respect his position being analogous to that of an attorney employed by a general guardian, or by an executor or administrator. In the cases last referred to the compensation is, under our system of laws, fixed by the Probate Court. The statute being silent as to the tribunal which is to fix the compensation in case of a guardian *ad litem*, it seems to reasonably follow that the court placing him in position and making use of his service would have the fixing of his disbursements and the compensation of the attorney employed.

The cases cited by the petitioner do not apply to this case. *In re Paschal*, 10 Wall. 483, was a case of employment *with power to contract*. In that case, the party applying for the order that his attorney pay to him the amount collected, was capable of contracting, and had contracted, for the employment and for the compensation; and the attorney claimed the right to have his accounts with the client fully adjusted. The court held that it would not, in such a proceeding, adjust the accounts, but would leave the party to his action. The court did not stand in any such relation with the party and the attorney, as courts stand with regard to infants and attorneys acting in their behalf.

It is urged, that by not permitting the attorney for the infant to retain such portion of the money collected as he may deem just, he is deprived of his property without due process of law, and is also deprived of his constitutional right of trial by jury. The error of the petitioner is in supposing that any specific portion of the money is his property. Such portion, only, of the

money collected will be his property as the court may fix; and until so fixed, he has no such right of property, as is contemplated by the Constitution. In accepting the employment he consented to perform his duty without other compensation than such as might be allowed by the court. The guarantee of the right of trial by jury does not apply to such a case as this. There is no question of fact for a jury to try. The court fixes the amount, and when so fixed it is settled.

It is also urged that there was no power to direct the money to be paid on the application of the general guardian; that so long as the appointment of the guardian *ad litem* remained unrevoked, the general guardian had no standing in regard to the suit. It is sufficient to say that the appointment of the guardian *ad litem* is made, as the name of the office indicates, for the purpose of the suit — to represent the ward *in the action*. When the action is terminated, the amount recovered becomes assets of the ward, to be managed and controlled for his benefit. The guardian *ad litem* does not manage the ward's general estate, investing and reinvesting, but such duties are performed by the general guardian; and in order to perform those duties he should have the control of the property.

The amount allowed to Mr. Cole for his services and disbursements was twenty-five hundred dollars. The costs recovered amounted to one hundred and eight dollars and fifty cents. It would thus appear that the court allowed as compensation for services nearly twenty-four hundred dollars; and these amounts he was permitted to retain. The court certainly had power to direct him to pay over the remainder. Possibly the court might have had power, before fixing this amount for his services, to require him to pay over the whole sum collected, and afterwards make such allowances as should be just, but the court saw fit to make the allowance first, and order the balance to be paid over. We see no error.

Writ dismissed.

MORRISON, C. J., THORNTON, J., and ROSS, J., concurred.

SHARPSTEIN, J., dissenting. — It is conceded that the guardian *ad litem* was authorized to employ an attorney to prosecute

the action for the infant plaintiffs, and that the plaintiff here was duly employed by said guardian *ad litem* to prosecute said action, and that he did prosecute it to final judgment; and that he received the sum recovered and discharged said judgment as he was authorized to do. (Code Civ. Proc. § 283.)

And it will probably be conceded that if the parties, for whom he appeared in the action in which he recovered such judgment, had been adults, the court in which said action was tried could not in a summary manner have determined the "measure and mode of his compensation, because that "it left to the agreement, express or implied, of the parties." (Code Civ. Proc. § 1021.) There are cases in which a court will summarily compel an attorney to pay over money which he has received in satisfaction of a judgment recovered by his client. But those are cases in which it is charged and made to appear that the attorney by not paying the money over is acting in bad faith. "It is this misconduct on which the court seizes as a ground of jurisdiction to compel him to pay the money in conformity with his professional duty. The application against him in such cases is not equivalent to an action of debt or assumpsit, but is a quasi-criminal proceeding in which the question is not merely whether the attorney has received the money, but whether he has acted improperly in not paying it over. If no dishonesty appears, the party will be left to his action." (*In re Paschal*, 10 Wall. 483.)

The only question which we have to determine in this proceeding is, whether the Superior Court acted without or in excess of its jurisdiction? And unless this case is distinguishable from *Paschal's*, this question is not altogether new. For as we interpret the opinion in that case, the court distinctly held that, in the absence of an allegation or proof of bad faith on the part of an attorney retaining money collected by him for a client, the court would not have jurisdiction to proceed in a summary manner against the attorney to compel him to pay it over to the client. That it was *prima facie* the duty of the attorney, "after deducting his own costs and disbursements," to pay over the residue to his client. But that for his fees and disbursements he had a lien upon the fund in his hands, and was under no obligation to pay over anything beyond the amount

remaining in his hands after deducting the amount of his fees and disbursements. And that where it appeared the attorney and client *honestly* differed as to the amount of such fees and disbursements, they would be left to the usual remedy at law. A motion for an order to have an attorney pay over money which he has collected for a client cannot be properly granted unless the neglect or refusal to pay it over be imputable to a dishonest motive. The motion must be based upon the misconduct of the attorney. That is necessary in order to give the court jurisdiction to proceed in a summary manner. Such we understand to be the doctrine of the court *In re Paschal*, and it commends itself to our judgment.

But it is contended that that case differs materially from this. In that case the parties for whom the attorney had collected the money which it was sought to have him compelled to pay over were adults. In this case they are infants. But it is not contended that the attorney in this case was not authorized to receive the money recovered and to acknowledge satisfaction of the judgment. Nor is it contended that he did not have a lien upon the fund in his hands for the amount of his fees and disbursements, or that he had no right to retain in his hands the amount of said fees and disbursements. But it is claimed that because the residue after deducting the amount of said fees and disbursements would belong to infants, the court had jurisdiction to proceed and determine in a summary manner the measure of compensation of their attorney. But the legislature when enacting that the manner and mode of compensation of attorneys should be left to the agreement of the parties, express or implied, did not provide that in cases where infants were parties the measure and mode of compensation of their attorneys should be left to the court in which the action was tried.

And there does not appear to be any very good reason for making any such distinction. It cannot be assumed that a judge, by proceeding to determine in a summary manner the amount of compensation to which an attorney is entitled for services rendered in behalf of infant parties, would be more favorable to the infants than a jury, or that there would be less likelihood of justice being done between the parties after both had had an opportunity of a fair trial before a court and jury

than there would be if the matter was summarily heard and determined by a judge upon motion.

And the general guardian who appears on behalf of the infants in this proceeding could as well have commenced an action as to have made a motion for the adjustment of the matter in controversy between his wards and the plaintiff herein.

The analogy between this case and one in which a general guardian of an infant sues or defends for his ward, is too slight to warrant a court in holding that the rules which prevail in regard to the employment and compensation of counsel by a general guardian can be applied to a case in which counsel appears on behalf of infants in an action in which they sue or defend by a guardian *ad litem*. Speaking of the appointment of a guardian *ad litem*, Abbott says: "Such an appointment does not seem to involve any relation of guardianship in any full or significant sense of the term, so little is any custody of person or estate involved." (Abbott's Law Dict.)

There is no law which authorizes such a guardian to allow or present to a court for allowance any claim for compensation of counsel for services rendered for the ward of such guardian.

And in *Smith v. Smith*, 69 Ill. 308, it was distinctly held, that where an infant is a party to an action, and appears by a guardian *ad litem* and an attorney, the fees of such attorney could not, in the absence of a statute authorizing it, be taxed by the court, in which the action was tried, upon the petition of the guardian *ad litem*, but that such fees could only be recovered in the usual mode against the general guardian, and collected out of the infant's estate. In that case the action in which the attorney had appeared for the infant involved the title to real estate, and the attorney did not, as in this case, have the fruits of the litigation in his own hands. So that the question of the right of the attorney to hold on to money recovered in an action for an infant client until his, the attorney's, fees were paid, was not involved in that case. But by parity of reasoning it would seem that if in the one case the attorney must sue the general guardian for his fee, in the other the general guardian must sue the attorney for such amount as the attorney retained over and above his fair compensation; that is, in a case like this, in which it is not claimed that the attorney withholds any-

thing beyond the sum to which he *honestly* believes himself entitled.

If the summary jurisdiction of the court depends, as was held *In re Paschal* (*supra*) upon the question of the attorney's good faith in withholding what he claims to be due him, it is quite clear that the court below exceeded its jurisdiction in making the order now before us, and therefore it should be annulled.

McKEE, J., dissenting.—I dissent. The moneys collected by the petitioner in this proceeding, as attorney at law for his infant clients, constituted the estate of the infants. To the possession of the estate and of the persons of the infants the general guardian was entitled. The guardian was subject to the supervision, and amenable to the orders of the Superior Court, sitting as a Probate Court; and the estate was a probate matter, over which the court had, as a Probate Court, under § 5, article vi., of the Constitution of 1879, the exclusive jurisdiction. As such it alone had authority to ascertain and determine the proper amount of compensation to which the attorney for the infants was entitled for the services which he had rendered in securing the estate of the infants; and upon presentation of a petition or claim against the estate for such services, it could, in the exercise of its jurisdiction, allow and order paid out of the estate what was just and reasonable.

But the Superior Court, sitting as a court of law, exercising its jurisdiction over parties to an action at law, in which a money judgment had been rendered and satisfied, had no jurisdiction of the money collected in satisfaction of the judgment, as part of the estate of the infants. Nor had it jurisdiction to ascertain and determine in the action the amount of compensation to which the attorney for the infants, who collected the judgment, was entitled for his services. The guardian could not make any contract with the attorney which would be binding on the estate of his wards. Such a contract, if made, would be, so far as the estate is concerned, null. (*Paige's Estate*, 57 Cal. 238; *Danielwitz v. Sheppard*, 62 Cal. 339.)

[Department Two.—January 26, 1883.]

LOWELL TRASK, RESPONDENT, v. THE CALIFORNIA
SOUTHERN RAILROAD COMPANY, APPELLANT.

NEGLIGENCE — MASTER AND SERVANT.—A railroad company is liable to an employee for an injury received by him in consequence of the unskillful, improper, and negligent manner in which the company constructed its road. In such a case, the rule exempting the master from liability for an injury to a servant caused by the negligence of a fellow-servant has no application.

APPEAL from a judgment of the Superior Court of the county of San Diego, and from an order refusing a new trial.

The injury resulted from an accident to a construction train on which the plaintiff was riding.

H. E. Cooper, and M. A. Luce, for Appellant.

A person who voluntarily enters the employ of another, with full knowledge of the dangers and hazards of the employment, must be held to have assumed the consequences of such risks; and he cannot recover from his employer for injuries resulting therefrom. (*Sweeney v. Central Pacific R. R. Co.* 57 Cal. 15; *McGlynn v. Bodie*, 31 Cal. 377; *Ladd v. New Bedford R. R. Co.* 20 Am. Rep. 331; *Lovejoy v. Boston & Lowell R. R. Co.* 28 Am. Rep. 206; *Gibson v. Erie R. R. Co.* 20 Am. Rep. 552; Civil Code, § 1970; *McLean v. Blue Point Gravel Co.* 51 Cal. 256; *McDonald v. Hazeltine*, 53 Cal. 36.)

Leach & Parker, for Respondent.

Cited *Beeson v. Green Mountain G. M. Co.* 57 Cal. 21.

PER CURIAM.—The demurrer to the complaint was properly overruled.

The point is made that the evidence shows that the plaintiff was injured by the negligence of the defendant's engineer, and that as he was engaged in the same general business with such engineer, he assumes, in taking employment, such a risk, and should not be allowed to recover. But the court finds that the injury was caused by the unskillful, improper, and negligent manner in which the defendant constructed its road.

Conceding that the point urged, as to the relation of the plaintiff

iff and the engineer is correct, it has no application to the facts as found. The plaintiff did not assume the risk arising from the unskillful, improper, and negligent manner in which *defendant's* road was constructed.

It is said that the evidence is not sufficient to sustain the findings as to the construction of the road above stated. We have examined the evidence and are of opinion that it does sustain the finding.

Judgment and order affirmed.

[In Bank.—January 26, 1883.]

T. M. LOUP ET AL., RESPONDENTS, v. CALIFORNIA SOUTHERN RAILROAD COMPANY, APPELLANT.

CONTRACT — RAILROAD CONSTRUCTION — ESTIMATES OF ENGINEER — PLEADING.—

The action was brought in part to recover a balance alleged to be due for the grading and masonry work of certain sections of a railroad. The contracts under which the work was done provided for payments from time to time during the progress of the work upon estimates by the engineer as to its amount and value according to the contract prices, and further provided that on the completion of the work the engineer should make a final estimate of all the work done, and that the balance due after deducting previous payments should thereupon be paid by the defendant. The complaint contained four counts, in the first and fourth of which the plaintiff declared specially upon the contracts above referred to. It was alleged that the work had been completed and the contracts fully performed on their part, but there was no allegation in regard to an estimate by the engineer. The defendant demurred for insufficiency, and the demurrer was overruled. *Heid*, that these two counts were bad because of the omission in respect to an estimate as provided for by the contracts.

APPEAL from a judgment of the Superior Court of the county of San Diego, and from an order refusing a new trial.

The facts are stated in the opinion of MR. JUSTICE MCKEE.

H. E. Cooper, and *M. A. Luce*, for Appellant.

Chase, Arnold & Hunsaker, and *Leach & Parker*, for Respondents.

MCKEE, J.—The complaint in this case contains four counts: The first and fourth are founded upon two special contracts, the third upon a *quantum meruit*, and the second upon a cause of

action in the nature of an action on the case for alleged wrongful acts or omissions by the defendant.

There was a demurrer to the complaint, on the grounds that several causes of action had been improperly united, and that none of the counts contained facts sufficient to constitute a cause of action; but the demurrer was overruled.

Several causes of action are unitable in one complaint when they arise upon contract express or implied; and as the first, third, and fourth counts arise out of the special contracts upon which the action is founded, they belong to the same class and were properly united in the complaint.

But the second count in the complaint is not founded on the contract. Its allegations are, substantially, that the defendant had, according to the terms of the contract, the right to enter at any time, by itself or its agents, upon the premises covered by the contract, and perform any work thereon; that about the 1st of April, 1881, it elected to avail itself of the right, and after notifying the plaintiffs entered upon the premises for the purpose of constructing some culverts on the road; that it kept and held possession of the premises for the space of three months, and "unnecessarily delayed and neglected and refused to proceed in a prompt or reasonable manner, or in a reasonable time, to construct said culverts, so as to permit the plaintiffs to do their part of the work, and thereby hindered and delayed plaintiffs in and about the doing of their work aforesaid; . . . and by reason of the hindrance and delay caused by the negligent and wrongful acts and omissions of the defendant the plaintiffs have sustained damages in the sum of one thousand dollars," for which they ask judgment.

In entering upon the premises covered by the contracts the defendant was not guilty of a breach of contract, for the right to enter was reserved by the contracts; but the charge is that the defendant, in exercising its right, "neglected and refused to proceed in a prompt or reasonable manner, or in a reasonable time," to perform its work; and for these wrongful acts or omissions the plaintiffs sue. But such acts or omissions constituted a breach of duty, not of contract, out of which arose an obligation and a liability on the part of the defendant to respond to the plaintiffs in damages.

A person commits a tort, and renders himself liable to an action for damages, who commits some act not authorized by law, or who omits to do something which he ought to do by law, and by such an act or omission either infringes some absolute right, to the enjoyment of which another is entitled, or causes to such other some substantial loss of money, health, or material comfort. (Underhill on Torts, 4.) So whenever there is a contract and something to be done in the course of the employment which is the subject of that contract, if there be a breach of duty in the course of the employment, the persons injured by the breach may recover damages in tort. (Cooley on Torts, 91; *Courtenay v. Earl*, 10 Com. B. 73.)

It therefore seems clear that the cause of action stated in the second count was founded on a neglect of duty. The plaintiffs allege that the defendant by its wrongful acts and omissions occasioned them injury, and the action was tried and determined as an action *ex delicto*; for the court found that the defendant had the right, under the contract, to enter upon the premises and construct the culverts. Where a person has authority to do an act no action will lie for doing it, unless in the performance of the act he has violated some duty which he owed to the plaintiffs. And the court finds that there was such a violation of duty, because, in performing the act which it had authority to perform, "the defendant did not proceed in a reasonably diligent or expeditious manner, but greatly delayed in building the culverts, and refused to proceed in a reasonably prompt or expeditious manner therewith." The defendant was therefore guilty of a wrong to the plaintiffs which occasioned damages to them in the sum of one thousand dollars, and that sum the court awarded to the plaintiffs in the general judgment on the causes of action on the contracts. Damages for breaches of contracts and for neglect of duty were thus assessed in the same case; but an action founded on neglect of duty cannot be united in the same complaint with actions founded on contracts. (*Bowman v. Purtell*, 47 N. Y. Supr. Ct. 403; *Thompson v. St. Nicholas Bank*, 61 How. 163.) The demurrer to the complaint should therefore have been sustained.

Besides, the defendant is sued as a corporation, and in the fourth count of the complaint there is no averment of the defendant's corporate existence.

It is a settled rule of pleading that each count must contain in itself facts sufficient to constitute a cause of action; it cannot be helped out by reference to other counts or parts of the complaint for averments which are essential to it as a cause of action. (*Collins v. Bartlett*, 44 Cal. 371; *Kretchbaum v. Melton*, 49 Cal. 55.)

Moreover, neither the first nor fourth counts contain any sufficient averment of a breach of the covenant of the defendant to pay, which is contained in the special contracts upon which the causes of action are founded.

It appears by the contracts that Loup and Withers, the respondents, undertook to do the grading and masonry work of some sections of the appellant's railroad, according to specifications of the work which were incorporated in the contracts, and in conformity to the plans and directions and to the satisfaction and acceptance of the chief engineer of the appellant. The work contracted for was to be commenced and finished within specified dates, for which the appellant agreed to pay, at prices fixed by the contracts, from time to time, "and in the manner and form provided" by the contracts. Those provisions were as follows:

"1st. Estimate of the work shall be made by and under the direction of the engineer at the close of each calendar month, or as soon thereafter as may be, of the amount and value as near as practicable of work done and material furnished and delivered under this contract according to the prices named herein; and within thirty days after the rendering of such estimates the said company shall pay to the said contractor the amount of said estimates, less previous payments, and less ten (10) per cent.

"2d. Also, that the ——— per cent. retained from the above monthly estimates shall in no case be considered due or payable to said contractor until the work herein contracted for is fully completed, in accordance with this agreement, and said percentage may be used by the company in case of apprehended delay, in hastening the completion of the work.

"Upon the completion of all the work herein contracted for, in the time and manner agreed upon, or as soon after said completion as may be, the engineer shall make a final estimate of all the work done, from which shall be deducted the sum of the

payments theretofore made on the monthly estimates, and the residue shall be paid by said company at its office in San Diego to said contractor, upon his receipting for the same in full upon said final estimate." It was also stipulated "that in case any disputes or differences shall arise between the company and the contractor as to the construction, or true intent or meaning of the agreement, or the sufficiency of the performance of any of the work to be done under it, or the price to be paid, that all such disputes and differences shall be referred to the engineer, who shall consider and decide the same, and his decision shall be final between the parties, who do hereby submit, all and singular, the premises to the award, arbitration, and decision of the engineer, and agree that the same shall be final and conclusive between them to all intents and purposes whatsoever; and it is further agreed that the submission to the engineer, touching all matters herein contained, agreed to be submitted to him, shall be deemed, considered, and taken as an essential part of this agreement, and not revocable by either of the parties hereto."

Allegations are made that the contractors performed all the conditions of the contracts to be by them performed; that they fully completed the work, and the same was accepted by the railroad company, but that the company has since its acceptance refused to perform its covenants, and has failed and refused to make or cause to be made a final estimate of the work and of the money due to the contractors.

The last of the stipulations in the contracts, to refer any disputes and differences which might arise between the contractors and the company, as to the construction of the contracts, or the sufficiency of the performance of any of the work done under them, or the price to be paid to the chief engineer of the company for his arbitrament and final decision, goes to the very foundation of the present action, and, if valid, operates to oust the jurisdiction of the courts over the contracts; but such a stipulation in a contract is regarded as being against the policy of the law, and, for that reason, void; and, notwithstanding such a stipulation in the contracts, an action may be maintained upon the contract without offering to comply with the stipulation. Such was the conclusion reached by this court, after a review of the authorities, in the case of *Holmes v. Richet*, 56

Cal. 307. In that case we held that an agreement to refer a case to arbitration will not be regarded by the courts; but they will take jurisdiction and determine a dispute between parties, notwithstanding such agreement.

But the first of the stipulations referred to is not the equivalent of the last; it does not attempt to exclude the jurisdiction of the courts over the contracts; it simply makes their enforcement dependent upon the settlement and ascertainment by a third person of the amount due and unpaid. As such, the obligation of the defendant to pay for the work did not arise until the final estimate was made by the chief engineer, showing all the work which had been done, the payments which had been made upon it, and the balance which remained due and unpaid. Upon the production of such a document the company promised to pay at its office in the city of San Diego. The right of the contractors to payment, or to enforce payment was, therefore, by their contract, made dependent upon the act of the engineer, and until performance of that, no action could be maintained to enforce performance of the promise to pay, unless the defendant waived the condition by permitting the performance of the act, or the engineer himself, fraudulently or otherwise, refused to perform, or unless there was a breach of the condition by refusal of the defendant to have the estimate made on demand of the contractors, or to pay according to its promise, when it was presented at its office and payment demanded. But there are no such averments contained in the complaint — there are, therefore, no sufficient averments of a breach of the conditions upon which the contracting parties made the payment dependent. One party to a contract cannot complain of the other until he has put his adversary in default by not only a substantial performance of the contract on his part, but a failure or refusal to perform on the other.

In *Smith v. Briggs*, 3 Denio, 73, defendant had covenanted to pay the plaintiff for doing the carpenter work of certain houses, when he should receive from the architect his certificate that the work was fully and completely finished, according to the specifications annexed to the contract, and it was held that the giving of the certificate by the architect was a condition

precedent, the performance of which must be averred in the declaration in an action to recover payment of the work. *Morgan v. Birnie*, 9 Bing. 672, is to the same effect; and this court in *Holmes v. Richet*, 56 Cal. 307, affirmed the same doctrine. "If," says Mr. Justice Bramwell, in *Elliot v. Royal Ex. Assurance Co.*, L. R. 2 Ex. 245, "the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third party has so assessed the sum. For to say the contrary would be to give the party a different measure or rate of compensation from that for which he bargained." "And," says the Supreme Court of Vermont, in *Herrick v. Belknap*, 27 Vt. 673, "if payment for the work performed is dependent upon, and to be made according to the engineer's estimates, as to its amount, and the employing party performs its duty in reference to the employment of suitable engineers, etc., the obligation to pay will not arise until such estimates are made, unless no estimates have been made through the neglect or fault of the engineer or of the party who employs him."

These cases establish the proposition that the action in hand was, according to the allegations of the complaint, prematurely brought, and the demurrer to the complaint ought to have been sustained.

Many other questions arise out of the record, but in view of the conclusions reached, it is unnecessary to pass upon them.

Judgment and order reversed.

THORNTON, J., concurring, specially. I concur in the judgment on the last point ruled in the foregoing opinion. As to the other points I am of opinion that there is no error in the ruling of the court below.

MORRISON, C. J., ROSS, J., MCKINSTRY, J., and MYRICK, J., concurring specially. We concur in the judgment on the ground that averment and proof of the estimates by the engineer, as provided for in the contracts, (or averment and proof of legal cause for the non-production of such estimates,) were essential to the vesting of a cause of action in plaintiffs.

[Department Two.—January 26, 1883.]

SANFORD M. HILLS, RESPONDENT, v. AUGUSTUS
OHLIG ET AL., PATRICK HOLLINAN, APPELLANT.

MECHANIC'S LIEN — SUFFICIENCY OF CLAIM.—The action was brought to enforce a mechanic's lien. The claim filed was objected to on the ground that it did not state the *time given* as required by the statute. It purported, however, to state the terms and conditions of the contract, and it did not appear that there was any express agreement as to time. *Held*, that the objection could not be sustained.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are sufficiently stated in the opinion of the court.

J. C. Bates, for Appellant.

L. J. Hardy, for Respondent.

PER CURIAM.—Action to foreclose a mechanic's lien.

The only point presented for decision relates to the claim of lien filed in the recorder's office. The claim as filed states that the plaintiff was by the contract to perform the work and labor and furnish materials for the alteration, construction, and repairing of a certain building, that he did perform the work and labor and furnished materials for the purpose indicated, that it was agreed he was to be paid for the same what they should be reasonably worth, and that they were reasonably worth \$601.80.

The law requires that the claim filed shall contain *inter alia* a statement of the terms, time given, and conditions of the contract (Code Civ. Proc., § 1187), and it is urged that the *time given* was not stated in the claim. So far as we can see, all the terms and conditions are stated. We cannot judicially say that they are not stated as agreed on by the parties and expressed in the contract. The words of the statute, "time given," in our judgment mean the time of payment for the work and labor performed and materials furnished, as agreed on and expressed in the contract. As said above, we cannot say that the contract is not accurately stated; that is, stated as made and agreed on. If this is so, no distinct time was agreed on, but the time of payment was left to the rule fixed by the

law on such a state of facts. When this is the case, no time is given in contemplation of law, and the requirement that the "time given" must be stated does not apply. If the words "time given" refer to the time agreed on for the completion of the contract, and no period of time for such completion is fixed by the contract, but such time is allowed as the law gives, the same rule applies, and no time need be stated in the claim.

We are of opinion that the claim, as filed, complied with the statute, and is sufficient.

Judgment affirmed.

Hearing in Bank denied.

[In Bank.—January 29, 1883.]

SAVINGS AND LOAN SOCIETY, RESPONDENT, v. A. E.
HORTON ET AL., LEVI CHASE, APPELLANT.

MORTGAGE FORECLOSURE — DEFAULT — JUDGMENT.—A judgment by default in a foreclosure suit cannot be entered for a larger amount than the complaint shows to be due.

INTEREST — COMPOUNDING.—Compound interest can only be allowed as provided for by § 1919 of the Civil Code.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are sufficiently stated in the opinion of the court.

Rhodes & Barstow, George N. Williams, and Levi Chase, for Appellant.

A. N. Drown, for Respondent.

PER CURIAM.—Plaintiff filed a complaint to foreclose a mortgage executed by the defendant, and no defense having been interposed, a default decree was entered in the case. On this appeal it is urged that the decree was for a larger amount than the complaint shows to have been due, and we think the point is well taken. Computing the interest claimed in the complaint, and adding thereto payments alleged to have been

made by the mortgagee for taxes, it appears that the decree is for a larger sum than results from such computation.

It is contended by respondent that the difference may be accounted for by proof of payments made by the mortgagee in the shape of taxes and insurance on the mortgaged premises, after suit brought, but this assumption will not support the decree.

"A decree *pro confesso* only concludes a party as to the averments in the bill, and does not amount to a confession of any fact not alleged in it." (*De Leuw v. Neely*, 71 Ill. 473); and the same rule is found in § 580, Code Civ. Proc.

The attention of the court below is directed to § 1919 of the Civil Code in computing interest upon the interest which is not punctually paid. That section declares that the parties may agree that it shall become a part of the principal, *and thereafter bear the same rate of interest as the principal debt*. This appears to us to be the limit.

Judgment reversed and cause remanded.

THORNTON, J., and MYRIOK, J., dissented.

Petition for a rehearing denied.

[Department One.—January 29, 1882.]

IN THE MATTER OF THE ESTATE OF J. M. KELLEY,
DECEASED.

PARTIAL DISTRIBUTION — EXECUTRIX — RIGHT OF APPEAL.—An executrix may appeal from an order directing a partial distribution, but in the absence of the evidence on which the order was made, the proceedings being regular, and it appearing from the facts found that the condition of the estate was such as to justify the order, there is no ground for a reversal.

APPEAL from an order of the Superior Court of the county of Yolo directing a partial distribution.

The facts are stated in the opinion of the court.

J. H. McKune, for Appellant.

F. E. Baker, for Respondents.

PER CURIAM.— This is an appeal from an order of partial distribution, made under § 1658 to § 1661 of the Code of Civil Procedure. The appeal is taken by the executrix.

First — The point made that the executrix cannot be heard to question the propriety of the order, or to appeal therefrom, is answered by § 1660, which declares that the executrix may resist the application.

Second — The court, after a hearing, found that prior to May 1, 1882, funds had come to the possession of the executrix sufficient to pay all the debts known to the executrix, and all the debts, charges, and expenses of administration which had accrued prior to April 4, 1882, together with the legacies of the first class, and that since that time the further sum of seven thousand dollars had come to her hands; that the legacies to the petitioners could be paid without loss to creditors or injury to the fund necessary to pay the expenses of administration accrued and to accrue. The case comes to us on appeal from the order without the evidence. We cannot see that any error was committed. The court has jurisdiction of the parties and of the subject-matter, and the proceedings seem to be in strict conformity to the sections above referred to.

Order affirmed.

[In Bank. — January 31, 1883.]

**EDMUND MARKS, RESPONDENT, v. E. BLACK RYAN,
APPELLANT.**

LANDLORD AND TENANT — ERECTION OF BUILDINGS — LEASE.— In an action to recover the value of a dwelling-house and barn erected by a tenant on leased premises, it appeared that there were several successive leases, and that the buildings were erected during the first lease and remained upon the land when the subsequent leases were executed. No provision for their removal was contained in either of the leases, nor were they referred to except in a covenant on the part of the tenant as set forth in the opinion of the court. The complaint alleged that the buildings were the personal property of the plaintiff, and that the defendant had taken possession of them and prevented their removal. On the trial of the case the plaintiff produced a conveyance from the tenant as evidence of his title. The conveyance was executed during the term created by the last lease. Afterwards, and before the expiration of the term, the landlord conveyed the premises to Charles Crocker. The defendant was the agent

of Crocker, and the facts relied on as proof of a conversion by the former occurred after the conveyance to the latter. *Held*, that the plaintiff could not recover, that the buildings were a part of the realty and not personal property, and that the evidence failed to establish any right on his part to remove them.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts not stated in the syllabus appear in the opinion of the court.

McAllister & Bergin, for Appellant.

Deuprey & Hutchinson, for Respondent.

SHARPSTEIN, J.—By the assignment and specifications of error we are confined to the consideration of the simple question, whether the buildings, for the value of which the plaintiff recovered judgment in this action, were the personal property of the plaintiff at the time of the alleged conversion of them by the defendant.

The Pacific Glass Works, a corporation, was the owner of the premises upon which said buildings were standing, and on the 18th day of December, 1867, executed a lease of said premises to one John Anderson, for the term of one year, who before the expiration of that term erected upon said premises the house and barn in controversy. At the expiration of that term said Pacific Glass Works made and said John Anderson accepted another lease of the said premises, which contains the following clause:—

“And that at the expiration of the said term the said party of the second part will quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted, and the said party of the second part further covenants and agrees that during his occupancy of the said demised premises he will not put nor suffer to be put thereon, nor use the same, or any part thereof, nor the buildings thereon, or to be erected thereon, nor suffer the same to be used by any other person or persons, for the erection or working of any still, distillery, apparatus, or

appliances for the illicit or other distillery or manufacture of spirituous or other liquors."

After that two other leases of the same premises were executed between the same parties, for the same rent, and on the same terms as that last above mentioned, differing from that only in dates and length of terms. The last of said leases is dated April 15, 1875, and is for the term of two years. On the 17th day of July, 1875, Anderson executed what purports to be a conveyance of the house and barn in controversy to the plaintiff in this action. "At the time of the execution and delivery of said conveyance Annie Langstone was, and had been for between two and three years, in occupation of the land, house, and barn mentioned in the complaint, as tenant of said Anderson, paying him therefor during that time the monthly rent of twenty-five dollars; and after the execution of said conveyance the plaintiff duly notified her thereof, and thereafter the plaintiff collected rent of her therefor, twenty-five dollars per month, for one or two months, and twenty dollars per month thereafter, until about February, 1876, one John J. Haley notified her not to pay any more rent to plaintiff, but to pay the rent to Charles Crocker, to whom he, Haley, said the land in the complaint described belonged."

Annie Langstone testified that she paid rent to the plaintiff five or six months, and that she then ceased paying rent to him because Mr. Haley notified her not to pay any more rent to plaintiff. After that she "paid rent to D. W. Parkhurst, the agent." At times to the defendant; i. e., when she did not have the rent when Mr. Parkhurst called, she had to go to the office and pay it to defendant.

On the 9th of March, 1876, Chester & Hyde, who had a contract with the plaintiff to remove said building off of said lot, went upon the premises, and while making preparations to remove said buildings were handed the following:—

"SAN FRANCISCO, March 9, 1876.

"*To Edmund Marks, his employees, Hyde & Chester, house-movers, their servants and agents*—Notice: You are hereby notified not to move, displace, or in any manner disturb a certain house situated on the Nuevo Potrero and now occupied by Mrs. Anna Langstone. If you fail to take notice as above, and

persist in removing said house, you will be prosecuted according to law.

“ CHAS. CROCKER,

“ By E. RYAN, Agent.

After receiving this nothing more was done toward removing said buildings, and the plaintiff afterwards commenced this action.

It is contended that defendant had no right or authority to interfere with the removal of said buildings. But that in our view of the case is not a material fact. If the plaintiff owned the buildings and had a right to remove them no one had any right to interfere. If he did not have a right to remove them, the defendant did not, by reason of interfering in the manner and to the extent that he is shown to have interfered, render himself liable to pay for the buildings in an action for their conversion.

If we follow the cases of *Merritt v. Judd*, 14 Cal. 60, and *Jungerman v. Bovee*, 19 Cal. 355, we must hold that the facts proven in this case are not sufficient to justify the finding “ that said buildings were at the date last aforesaid (March 9, 1876), the personal property of the plaintiff.”

Neither of those cases is distinguishable in principle from this case. The earlier one certainly is not. According to the doctrine of those cases upon the execution of a new lease the lessee “ is in the same situation as if the landlord, being seized of the land, had leased both land and fixtures to him.” In that case we do not think that any one would claim that the lessee could remove the buildings, or that they were not fixtures annexed to the land.

The correctness of the doctrine here laid down is doubted, or, more strictly speaking, denied in *Kerr v. Kingsbury*, 39 Mich. 150. The Supreme Court of Massachusetts, however, in the same year, 1878, said: “ When the same tenant continues in possession under a new lease containing different terms and conditions, making no reference to the old lease, reserving no rights to the lessee in fixtures annexed during the previous term, and not removed before its expiration, and containing the covenant to deliver up the premises at the end of the term in the same condition, this is not the extension of or holding over under an

existing lease; it is the creation of a new tenancy. And it follows that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in as a trade fixture under a previous lease which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate and the fixtures annexed, which have become part of it. The occupation under the new lease is in effect a surrender of the premises to the landlord under the old." (*Watriss v. National Bank*, 124 Mass. 571-576.) And the New York Court of Appeals, in *Loughran v. Ross*, 45 N. Y. 792, said: "A surrender of the premises, after the expiration of the lease is such an abandonment as vests the title in the landlord. In reason and principle the acceptance of a lease of the premises, including the buildings, without any reservation of right or mention of any claim to the buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term." And in *Ewell on Fixtures* (p. 174), this is said to be well settled.

If that be so it logically follows that the rights of the plaintiff and his grantor, Anderson, must be viewed in the same light as they would be if the buildings had been erected before, and had been standing upon the land at the time of the execution of the first lease; or as if the second or any subsequent lease had been in fact the first. And viewed in that light, it is quite clear that the buildings standing upon the premises were a part of the realty, and would have passed with it by deed, although not specifically mentioned in it.

And it appears by the record that prior to the time of the alleged interference of the defendant with the removal of said buildings the premises had been conveyed by Anderson's lessors to other parties.

There can be no question that in the absence of any agreement to the contrary a dwelling-house and barn erected upon the land of his landlord by a tenant would, when so erected, be annexed to the realty. In *Van Ness v. Packard*, 2 Peters, 137,

Story, J., delivering the opinion of the court, observed that "if the house were built principally for a dwelling-house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture falling within the general rule, and immovable."

We think it quite clear that if the consequence of taking a lease of the premises after said buildings had been erected thereon, was to place the lessor and the lessee in the same positions that they would have respectively occupied in the absence of any former lease, the finding of the court that said buildings were, on the 9th day of March, 1876, the personal property of the plaintiff, is not sustained by the evidence, and the judgment and order appealed from must be reversed.

Judgment and order reversed, and cause remanded for new trial.

MORRISON, C. J., MCKINSTRY, J., ROSS, J., THORNTON, J., and MCKEE, J., concurred.

Petition for a rehearing denied.

[Department One. — January 31, 1883.]

**CENTRAL PACIFIC RAILROAD COMPANY, Re-
spondent, v. A. MEAD, Appellant.**

EJECTMENT — STATUTE OF LIMITATIONS — OFFER TO PURCHASE. — The action was ejectment. The plaintiff claimed under a patent from the United States. The defendant relied on the Statute of Limitations. Evidence was given at the trial tending to show that the defendant had offered to purchase the land of the plaintiff within five years before the commencement of the action. In submitting the case to the jury the court directed them to disregard this evidence. A verdict was rendered in favor of the defendant. The plaintiff moved for a new trial, which was granted. *Held*, that the offer to purchase, if made, was a recognition of the title of the plaintiff, and an answer to the claim of adverse possession on the part of the defendant, and that a new trial was, therefore, properly granted.

APPEAL from an order of the Superior Court of the county of Colusa granting a new trial.

Dyas & Bridgford, for Appellant.

H. M. Albery and W. F. Goad, for Respondent.

Ross, J.—The true and only paper title to the land in dispute is, and since March 17, 1875, has been in the plaintiff, as evidenced by a United States patent of that date. The plea of the defendant was the Statute of Limitations, and he relied upon adverse possession of the property for five years immediately preceding the commencement of the action as constituting a bar to the plaintiff's action to recover it.

There was evidence given on the trial tending to show an offer on the part of defendant to purchase the property from the plaintiff within the period of five years next preceding the commencement of the action. Such an offer, if made, was a clear recognition of plaintiff's title, and a perfect answer to the defendant's claim of adverse possession. (*Lovell v. Frost*, 44 Cal. 474; *Tyler on Ejectment*, 921.) An offer to purchase the *property* from the party having the legal title to it does not come within the doctrine of the case of *Cannon v. Stockman*, 36 Cal. 535, and of kindred cases.

Order affirmed.

McKINSTRY, J., and McKEE, J., concurred.

Hearing in Bank denied.

[Department One. — February 1, 1883.]

H. J. LAUGHLIN, APPELLANT, v. RICHARD WRIGHT
ET AL., RESPONDENTS.

FINDINGS — INSUFFICIENCY. — When findings are not waived, and the court fails to find upon one of the material issues made by the pleadings, the judgment cannot be sustained.

PROMISSORY NOTE — INTEREST. — The fact that the payee of a promissory note has in his hands sufficient money belonging to the maker to pay the interest thereon, the money not being used for that purpose, does not prevent the note from bearing simple interest according to its terms.

HOMESTEAD — PROPERTY USED AS A HOTEL. — The mere filing of a declaration of homestead is not enough to make the property a homestead within the meaning of the statute. The use of the property is an important element to be considered. Where the property is primarily and chiefly used as a hotel for the accommodation of the public, it would be doing violence to the statute to regard it as a homestead, although the owner may reside there with his family for the purpose of carrying on the business.

LXIII. CAL.—8.

APPEAL from a judgment of the Superior Court of the county of Santa Barbara, and from an order refusing a new trial.

The action was brought to foreclose a mortgage executed to secure the payment of a promissory note. The facts bearing upon the points decided appear in the opinion of the court.

J. B. Hall, Richards & Boyce, and Garber, Thornton & Bishop, for Appellant.

Williams & Williams, for Respondents.

Ross, J.—The issue raised by the pleadings as to whether the promissory note for the security of which the mortgage sought to be foreclosed was given, had been paid, was *the* issue in the case, and upon that issue there is no finding. In other respects, also, the findings do not sustain the judgment. The court found the due execution of the note and mortgage on the 20th of November, 1875. The note was for \$1479, payable one year after its date, with interest at the rate of one and one half per cent per month, payable monthly, and if not so paid to be compounded monthly. The court also found that the plaintiff, who was in charge of the mortgaged premises, received from the rents thereof the sum of \$3000, out of which he paid to and on account of the mortgagors \$580.80. This, according to the findings, left of the rents in the plaintiff's hands \$2419.20. Out of this the court below allowed the plaintiff the amount of the principal sum of the note — \$1479 — and gave the defendant, Mary Glasgow, who was one of the mortgagors, judgment against the plaintiff for the balance of the rents, \$940.20, on a counter-claim set up by her against the plaintiff.

This action on the part of the court below could only have been based on the idea that because the plaintiff had in his hands sufficient funds derived from the rents of the mortgaged premises with which to pay the interest on the note as it became due, the note ceased to bear interest. But clearly this was not so. If it be true that the plaintiff held in his hands sufficient funds of the mortgagors with which to pay the interest, and did not do so, it may be that the interest should not be compounded, but it certainly would not prevent the note from bearing simple in-

terest, according to its terms. To hold that it would, would be to hold that paid which was not paid.

As the case must go back for a new trial it is proper that we should indicate our views upon another point involved in the case; and to do that it is necessary to go somewhat into the facts as they appear in the record.

The defendant Mary Glasgow was formerly the wife of the defendant Richard Wright, and was such at the time of the execution of the note and mortgage in suit. It was they who executed them. The mortgaged premises consist, according to the record before us, of two lots in the town of Guadalupe, in the county of Santa Barbara, on which is erected a building called the Wright Hotel. This property was encumbered by a mortgage in favor of Schwartz & Co. for \$1573.02; by a lien in favor of Schwartz, Hartford & Co. for \$1100; by a lien in favor of one Douglas for \$247.50, and by a mortgage in favor of the plaintiff for \$1200. To get rid of these encumbrances the Wrights put the plaintiff in charge of the property, with power to rent and collect the rents, and executed to him a power of attorney appointing him their attorney in fact "to raise money on" the property "by executing our notes for such sums as to our attorney may seem proper, and on such terms, and to become payable at such time, and to draw such interest, not exceeding one and one half per cent per month, as to our said attorney may seem proper, and by executing such mortgage to secure said notes in our names, places, and stead on said real estate, and the improvements thereon or relating thereto as to our said attorney may seem proper, the money for which said notes are drawn, and which said mortgages are to secure, is to be used exclusively to pay off and settle all debts now standing against the aforesaid property." Pursuant to this power of attorney the plaintiff borrowed of the bank of San Luis Obispo the sum of \$2000, for which he executed as the attorney in fact of the Wrights a promissory note secured by a mortgage on the premises. In order to give the mortgage to the bank priority the plaintiff released his own mortgage on the property. With the money the plaintiff thus got from the San Luis Obispo Bank, increased by advances made by himself, he paid off at the request of the Wrights the mortgage of Schwartz & Co., and the

liens of Schwartz, Hartford & Co., and of Douglas, aggregating \$2920.52. Subsequently, to wit, on the 20th of November, 1875, the Wrights executed to the plaintiff the note and mortgage in suit for \$1479, being the amount of the mortgage released by plaintiff in order to obtain the money from the bank, together with accumulated interest. When the mortgage executed to the bank became due the bank demanded the money, and in order to pay it the plaintiff borrowed, as the attorney in fact of the Wrights, of one Greening the sum of \$2000, executing therefor as their attorney in fact a note secured by a mortgage on the property.

The plaintiff claims that after having paid out of the rents collected the several amounts to the Wrights, and the interest on the mortgages and the taxes and insurance on the property, there remained a balance due him, whereas, the defendant, Mary Glasgow, formerly Mary Wright, now asserts that the mortgages executed by the plaintiff under the power of attorney were void, on the ground that the premises constituted the homestead of herself and her former husband. It is true that the husband—the defendant Richard Wright—filed a declaration of homestead on the premises on the 25th of May, 1874, which was prior to the execution of the power of attorney. But the mere filing of a declaration of homestead does not of itself constitute the premises embraced within it, the homestead of the declarant. The use of the property is an important element to be considered. From the record in this case it appears that the premises in question were used by the Wrights primarily and principally as a hotel for the accommodation of the public. It was so used by them at the time of the filing of the declaration, and until August, 1874, when, because of the embarrassed condition of their business, they left the hotel and put it in other hands. The Wrights, it is true, lived in the hotel until August, 1874, but their residence there was but incidental to the business of “running the hotel.” When they became embarrassed in their business they sought a residence elsewhere, and put the hotel property in charge of others; and this was prior to the execution of the power of attorney to the plaintiff. It would be doing violence to the statute to regard property so used as a homestead, which is, and was intended to be the place where the

home is. On this subject see *Ackley v. Chamberlain*, 16 Cal. 183; *Rhodes v. McCormick*, 4 Iowa, 374; *Gregg v. Bostwick*, 33 Cal. 228; *Mann v. Rogers*, 35 Cal. 319.

Judgment and order reversed, and cause remanded for a new trial.

McKEE, J., and McKINSTRY, J., concurred.

[In Bank. — February 2, 1883.]

F. A. GIBBS, PETITIONER, v. WASHINGTON BARTLETT ET AL., RESPONDENTS.

MANDAMUS — WHEN THE WRIT WILL LIE. — Where it is clearly the duty of the board of election commissioners to call and hold an election, performance of such duty cannot be refused on the ground that there may not be sufficient funds in the treasury to defray the expenses.

THE petitioner prayed for a writ of mandate to compel the defendants, as members of the board of election commissioners of the city and county of San Francisco, to provide for, call, and hold a special election for the purpose of submitting to the qualified electors of that city and county the question of ratifying a charter for its government, prepared and proposed by a board of fifteen freeholders, as provided by art. 11, § 8, of the Constitution.

The defendants denied that it was their duty to provide for, call, and hold such an election, and alleged specifically as a reason for their refusal that it would necessitate a large expenditure of money from the general fund of the city and county, and that there was not and would not be any money in such fund during the then fiscal year with which to defray such expenses.

John F. Swift, and *Russell J. Wilson*, for Petitioner.

Wm. Craig, for Respondents.

PER CURIAM.— The duties sought to be enforced on the part of the respondents are clearly enjoined by law. Performance of these duties cannot be refused on the ground set up by

respondents, to wit, that there *may not* be sufficient funds in the treasury to defray the expenses of the election.

Let the writ issue as prayed.

[Department One. — February 5, 1883.]

**JAMES FARRIS ET AL., APPELLANTS, v. H. P. MERRITT
ET AL., RESPONDENTS.**

PLEADING — FICTITIOUS NAME — AMENDED COMPLAINT. — A defendant sued by a fictitious name is a party to the action from its commencement, and an amendment to the complaint by inserting the true name does not change the cause of action.

ID.— STATUTE OF LIMITATIONS — DEMURRER. — The Statute of Limitations is not available on demurrer unless all the facts which the defendant would be required to prove under a plea of the statute appear on the face of the complaint.

APPEAL from a judgment of the Superior Court of the county of Yolo.

The action was ejectment. One of the defendants was sued by a fictitious name, and the complaint was afterwards amended and the true name inserted. The defendants demurred separately to the amended complaint on the ground that the action was barred by the Statute of Limitations. The demurrers were sustained, and the plaintiffs declined to amend.

Freeman & Bates, and Dunlap & Van Fleet, for Appellants.

J. H. McKune, and W. B. Treadwell, for Respondents.

McKEE, J.—The court erred in sustaining the demurrers to the amended complaint filed on the 2d of April, 1882.

The demurrers admitted all the material allegations of the complaint. These showed that the plaintiffs were the owners in fee, and entitled to the possession of the demanded premises, and that the defendants were in possession of the same, and wrongfully withheld them from the plaintiffs. The cause of action was, in no respect, different from that stated in the first complaint, which had been filed on the 8th of August, 1881, except that it ran against a party named as a defendant, whose name did not appear in the first complaint, who, it was alleged, was in possession as a tenant of his co-defendant, Merritt. But

this new name was alleged to be the real name of one of the defendants named in the first complaint by a fictitious name. Being a party named in that complaint by a fictitious name, he was a party to the action from its commencement. (*Sacramento v. Spencer*, 53 Cal. 737.) It was necessary, however, to amend the complaint by inserting his real name when ascertained, otherwise no judgment could be taken and enforced against him. (Sec. 474, Code Civ. Proc.; *McKinlay v. Tuttle*, 42 Cal. 577; *Campbell v. Adams*, 50 Cal. 205; *Baldwin v. Morgan*, 50 Cal. 585.) Such an amendment, however, does not change the original cause of action. Merritt was a proper party defendant. Section 379 of the Code of Civil Procedure provides that a landlord may be made a defendant to an action of ejectment. Whether the Statute of Limitations had run in favor of either of the demurring defendants at the time of filing the amended complaint was a question which could not be raised by demurrer, unless the complaint contained allegations of all the facts necessary to constitute adverse possession by the defendants, according to the provisions of the sections of the Code which they invoked by their demurrers. No such allegations were contained in the complaint; it did allege an ouster on the 20th of December, 1876, and, assuming that the cause of action then accrued, the action was brought within five years at the filing of the first complaint. But while it is a fact that more than five years had run at the time of filing the amended complaint, in which the real name of the defendant Platt was, for the first time inserted, yet the right of the plaintiffs as alleged owners in fee of the demanded premises was not forfeited by the mere lapse of time. They could only be deprived of their title or barred of their action by proof of an adverse possession by the defendants, according to the requisites and requirements of the Statute of Limitations, upon which they relied; and the burden of the *allegata et probata* of such a statutory right was upon them. Such is the case of *Lawrence v. Ballou*, 50 Cal. 258, referred to by respondents' counsel.

Judgment and order reversed, and cause remanded with direction to overrule the demurrers, and allow the defendants to answer.

ROSS, J., and MCKINSTRY, J., concurred.

[Department Two.—February 7, 1883.]

HENRY GILMAN, RESPONDENT, v. ADAM BOOTZ,
APPELLANT.

PLEADING—COMPLAINT—ANSWER—NONSUIT.—The complaint alleged that the defendant purchased of one Galvin certain real estate, and agreed to pay eight hundred dollars in gold coin therefor, but had only paid four hundred dollars. An assignment of the indebtedness to the plaintiff was also alleged. The answer admitted the purchase, but denied that the consideration was eight hundred dollars in gold coin, and averred the agreement to be that the defendant should pay four hundred dollars in money, and four hundred dollars in board and lodging. At the trial the plaintiff proved the assignment and rested. The defendant moved for a nonsuit on the ground that the plaintiff had failed to make out a case. The court denied the motion, and after hearing evidence on the part of the defendant and in rebuttal, rendered a judgment in favor of the plaintiff as demanded in the complaint. *Held*, that the answer put in issue the allegations of the complaint as to the terms of the agreement, and that the motion for a nonsuit should have been granted.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

C. J. Bearstecher, and F. J. Castelhun, for Appellant.

George W. Tyler, for Respondent.

PER CURIAM.—The court below must have denied the motion for a nonsuit on the ground that the answer failed to deny the allegations of the complaint, except as to the assignment to the plaintiff. In so construing the answer the court misconceived its meaning. The answer denied that the sale was for eight hundred dollars in gold coin, as alleged in the complaint, and then proceeded to aver that the contract of sale was for four hundred dollars in money, and four hundred dollars to be paid in boarding the plaintiff. This was in legal effect to deny that the sale was for eight hundred dollars, or on any other terms than as set forth in the subsequent averments of the answer above stated. When, then, the plaintiff only offered the assignment to him and rested, he had offered no evidence to establish the main allegation of his complaint, and the nonsuit should have been granted.

Nothing which subsequently occurred on the trial removed the injury done by this error, and the judgment and order must be reversed, and the cause remanded. So ordered.

[Department Two. — February 8, 1883.]

THE HOGS BACK CONSOLIDATED MINING COMPANY, RESPONDENT, v. THE NEW BASIL CONSOLIDATED MINING COMPANY, APPELLANT.

SERVICE BY MAIL — INSUFFICIENCY OF AFFIDAVIT. — An affidavit of service by mail is insufficient when it fails to show that the person making service, and the person on whom it is made, reside, or have their offices in different places, between which there is a regular communication by mail.

APPEAL from a judgment of the Superior Court of Placer County.

The plaintiff and defendant are corporations. The action was brought in the Superior Court of Placer County. The defendant demurred to the complaint, and the plaintiff confessed the demurrer, and obtained leave to amend within twenty days. An amended complaint was filed accordingly, with an affidavit attached showing an attempted service by mail. A judgment by default was entered against the defendant for failing to answer the amended complaint. The additional facts appear in the opinion of the court.

W. R. Daingerfield, and Edward Lynch, for Appellant.

Hale & Craig, for Respondent.

PER CURIAM. — In this case plaintiff had judgment against defendant by default; the court below denied a motion to open the default, and defendant appealed.

The following is the affidavit of service of the amended complaint:—

“D. W. Spear of said Placer County, being duly sworn, says: That he is a citizen of the United States, and is, and was on the 20th day of October, 1881, over eighteen years of age, and not a party to this action. That on the 20th day of October, 1881, the amended complaint in the said action was filed; that forthwith, to wit, on the 20th day of October, 1881, he, affiant, deposited in the postoffice at Auburn, Placer County, California, a copy of the said amended complaint, enclosed in a sealed envelope, postage prepaid, and directed to Edward Lynch (the attorney for defendant herein), at No. 324 Pine Street, San

Francisco, California, the place where said attorney resides and has his office."

The affidavit of service was insufficient, and therefore the default in the case was improperly entered. (*Reed v. Allison*, 61 Cal. 461; *Cunningham v. Warnekey*, 61 Cal. 507; *Moore v. Besse*, 85 Cal. 185; *People v. Alameda T. R. Co.* 80 Cal. 182; § 1012, Code Civ. Proc.)

Judgment reversed, and cause remanded with leave to appellant to file an answer to the complaint within twenty days after the filing of the remittitur herein in the court below.

[In Bank. — February 9, 1882.]

B. S. BRADFORD ET ALS., APPELLANTS, v. CALEB DORSEY ET AL., RESPONDENTS.

MECHANIC'S LIEN — INSOLVENCY — LIMITATION.— An action to foreclose mechanics' liens must be commenced within ninety days after the liens are filed, notwithstanding the insolvency of the debtor. A debt so secured is not provable under the insolvency act, and the commencement of foreclosure proceedings are not stayed by any of its provisions.

APPEAL from a judgment of the Superior Court of Tuolumne County.

The facts appear in the opinion of the court.

Street & Street, for Appellants.

Dorsey & Nicol, for Respondents.

SHARPSTEIN, J.—Action to foreclose mechanics' liens. It appears by the allegations of the complaint that the action was not commenced within ninety days after the liens were filed, and a demurrer to the complaint on that ground among others was sustained. The plaintiffs declined to amend, and a judgment was entered in favor of the defendants. This appeal is from that judgment.

The demurrer was properly sustained, unless the commencement of the action within ninety days after the liens were filed was stayed by injunction or statutory prohibition. (Code Civ. Proc. § 1190; Code Civ. Proc. § 356.) And the appellants con-

tend that they were prohibited by statute from commencing their action within the time prescribed for its commencement, by reason of the owners of the mines, against which said liens were filed, being adjudged insolvent by a court of competent jurisdiction after said liens were filed, and before the expiration of the period of ninety days from the date of such filing.

The provisions of the insolvent act which are principally relied on by the appellants are contained in sections six and forty-five of said act. The former declares that upon the court making an order adjudging the petitioner insolvent, all proceedings against him shall be stayed. The latter, that "no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the debtor, but shall be deemed to have waived all right of action and suit against him, and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby; *provided*, that no valid lien existing in good faith thereunder shall be thereby affected; and *further provided*, that a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the debtor where a discharge has been refused, or the proceedings have been determined without a discharge. And no creditor whose debt is provable under this act shall be allowed, after the commencement of proceedings in insolvency, to prosecute to final judgment any action therefor against the debtor until the question of the debtor's discharge shall have been determined."

The appellants did not prove their debts, and if they were not provable under said act, said appellants were not prohibited from commencing an action or actions for the foreclosure of their liens within ninety days after the same had been filed.

The debts or claims of the appellants were not provable until after they had released or conveyed their claims to the assignee upon the property. (§ 44.) After doing that they could have proved their whole debts. (§ 44.) But it is not alleged that they ever released or conveyed their claims upon the property to the assignee, and therefore they could not be admitted to prove their whole debts. They might have been admitted as creditors for the balance of their debts after deducting the value of the property against which they had filed their liens. But

that would not constitute them creditors having provable debts. Whether they could be admitted to prove anything depended upon the value of the property against which they had filed their liens. If that was sufficient to satisfy their claims, then they could not be admitted to prove their debts or any part thereof. They clearly could not be included in the category of creditors having provable debts. (*Montgomery v. Merrill*, 62 Cal. 385.)

Other grounds of demurrer were specified, which it is unnecessary to consider.

Judgment affirmed.

MORRISON, C. J., McKEE, J., ROSS, J., MYRICK, J., and THORNTON, J., concurred.

[Department Two. — February 12, 1883.]

JESSIE RICE, APPELLANT, v. JOHN H. McKUNE ET AL.,
RESPONDENTS.

SWAMP AND OVERFLOWED LANDS — PURCHASE — SURVEY — BOUNDARY.— Certain swamp and overflowed lands situated in township five north, range five east, Mount Diablo meridian, were purchased from the State prior to the completion of the government surveys. The lands were surveyed by the county surveyor under a statute of the State then in force. One of the lines described in the field notes commenced at the southwest corner of section one, and ran north eighty chains to the township line. A certificate of purchase was issued in accordance with this survey, and subsequently a patent was also issued in which reference was made both to the survey and field notes. At the time of the survey the section lines had not been run, but the township line referred to in the field notes had been run and established. When the section lines were run the southwest corner of section one was located considerably more than eighty chains south of the township line. The question was as to the northern boundary of the lands so purchased. *Held*, that the township line constituted the boundary.

APPEAL from a judgment of the Superior Court of the county of Sacramento, and from an order refusing a new trial.

The action was ejectment against a landlord and his tenant, and the judgment was in their favor. The facts are stated in the opinion of the court.

S. Solon Holl, for Appellant.

Freeman & Bates, for Respondents.

SHARPSTEIN, J.—The respondent, McKune, purchased of the State five hundred and sixty acres of swamp and overflowed land which had not then been surveyed by the United States, but of which he procured a survey to be made by the county surveyor of the county in which said land was situated according to the provisions of the statute then in force.

The controversy is as to the location of the northern boundary line of a tract sold by the State to the respondent. He claims that the land purchased by him is bounded on the north by the northern line of township five north of range five east. And he bases that claim upon the field notes of the survey by the county surveyor, of which the following is a copy:—

“Beginning at the southwest corner of section one; thence north eighty chains to the township line; thence east nine chains to Cosumnes River; in all, eighty chains; thence south on range line forty chains; thence south forty chains; thence west thirty-eight and fifty-one hundredths chains to Cosumnes River, in all sixty chains, to place of beginning.”

When that survey was made the location of the southwest corner of section one had not been determined by a United States survey. But the township line referred to had been run. That line and the Cosumnes River constituted the only fixed objects referred to in said field notes. After the respondent had purchased the land it was surveyed by the United States, and according to that survey the southwest corner of said section one is considerably more than eighty chains south of said township line, and the strip of land lying between a line eighty chains north of the south line of said section, and said township line was subdivided into lots numbered one, two, three, four, which the State afterwards undertook to sell and convey to the appellant. So that the only question which we have to decide is whether these lots were included in the conveyance of the State to the respondent.

The certificate of purchase issued March 16, 1864, to the respondent, describes the land sold to him as follows:—

“Survey number six hundred and fifteen, Sacramento County, the north half, the southwest quarter, and the west half of the

southeast quarter of section one, township five north, range five east, Mount Diablo base meridian."

And in the patent issued to respondent January 24, 1872, the following description is given:—

"Said lands being situated in Sacramento County, and described as follows, to wit: Survey number six hundred and fifteen, swamp and overflowed land, Sacramento County, township number five north, range number five east, Mount Diablo meridian, section number one; the north half, the southwest quarter, and west half southeast quarter, section one, and more particularly described in the field notes of said survey as follows: The north half, the southwest quarter, and the west half of the southeast quarter of section one, township five north, range five east, Mount Diablo meridian, containing five hundred and sixty acres."

As before stated the respondent purchased before the United States survey was made, and before the lines of section one had been run; and at the time of such purchase there were no such legal subdivisions as half or quarter sections of said section in existence. But by reference to the field notes of the survey of the county surveyor we find a definite description of said land by metes and bounds, and the respondent purchased the land included in that survey. The county surveyor could not run the section lines, nor subdivide into half or quarter sections, but he could survey a tract of five hundred and sixty acres, which should be bounded on the north by a township line, and on the east by the Cosumnes River, and by the aid of those two fixed monuments and the courses and distances given, there is no difficulty in determining the proper boundaries of the land conveyed to the respondent. And we do not doubt that the north line of township five constitutes the northern boundary of said land.

We find no error in the rulings of the court upon the admissibility of evidence to the introduction of which the appellant objected.

Judgment and order affirmed.

MORRISON, C. J., MYRICK, J., and THORNTON, J., concurred.

Hearing in bank denied.

[Department One.—February 12, 1883.]

THE PEOPLE *EX REL.* G. F. CULBERTSON, APPELLANT,
v. I. J. POTTER, AUDITOR, ETC., RESPONDENT.

OFFICE — SALARY — CONTEST — DE FACTO AND DE JURE OFFICERS.—An officer *de facto*, acting even in good faith under a claim of right to an office, is not entitled to recover the compensation provided by law to the exclusion of the officer *de jure*.

IN — QUALIFICATION.—Section 907 of the Political Code, which requires the officer-elect to qualify within fifteen days from the commencement of his term, has no application during the pendency of a contest.

APPEAL from a judgment of the Superior Court of Tuolumne County.

The facts are stated in the opinion of the court.

Dorsey & Nicol, for Appellant.

E. A. Rogers, for Respondent.

McKEE, J.—This was an application to compel the auditor of Tuolumne County to draw his warrant in favor of petitioner and appellant on the county treasurer for the sum of eight hundred and seventy dollars, which had been allowed by the board of supervisors of the county as compensation for services, which had been rendered by the petitioner as a *de facto* member of the board, pending a contest between him and a supervisor-elect, in which the latter was adjudged to have been legally elected, and to be entitled to the office. The judgment was rendered on the 5th of December, 1878, but the incumbent, instead of surrendering the office, appealed from the judgment to the Supreme Court, where it was affirmed on August 16, 1881. The term of the office commenced on the first Monday of March, 1879. From that time until the final determination of the contest by the decision of the Supreme Court the petitioner excluded the officer-elect from the office, and for the services rendered by him during the time that he intruded himself into the office to which he was not elected, he asked the county to compensate him.

The court below properly refused the prayer of the petitioner. An officer *de facto*, acting even in good faith under a claim of right to an office, is not entitled to recover from a county the

compensation provided by law for such services to the exclusion of the officer *de jure*. "It will be remembered," says the Supreme Court of Iowa in *McCue v. County of Wapello*, 51 Iowa, 60, "that one exercising the power of an office without lawful authority is regarded as an officer *de facto*, not for his own protection or advantage, but for the protection of the public and those who are doing business with him. When his right to the possession of the office is to be determined he cannot be declared an officer *de jure*, on the ground that he has been an officer *de facto*. It is therefore a rule of law that when an officer seeks to recover the emoluments of an office he must show his right to the possession of the office. The rule is based upon the ground that the officer *de jure* who has been ousted from his place by an intruder has a property interest in the emoluments of the office, of which he cannot be deprived by one having no title thereto. This property right demands protection, and the officer *de facto* cannot recover emoluments to which the officer *de jure* is entitled." (56 Iowa, 331.) Actual incumbency merely, gives no right of recovery. (*Dorsey v. Smyth*, 28 Cal. 21.)

Appellant, however, claims that the rule has been changed by the Political Code of this State. In this he is mistaken. Section 963 of that Code declares that pending a contest for an office no warrant for any part of the salary of the office must be drawn or paid. From this it results that after the contest has been finally decided the officer *de jure* is the only person entitled to the salary. (*Dorsey v. Smyth*, 28 Cal. 21; *Stratton v. Oulton*, 28 Cal. 45.)

In answer to this result it is claimed that the appellant *was* the officer *de jure*, because the officer elect failed to qualify before the expiration of fifteen days from the commencement of his term of office, as he was required to do by section 907 of the Political Code; and the appellant, as the incumbent of the office, was compelled by section 879 of such Code to hold over and perform the duties of the office until his successor had been elected and qualified.

These sections of the Code do not admit of such a construction. Where a contest is pending for an office, section 907 has no application until the contest has been finally determined (*Pearson v. Wilson*, 57 Miss. 862); otherwise it would be in the

power of an incumbent in office to hold over after the expiration of his term, and defeat the will of the people at an election by contesting the election of his successor. Of course such a contest may be made by an incumbent in good faith; but when decided against him he becomes an intruder in the office *ab initio* and throughout, and not an officer *de jure*. There cannot be two officers *de jure* to the same office. After the judgment of December 5, 1878, there was no legal compulsion upon the incumbent to hold over after the commencement of the term to which his successor was elected. On the contrary the law made it his duty to surrender the office to his successor at the commencement of the term, and if he continued thereafter to exercise its functions he did so at his peril.

Judgment affirmed.

ROSS, J., and McKINSTRY, J., concurred.

[In Bank.—February 12, 1883.]

FERDINAND REIS, APPELLANT, v. FANNIE P. LAWRENCE, RESPONDENT.

MARRIED WOMAN — DIVORCE — DEED — ACKNOWLEDGMENT — ESTOPPEL.—Where a decree of divorce obtained by a married woman is void, but she assumes her maiden name, lives apart from her husband, and continuously acts and represents herself as *a femme sole*, a deed of conveyance of her separate real estate, made and acknowledged by her as an unmarried woman, is valid and binding.

APPEAL from a judgment of the late District Court of the third judicial district in and for the county of Alameda, and from an order refusing a new trial.

The action was brought against Fannie P. Lawrence and Edwin A. Lawrence on a promissory note for money loaned, and to enforce a lien for the payment thereof arising from certain conveyances of real estate absolute on their face, but intended as security. A judgment was rendered on the note against Edwin A. Lawrence. The additional facts are stated in the opinion of the court, and the dissenting opinion of Mr. Justice McKee.

Edward J. Pringle, for Appellant.

The respondent is estopped from denying the validity of her deed, because, in the desertion of her husband by herself, and of herself by her husband, the reasons which protect a married woman from the operation of an equitable estoppel cease. (*Lawrence v. Spear*, 17 Cal. 421; *Blumenberg v. Adams*, 49 Cal. 308; *Patterson v. Lawrence*, 90 Ill. 174; *Frary v. Booth*, 37 Vt. 78.)

She is estopped from denying the validity of her deed, because the reasons which protect a married woman from the operation of an equitable estoppel cease when she denies the very status which affords the protection.

Granted that a married woman may not be estopped by her acts so long as her character is recognized or known, yet she is raised above or falls below this protection when she claims to have been divorced from her husband, resumes her maiden name, and acts, signs, and conveys as a single woman. All the sense and reason of protecting her as a married woman then cease, or else she is a licensed plunderer. The question, then, is not whether a married woman can be estopped, but whether a woman shall not be estopped from calling herself married.

The defendant was married on the 13th of April, 1871; she obtained a decree of divorce from her husband on the ground that he had deserted her as early as the 1st of March, 1872; he then obtained a decree of divorce from her on the ground that she had deserted him in July, 1872.

Married for less than eleven months, and ever since deserting and deserted, divorcing and divorced! Truly she was not "much married," and was very much divorced. And yet she claims to invalidate a deed made during the period of the double desertion because she was not examined "without the hearing of" this husband.

A case completely in point is *Richeson v. Simmons*, 47 Mo. 20; and see *Ruger v. Heckel*, 28 N. Y. S. C. 489.

Our Code removing the disabilities of married women, and codifying the laws of estoppel does not exempt a married woman from their operation. (Code Civ. Proc. § 1962, subs. 2 and 3.)

We cannot, by judicial construction, add an element which the Code, having spoken on the subject, has industriously omitted.

William Irvine, for Respondent.

The doctrine of estoppel has no application. Points 2, 3, 4, and 5 of appellant's brief is devoted to a consideration of estoppel as applied to married women.

To answer them all at once it has been held time and again that a married woman is not bound by an estoppel. Her title to land can only pass by deed, and the acknowledgment is a part of the deed. (*Morrison v. Wilson*, 13 Cal. 494; *Ewald v. Corbett*, 32 Cal. 493; *Barrett v. Tewksbury*, 9 Cal. 13; *Kendall v. Miller*, 9 Cal. 591; *Selover v. Am. Rus. Co.* 7 Cal. 266; Wells on Sep. Prop. of Wife, § 267; *Looney v. Adamson*, 48 Tex. 619; *Marsh v. Mitchell*, 26 N. J. Eq. 497; *Ennor v. Thompson*, 46 Ill. 221; *Kerr v. Russell*, 69 Ill. 666; *Board v. Davidson*, 65 Ill. 124; *Robinson v. Noel*, 49 Miss. 253; *Stillwell v. Adams*, 29 Ark. 346; *Heaton v. Fryberger*, 38 Iowa, 185; *Leftwich v. Neal*, 7 W. Va. 560; *Grove v. Zumbro*, 14 Gratt. 507; *Lindley v. Smith*, 48 Ill. 523; *McIntosh v. Smith*, 2 La. An. 758; *Coal Co. v. Pasco*, 79 Ill. 170; *Behler v. Weyburn*, 59 Ind. 143; *Horsey's Lessee v. Horsey*, 4 Har. (Del.) 517.)

To permit an estoppel to operate against her would be a virtual repeal of the statute. (*Drury v. Foster*, 2 Wall. 24.)

The title of a *femme covert* to land cannot be affected by acts of commission short of those required by law to bind her, much less by acts of omission. (*Lessee of Delancey v. McKeen*, 1 Wash. C. C. 354.)

Estoppel does not conclude her, even when she represents herself as sole. (*Behler v. Weyburn*, 69 Ind. 143, and cases cited; 2 Hilliard Torts, 506; 48 Pa. St. 497; Wells' Sep. Prop. of Wife, 277; see Bigelow on Estoppel, 490, 491; Herman on Estoppel, p. 236, § 215; *Hempstead v. Easton*, 33 Mo. 142; *Liverpool Assn. v. Fairhurst*, 9 Ex. 422; Cooley on Torts, pp. 116, 117; *Cooper v. Witham*, 1 Lev. 248; *Woodward v. Barnes*, 14 Am. Rep. 626; *Burnard v. Haggis*, 14 Com. B. N. S. 45; *Keen v. Coleman*, 39 Pa. St. 299; *Keen v. Hartman*, 48 Pa. St. 497; *Owens v. Snodgrass*, 6 Dana, 229; 2 Bishop on Married Women, § 263; *Tiernan v. Poor*, 19 Am. Dec. p. 230, note; *Carr v. Williams*, 36 Am. Dec. p. 90, note; *Klein v. Caldwell*, 91 Pa. St. 140.)

Ross, J.—The defendant, Edwin A. Lawrence, is the father

of the defendant Fannie P. Lawrence. The latter married one Hiram Hutchinson, in the city of San Francisco, on the 13th of April, 1871. In the year 1873 she went to the Territory of Utah for the purpose of obtaining a divorce from her husband, and on the 6th of May of that year filed in the Probate Court of Salt Lake County, Utah Territory, a petition in which she set forth that Hutchinson deserted and abandoned her on or about the first day of March, 1872, and had ever since continued his desertion and abandonment of her, and praying for a decree of divorce dissolving the bonds of matrimony existing between them. On the 15th of July, 1873, the court in which the proceeding was had entered a decree purporting to dissolve the bonds of matrimony existing between Mr. and Mrs. Hutchinson, and restoring to the petitioner her maiden name.

From the view we take of the case before us it will not be necessary to determine whether or not the decree of the Probate Court of Utah was validated by subsequent congressional action. Upon the entry of the decree on the 15th of July, 1873, Mrs. Hutchinson resumed her maiden name, and never afterwards lived with Hutchinson, but has ever since that date lived and acted as a single woman, and borne her maiden name.

On the 26th of May, 1874, she was the owner of a certain piece of land situated in Alameda County of this State, which was her separate property, it having been given to her by her father on the occasion of her marriage. On the day last named she signed a power of attorney, very general in its terms, appointing her father her attorney in fact to (among other things) "lease, let, demise, bargain, sell, remise, release, convey, mortgage, and hypothecate" her said land upon such terms and conditions, and under such covenants as to him should seem fit. The power as well as the certificate of acknowledgment described the constituent as "Fannie P. Lawrence, formerly Fannie P. Hutchinson," and the power was so signed. The certificate, however, did not conform to the requirements of our statute prescribing the form for certificates of acknowledgment of married women.

When the power of attorney, so signed and acknowledged, was received by Edwin A. Lawrence, the latter was the owner of various certificates of purchase issued by the State of Califor-

nia for State lands, on which Gustave Reis held a mortgage executed to him by Lawrence. A part of the purchase-money of the lands had been paid, but a part of it remained unpaid. In due course of time an instalment became due. Lawrence needed the money with which to make the payment. He negotiated with Mr. E. B. Mastick for the loan of the required amount on a mortgage he proposed to give on his daughter's land under and by virtue of the power of attorney. The power, the daughter testified on the trial of this case, she signed unwillingly and only after urgent solicitation on the part of her father; and in answer to the question "Why did your father urge you to execute the power of attorney to which you have referred?" she answered: "Because he said he had payments to make on certain lands of his, and that in case of necessity he wished to raise enough money on my property to meet that demand; but that he hardly thought he would be obliged to do so; but he wished to have the paper on hand, so in case of need he could make use of it." In endeavoring to obtain money on the strength of his daughter's land, Edwin A. Lawrence was, therefore, but carrying out the purpose had in view by both when the daughter gave him the power.

His negotiations with Mr. Mastick for a loan of the required money failed of accomplishment on the last day allowed for the payment of the instalment due upon the certificates of purchase. In this extremity he applied to Gustave Reis for the loan of the amount necessary to make the payment, viz., \$4,550. Gustave furnished a part of the money, but got the greater part of it from Ferdinand Reis, who is the plaintiff in this action. The loan was accordingly made, and as security for its payment Edwin A. Lawrence executed to the plaintiff Reis a deed for the Alameda land as attorney in fact for Fannie P. Lawrence. At the time of this transaction, which took place on the 27th of June, 1874, Edwin A. Lawrence represented to Reis that his daughter had obtained a divorce from her husband in Salt Lake, and had been restored to her maiden name. Subsequently, to wit, on the 18th of September, 1874, upon application made on behalf of the plaintiff, Fannie P. Lawrence executed to plaintiff a deed for the same land described in the deed already executed to him by her father as her attorney in

fact, which deed expressed a consideration of \$4,500, and contained the clause: "This deed is given in confirmation of the deed given by me to said Reis on June 27, 1874, by my attorney in fact, hereby ratifying and confirming the same." The certificate of acknowledgment to this confirmatory deed described the grantor as "Fannie P. Lawrence (*femme sole*)," and complied with the requirements of the statute prescribing the form of such certificates for others than married women, but did not conform to those in respect to the latter.

The case further shows that in the month of July, 1877, Hutchinson commenced an action in the District Court of Marin County of this State against the defendant Fannie for the purpose of obtaining a decree dissolving the bonds of matrimony alleged to have existed between them since the 13th of April, 1871, on the ground that the defendant therein, on or about the 1st of July, 1872, deserted the plaintiff in that action, and from that time forth lived apart from him, and denied him all marital rights. After trial the court in which the action was brought decreed the plaintiff a divorce on the ground stated in his complaint.

We assume that the Utah decree was invalid. Nevertheless the fact remains that upon the rendition of that decree the defendant, Fannie P. Lawrence, resumed her maiden name, and thence hitherto continued to act and represent herself as a *femme sole*. As such she signed and acknowledged the power of attorney to her father for the purpose of enabling him to borrow money on the strength of her land. On the security of that land, and on those representations, the father did borrow money, and to secure its repayment executed to the lender, pursuant to the power, a deed for the premises. Subsequently, and in consideration of that loan, the daughter, still acting and representing herself as a *femme sole*, executed as such to the lender another deed for the premises, in which she recited that it was given in confirmation of the deed previously executed by her attorney in fact. At this day she seeks to avoid the effect of these conveyances to the injury of the party who parted with his money on the strength of her actions and representations by saying that she was all along a married woman, and that the certificates of acknowledgment to the instruments executed by her were not in

accordance with the form prescribed by statute for married women in that they did not recite that she was examined "without the hearing of her husband," a husband who, according to her petition for divorce filed in Utah, had deserted and abandoned her on the 1st day of March, 1872, and whom, according to the record put in evidence from the District Court of Marin County, she had deserted and abandoned in July of the same year, and between whom no marital relations other than the dry, legal relation in fact existed. Of course, under such circumstances the reason for the rule that requires, in cases of married women, the certificate of acknowledgment to recite an examination without the hearing of the husband, does not exist. At least as early as July, 1872, the defendant Fannie lived apart from, and independent of her husband. Later on, in 1873, she resumed her maiden name, and thence hitherto acted and represented herself as a single woman. In that character she executed the instruments in question, and in that character, in our opinion, a court of equity ought to regard her in the construction of them. (As giving support to these views, see *Richeson v. Simmons*, 47 Mo. 20; *Rosenthal v. Mayhugh*, 33 Ohio St. 155; *Patterson v. Lawrence*, 90 Ill. 174.)

We find it unnecessary to determine whether the rules based on the common law relation of husband and wife are to be applied to their full extent in this State, where the wife is now by statute empowered to dispose of her separate estate without the consent or concurrence of her husband.

It follows that the plaintiff is entitled to the lien prayed for.

Judgment and order reversed, and cause remanded for a new trial.

MORRISON, O. J., SHARPSTEIN, J., and MYRIOK, J., concurred.

McKEE, J.—I dissent. The case arises out of an equitable action brought by the plaintiff against the defendants to obtain a decree declaring an alleged conveyance of real estate, purporting to have been executed June 27, 1874, by the defendant, Fannie P. Lawrence, by her attorney in fact, Edwin A. Lawrence, to be a mortgage, given to secure payment of the following promissory note:—

"4,550.

SAN FRANCISCO, June 27, 1874.

"Sixty days from date, for value received, we jointly and severally promise to pay to the order of Ferdinand Reis forty-five hundred and fifty dollars in U. S. gold coin, with interest at the rate of one and one quarter per cent per month till paid.

[Signed.]

FANNIE P. LAWRENCE,

"Formerly Fannie L. Hutchinson, by her attorney in fact, Edwin A. Lawrence.

"E. A. LAWRENCE."

Neither the individual indebtedness of the defendant Fannie, nor the joint indebtedness of her and the defendant Edwin, constituted any part of the consideration of the note. It was given solely for the individual indebtedness of the defendant Edwin A. Lawrence. But both the note and deed were made and delivered by the latter under a pretended power of attorney, whereby the former attempted to constitute and appoint her father, the said Edwin, her attorney in fact, with authority to sell, convey, or mortgage her real estate, on such terms and conditions as to him might seem fit. Ratification of the conveyance made by him under the power was also attempted by her, by a formal deed dated September 18, 1874, which was signed "Fannie P. Lawrence," and subsequently by another deed dated in October, 1874, and signed by the same name. But at the times and dates of those transactions the defendant Fannie was a married woman, the lawful wife of one Hiram Hutchinson; and the real property described in the several instruments in writing was her separate property; and neither the power of attorney nor any of the pretended deeds were executed or acknowledged by her in any manner or form, to make it her act and deed, or to give any power or authority over or concerning her separate real property. It was supposed, however, that her status as the wife of Hiram Hutchinson had been changed by a decree of divorce.

The record shows that she was married to Hutchinson in the city of San Francisco, in the year 1871. There the parties were domiciled, and there, the wife at least, continued to be domiciled until some time in the year 1873, when she went to Salt Lake City, in the Territory of Utah, for the sole purpose of obtaining a fictitious domicile on which to commence proceedings against

her husband for a divorce. The husband appears to have been, at that time, domiciled in the city of New York. After remaining long enough in Salt Lake City to obtain a fictitious domicile under the laws of the Territory, the wife commenced proceedings for divorce by filing a complaint against her husband in the Probate Court of Salt Lake City, and causing a summons to be issued thereon; and after publication of the summons was had for a sufficient length of time under the statute of the Territory, a decree of divorce was entered in the case in her favor, and against her husband, who neither appeared in the proceedings, nor authorized an appearance for him by attorney or otherwise; and immediately after obtaining that decree the plaintiff therein returned to California.

A decree of divorce rendered in a State or Territory other than that in which the marriage of the parties was celebrated is void beyond the limit of the State or Territory where it was rendered, unless one of the parties to the proceedings for divorce had an actual *bona fide* domicile in the State or Territory. If neither of the parties were actually and in good faith domiciled in the State or Territory in which the decree was rendered, the decree is void in all other States or Territories. (*Hinds v. Hinds*, 1 Iowa, 36; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 80; *Cheerer v. Wilson*, 9 Wall. 108; *Cox v. Cox*, 19 Ohio St. 502; *Sewall v. Sewall*, 122 Mass. 156; *Hood v. State*, 56 Ind. 263; *People v. Dawell*, 25 Mich. 247; *Litowich v. Litowich*, 19 Kan. 451.)

But the decree in this case was absolutely void, because, although the legislature of Utah had by statute authorized any Probate Court of the Territory to grant a divorce to any applicant residing in the county in which an action for divorce might be brought, yet the Supreme Court of the Territory in *Cast v. Cast*, 1 Utah, 122, decided that the statute, conferring upon the Probate Courts jurisdiction in divorce cases, was opposed to the organic law of the Territory and void; therefore the Utah decree of divorce was rendered by a court that had no jurisdiction of the subject-matter, nor of the persons to the action of *Hutchinson v. Hutchinson*, and the decree rendered therein was wholly void.

It is, however, claimed that the Congress of the United States

by an act passed June 28, 1874, "validated and confirmed all judgments and decrees rendered before that date by the Probate Courts of the Territory of Utah, which had been executed, and from which no appeals had been taken"; and that the decree under consideration was ratified and confirmed by that act.

Decrees of divorce are not enumerated in the statute. But it is said that they are comprehended by the phrase "all executed judgments and decrees from which no appeal has been taken." But the decree under consideration was not an existing or executed decree at the time of the passage of the act, because it had been adjudged by the Supreme Court of the Territory in which it was rendered absolutely void. Being no judgment, how could the legislature declare it to be a judgment? That which courts have adjudged void cannot be declared valid by legislation. A legislature can no more impart a binding efficacy to judicial proceedings which are void than it can take from a citizen his property and give it to another. Indeed, as has been said, to do the one thing is to accomplish the other, and therefore I understand it to be a principle of constitutional law, recognized by all courts, that the legislature can never by retrospective proceedings cure a defect of jurisdiction in the proceedings of courts. (*Nelson v. Rountree*, 23 Wis. 367; *Griffin v. Cunningham*, 20 Gratt. 109; *Pryor v. Downey*, 50 Cal. 388.) The reason is manifest. Such proceedings being utterly void, they would acquire vitality as judicial acts, if at all, by the legislative act exclusively, and the curative act must therefore be in its nature a judgment. (*McDaniel v. Correll et al.* 19 Ill. 226; *Denny v. Mattoon*, 2 Allen. 361; *State v. Doherty*, 60 Me. 504.)

But Congress had no power to render judgment in an action between parties that have never been before it. By the Constitution of the United States the judicial powers of the United States are vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish. And the powers of the courts thus ordained and established extend to all possible cases in law and equity, or admiralty and maritime jurisdiction between citizens of domestic States and citizens and subjects of foreign states. With these courts, in the exercise of the judicial powers vested in them by law, Congress cannot interfere. It cannot dispense with them in States or

Territories, nor assume any of their functions, not even in the summons and selection of jurors, as the Supreme Court of the United States held in *Clinton v. Englebrecht*, 13 Wall. 434.

The Utah decree of divorce was, therefore, a nullity. (*Davis v. Commonwealth*, 13 Bush, 318; *The State v. Armington*, 25 Minn. 29; *Litowich v. Litowich*, 19 Kan. 451.) Being null, the status of the defendant Fannie was, at the times of the transactions under consideration, that of a married woman. As such, however, she was enabled by the laws of the State to alienate or encumber her real property, by herself or her legally authorized agent, in the mode prescribed by the law, but not otherwise. The law which removed her disabilities made her a *femme sole*, with capacity to act within the limits of the powers conferred upon her; but outside those limits she is still under disability to act. She has no power to change or transfer her real estate in any other mode than that prescribed by the law which conferred upon her power to deal with it at all. Any attempt by her to dispose of it otherwise than as the law directs, the law itself pronounces invalid and void. (§ 1487, Civ. Code; *Morrison v. Wilson*, 13 Cal. 495; *Camden v. Vail*, 23 Cal. 633; *MacLay v. Love*, 25 Cal. 368; *Landers v. Bolton*, 26 Cal. 393; *Smith v. Greer*, 31 Cal. 477.) The instruments in writing by which it is sought in this case to charge the separate real property of the wife were, therefore, void, because not executed in the mode prescribed by the law; there was neither in fact nor in law a transfer of her estate; that being so, can she be divested of her title by the courts? Can void transfers of her real estate be made valid? It is claimed that that may be done by the equitable doctrine of estoppel.

Equity, however, does not overturn, but follows the law. It never attempts to breathe life into a legal nonentity. Hence courts of equity have never attempted to divest a married woman of the title to her land by an estoppel *in pais*. "That," says the Supreme Court of Indiana in *Behler v. Weyburn*, 59 Ind. 143, "would be overturning the statute which prohibits all modes of encumbering or conveying her land save the one provided for." The same question was involved in the case of *Lowell v. Daniels*, 2 Gray, 161, in which the court said: "This raises the material question at issue between the parties, whether

a married woman and her heirs may be barred of her estate by an estoppel *in pais*? She can make no valid contract in relation to her estate. Her separate deed of it is absolutely void. If she were to covenant that she was sole, was seized in her own right, and had full power to convey, such covenants would avail the grantee nothing. She could not be estopped by them. The law has rendered her incapable of such a contract, and she finds in her incapacity her weakness. . . . And we think a married woman cannot do indirectly what she cannot do directly; cannot do by acts *in pais* what she cannot do by deed. She cannot by her own act enlarge her legal capacity to convey an estate.

"This doctrine of estoppel *in pais* would seem to be stated broadly enough when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment, or by silence, in effect do what could not be done by deed would be practically to dispense with all the limitations the law has imposed upon the capacity of married women to alienate their estates. No case at law has been cited, nor have we found one in which it has been held that the estate of a party has been barred by an estoppel *in pais*, who was incapable of conveying by deed.

To the same effect will be found the cases of *Todd v. The Pittsburg and Fort Wayne Railroad Company*, 19 Ohio St. 514; *Drury v. Foster*, 2 Wall. 24; *Petit v. Fretz*, 9 Casey, 118; *Glidden v. Strupler*, 52 Pa. St. 400; *Rumfelt v. Clemens*, 46 Pa. St. 456.) Says Mr. Justice Agnew in the case last cited: "There is no such doctrine in equity as that an estoppel *in pais* shall work a transfer of the legal title to lands belonging to a married woman. If there were it would be a flat denial of a legislative policy, founded on the most important reasons, entering into the very constitution of society, and social order must lie at the feet of chancery."

I do not deny that a married woman may be estopped in cases of pure torts (*Oglesby v. Pasco*, 79 Ill. 164), or in cases of fraud where innocent parties, induced by the intentional and fraudulent conduct of the wife, may have acquired rights of property upon the faith of ownership in the husband. (*Drake v. Glover*, 30 Ala. 382; *Connolly v. Branstlor*, 3 Bush, 702.) Fraud of course vitiates every contract. "But even this doctrine when

applied to married women is," said Mr. Justice Baldwin, in *Morrison v. Wilson, supra*, "limited under statutes like ours to this: that the contract of a married woman effected by fraud cannot be enforced; but not that a fraudulent representation will divest a *femme's* title in the face of a statute declaring a different and exclusive mode of divestiture," and *a fortiori* she will not be divested of the title where she has not been guilty of fraudulent representation. And that is this case; there was no fraudulent representation by the *femme covert*, for the person with whom her father negotiated for a loan of the money involved in the case testified at the trial that the father produced the power of attorney, note, and conveyance upon which he wanted to borrow the amount of the note, and represented that his daughter had been divorced from her husband in Salt Lake City, and had resumed her maiden name, and that the power of attorney was in all respects regular. Yet the money was not loaned upon these representations. The plaintiff took the advice of his counsel upon the validity and sufficiency of the securities, and acting upon that advice lent his money to the father upon the faith of the securities. In the transaction there was no fraud. All the parties to it, including the attorneys of the plaintiff, believed that the decree of divorce was valid. The woman believed it, and resumed her maiden name; the plaintiff believed it, and lent his money. There was no attempt at deception or fraud. Each one had the same means and opportunity for knowledge and judgment as to the subject of the divorce; and the opinion which was entertained in relation to it was simply a mistake of law. But an estoppel *in pais* does not arise out of a mistake. It can arise only out of such proof as would be sufficient to maintain an action for deceit or false representation. (*Real Estate Co. v. Balch*, 45 N. Y. 529.)

"In order to constitute an equitable estoppel with respect to the title of property it must appear that the party to be estopped has made admissions or declarations, or done acts, *with the intention of deceiving* the other party with regard to the title, or with such carelessness, or culpable negligence, as to amount to a constructive fraud; and that at the time of making the admissions or declarations, or doing the act, he was apprised of the true state of his own title, and that the other party was

not only destitute of all knowledge of the true state of the title, but also of all convenient or ready means of acquiring such knowledge." (*Davis v. Davis*, 26 Cal. 23.)

None of these elements are to be found in this case. The simple facts are that the defendant Fannie obtained a decree of divorce from her husband, which she believed, in common with her father and the plaintiff and his attorneys, was valid; that upon that belief she resumed her maiden name and signed it, in good faith, to all the papers in the transactions in question. It is not found, nor is it claimed, that she represented herself as an unmarried woman, or signed her maiden name to the papers knowingly and intentionally, or fraudulently. Her representation and signatures were simply mistakes by her and by all concerned, the results of which she could not ratify by instruments in writing which were also void. (§§ 2310, 2312, 2314, Civ. Code.) But if her acts had been wrong in the abstract, or if she had acted in bad faith, the wrong could not make her contract good by way of estoppel. "We do not see," says the Supreme Court of Pennsylvania, in *Keen v. Coleman*, 39 Pa. St. 302, "how there can be an estoppel involved in the very acts to which the incapacity relates that can take away the incapacity. If a legal incapacity can be removed by a fraudulent representation of capacity, then the legal incapacity would have only a moral force, which is absurd." (See also *Wilson S. M. Co. v. Fuller*, 60 How. Pr. 480; *Hoffman v. Hoffman*, 46 N. Y. 30; *Kerr v. Kerr*, 41 N. Y. 272; *Cheever v. Wilson*, 9 Wall. 108; *Cox v. Cox*, 19 Ohio St. 502; *Sewall v. Sewall*, 122 Mass. 156; *Hood v. The State*, 56 Ind. 263; *People v. Dawell*, 25 Mich. 247; *Litowich v. Litowich*, 19 Kan. 451; *Van Fossen v. The State*, 37 Ohio St. 320; *Hinds v. Hinds*, 1 Iowa, 36.)

The cases of *Patterson v. Lawrence*, 90 Ill. 174, and *Richerson v. Simmons*, 47 Mo. 20, referred to in the prevailing opinion have no application, in my judgment, to the case in hand. The first was an action founded upon an actual fraud, and the second upon a special contract by the trustees of a married woman, acting under a deed of trust. Neither of them involved the question of the disability or capacity of a married woman to contract in the face of a statute which established the mode of contracting.

THORNTON, J.—I dissent. I see no element of estoppel in this case. The plaintiff had knowledge of all the facts, or ready and accessible means of knowledge, which is always held to be equivalent to knowledge. The plaintiff was not deceived, and without some element of fraud or deceit there can be no estoppel. (*Davis v. Davis*, 26 Cal. 23, where the Supreme Court of this State has spoken in unmistakable terms.)

The decree of divorce rendered by the Probate Court of Utah is void. That court had no jurisdiction of the subject-matter. (*Cast v. Cast*, 1 Utah, 122; *Ferris v. Higley*, 20 Wall. 375.) This decree was not confirmed by the act of Congress of June 23, 1878. I do not think it came within the terms of the act, and if it did Congress had no power to confirm a void decree. (See Cooley's Principles of Constitutional Law, 325.)

Petition for a rehearing denied.

[In Bank. — February 13, 1883.]

WILLIAM HAYES, RESPONDENT, v. JOHN H. CAMPBELL, APPELLANT.

PRINCIPAL AND AGENT — COMMISSION MERCHANTS — CARRIAGE — LIEN — PAYMENT — TENDER — REPLEVIN. — A carrier of goods received from a firm of commission merchants in San Francisco certain wheat belonging to the plaintiff for transportation to Europe. The wheat was received under a contract with the firm in their own name, but in the course of a business which the carrier knew or had reason to believe was conducted by them merely as agents. The plaintiff had consigned the wheat to the firm with special instructions as to its transportation, and in delivering the same to the carrier under the contract referred to, they exceeded their authority. The firm failed, and on inquiry subsequently made in regard to the wheat, the plaintiff ascertained the terms and conditions of the contract with the carrier, and thereupon demanded the wheat, which the carrier refused to deliver, repudiating the plaintiff as the owner, and claiming a lien upon the wheat for charges arising under the contract. As to a large portion of these charges, the firm had no authority to bind the plaintiff, and no payment or tender was made by him. In an action of replevin to recover the wheat, held, that the carrier was put upon inquiry as to the agency and the authority of the firm, that the plaintiff was not bound by the contract, and that no payment or tender was required before commencing the action.

FINDING — SUFFICIENCY OF THE EVIDENCE. — The action was tried by the court without a jury, and written findings were filed. On motion for a new trial it was objected that some of the findings were not justified by the evidence. Held, that the evidence was sufficient, and that the objection could not be sustained.

APPEAL from a judgment of the Superior Court of the county of Sacramento, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Milton Andros, and Charles Page, for Appellant.

The defendant had no knowledge of the actual ownership of the wheat, and as the agents of the plaintiff were general shipping and commission merchants, he was bound by the contract, although his instructions may not have been followed. (Civ. Code, § 2369; *Green v. Campbell*, 52 Cal. 586; *Hayes v. Campbell*, 55 Cal. 421; *Waring v. Mason*, 18 Wend. 434; *Lobdell v. Baker*, 1 Met. 193; *Munn v. Commission Co.* 15 Johns. 44; *Bank v. Astor*, 11 Wend. 87; *Wright v. Solomon*, 19 Cal. 76.)

The defendant had a lien on the wheat for freight, dead freight, and demurrage. The action was brought without any payment or tender by the plaintiff on account of the lien, and there was no waiver of a tender on the part of the defendant.

The mere assertion, unaccompanied by any other act, of a lien greater in amount than the lienor is entitled to, will not obviate the necessity of a tender, for it may be that the right amount would be accepted.

A legal tender is only excused in cases in which it clearly appears that it would be useless to make a tender, or that making tender would be a nugatory act. (*Farnsworth v. Howard*, 1 Cold. 215; *Stone v. Sprague*, 20 Barb. 509; *Bellinger v. Kitts*, 6 Barb. 281; *Holmes v. Holmes*, 12 Barb. 137, 146; *Hazard v. Loring*, 10 Cush. 267; *Hoyt v. Sprague*, 61 Barb. 506.)

The party claiming a waiver must be ready and willing to produce and pay the money, and must be prevented by the creditor declaring he will not receive it. In such case actual production is dispensed with. (*Farnsworth v. Howard*, *ubi sup.*; *Lacy v. Wilson*, 24 Mich. 479; *Dorsey v. Barbee*, Litt. Sel. Cas. 204; *Terrell v. Walker*, 65 N. C. 91; 2 Greenl. on Ev. § 603; 2 Pars. on Cont. 643.)

J. H. McKune, and J. C. Ball, for Respondent.

Where a party having knowledge of such facts as would lead an honest man using ordinary caution to make further inquiries, does not make, but on the contrary, studiously avoids making such inquiries, he must be taken to have notice of those facts which, if he had used ordinary diligence, he would readily have ascertained. (Wade on the Law of Notice, §§ 10, 11; *Whitbread v. Jordan*, 1 Younge & C. 305; *Hankinson v. Barbour*, 29 Ill. 80; *Lewis v. Bradford*, 10 Watts, 67; *Williamson v. Brown*, 15 N. Y. 354; *Fink v. Potter*, 39 N. Y. 70; Civ. Code, § 19; *Bank v. Delano*, 4 N. Y. 326.)

Where one has the property of another, with the right to retain it for the satisfaction of a lien, if he demands more than he is entitled to he thereby waives his lien, and without tender of the money due, the owner may recover possession of the property by proper action. (*Kerford v. Mondel*, 28 Law J. Ex. 303; *The Norway*, Browning & Lushington's Reports, pp. 377, 404; *Allen v. Smith*, 12 Conn. B. N. S. 638; 3d Bouvier's Inst. § 3525; *Kennet v. Robinson*, 2 Marsh. J. J. 84.)

MYRIOK, J.—This case was in this court on a former appeal when a new trial was ordered. The decision is reported in 55 Cal. p. 421. A new trial was had, and judgment went for plaintiff. From that judgment, and from the order denying motion for new trial, defendant has appealed. The facts as now presented are in some respects different from those presented on the former appeal.

The transcript shows that the findings as to the following facts were agreed to by the parties:—

Plaintiff was the owner of the wheat in controversy. He shipped the wheat October 18, 1874, by rail from Woodland, Yolo County, consigned generally to E. E. Morgans' Sons, care of Starr Bros. & Campbell, at Vallejo, to be by Morgans' Sons shipped to Europe, and there sold by Morgans' Sons for the account of plaintiff. The charges and cost of transportation to Europe were to be at the rate of £3, 17s, 6d per ton, to be paid by plaintiff. There were no marks on the wheat to indicate either the ownership or destination. E. E. Morgans' Sons were general shipping and commission merchants doing business at the city and county of San Francisco. In 1872-73 they had

been largely engaged in purchasing and selling wheat in California, and forwarding the same to Europe for sale. In 1873 and 1874 they were largely engaged in chartering vessels to carry wheat from ports in California to Europe to be sold by them, but were not buying, selling, or shipping their own wheat. In March, 1874, Morgans' Sons made and entered into a charter party with the owner of the British ship *Charles Murdoch*, by which they chartered the carrying capacity of the vessel at the rate of £4, 7s, 6d per ton. The vessel was to employ stevedores, and the cargo was to be stowed under the captain's supervision and direction. The defendant Campbell was master and part owner of the ship. Pursuant to the charter party the ship proceeded to Vallejo to receive cargo, and at that place, October 18, 1874, the wheat of plaintiff was placed on board the vessel by E. E. Morgans' Sons in their own name, and received by the master under the charter party. On the day following, October 19th, Morgans' Sons became insolvent, and broke the terms of the charter party by refusing to proceed with the loading of the ship; and the ship was not loaded by them other than by placing on board the wheat of plaintiff and others, amounting in all to about two hundred and fifty tons, being less than half a cargo. Prior to the commencement of this action plaintiff demanded from defendant Campbell the possession of his wheat, which was refused, Campbell claiming a lien under his agreement with Morgans' Sons. The defendant incurred no expense in relation to this wheat, and the charter party had no relation to it. The taking on board and discharging was done by stevedores paid by plaintiff, and Morgans' Sons never pretended or represented to defendant or any one that this wheat belonged to them.

In addition to the findings agreed to the court found, among other facts,—

That in conducting their business Morgans' Sons, as charterers, had the *Charles Murdoch* alongside the wharf at Vallejo as a general ship, and invited and solicited cargo from separate owners of wheat, and that plaintiff sent forward his wheat without any combination or agreement with other shippers; that immediately after the failure of E. E. Morgans' Sons the plaintiff sent his agent, L. D. Stevens, to Vallejo, to ascertain the status of his

wheat, and to take measures for its recovery. And the said Stevens, as such agent, had several interviews with the defendant between the 20th and 29th of October, 1874, and therein demanded of the defendant that he surrender to plaintiff the possession of said wheat, and offered to allow the defendant to carry forward said wheat for him to Europe on the same terms and for the same freight money as was stipulated in said charter party; that is to say, the plaintiff offered to pay the defendant £4, 7s, 6d, per ton to carry his said wheat to Europe for him, and the defendant then and there refused to carry forward his wheat for plaintiff at all, and claimed and insisted that the wheat was the property of said E. E. Morgans' Sons; that he did not know or recognize the plaintiff as owner, or interested in said wheat; that the said E. E. Morgans' Sons had broken their said contract with him, and failed to furnish cargo for his said ship as stipulated in said charter party; that there were large sums due him as owner of said ship from E. E. Morgans' Sons for damages in the nature of demurrage, as well as for the freight that might become due for the actual carriage of a cargo to Europe, and the said defendant then and there demanded of the plaintiff that he should, as a condition precedent to the delivery of said wheat to plaintiff, pay,—

1. All damages in the nature of dead freight sustained by the owners of said ship by the failure of said E. E. Morgans' Sons to furnish full cargo for said ship as provided in said charter party.

2. All damages in the nature of demurrage sustained by said owners of said ship by the detention of said ship beyond the lay days provided for in said charter.

3. The freight of all the wheat actually laden on board said ship, as well the wheat of other shippers as the wheat of this plaintiff, and the defendant declined and wholly refused to deliver the wheat of the plaintiff to him on any other terms, and refused to carry the said wheat forward to Europe for him at the rate stipulated in said charter party, and refused to treat plaintiff as the owner of said wheat on any terms.

The court also found that defendant during all the times his ship was awaiting cargo at San Francisco was advised, had notice of, and knew the following facts:—

1. That E. E. Morgans' Sons were, in the matter of chartering and freighting ships during the shipping season of 1874, engaged in chartering ships and sending forward wheat and flour as agents of the grangers (farmers) of California, and that they were not engaged in buying, selling, or shipping such or any goods on their own account.

2. That E. E. Morgans' Sons had no warehouse for storage of wheat in said State.

3. That they had no place of business other than their broker's office in San Francisco.

4. That they depended for cargo on wheat sent forward from time to time from the said farmers as principals for shipment on board their chartered vessels.

3. That E. E. Morgans' Sons did not own or claim to deal with said or any wheat as their own, and such facts were sufficient to put a reasonable man on inquiry as to the actual ownership of said wheat, and said defendant did not deal with said Morgans' Sons as the ostensible owners of said wheat with the belief that said E. E. Morgans' Sons were such owners, but the facts they did know were sufficient to put defendant on inquiry as to the true ownership of said wheat, and by inquiry of said E. E. Morgans' Sons he could have readily ascertained the names of the true owners of said wheat.

Defendant on his motion for new trial objected that these findings were not sustained by the evidence; he also alleged error in the ordering of judgment, averring that defendant had a lien on the wheat which was not extinguished by payment or tender before demand for possession.

We have examined the testimony, and think there is sufficient to sustain the findings objected to. In some respects the testimony is not positive, nor as clear as might be expected where persons are carrying on business as important as the business referred to; yet we find sufficient testimony to justify the findings. Let us take the agreed facts that in 1873 and 1874 Morgans' Sons were engaged in chartering vessels to carry wheat from California to Europe, but were not buying, selling, or shipping their own wheat; that the charter party had no relation to this wheat; that by the terms of the charter party the owners of the vessel were to pay the stevedores for loading, but

that in fact plaintiff paid them; that Morgans' Sons never pretended or represented to any one that this wheat belonged to them; together with the testimony of Wolcott, a partner in the firm of E. E. Morgans' Sons, who told the defendant when he applied for cargo that he must wait his turn; of Chapman, agent for the defendant: "I understood that Morgans' Sons in 1874 were shippers of wheat, and agents for the grangers; the grangers were the farmers and wheat-growers of the country generally"; and it seems to us there is *some* evidence, though perhaps slight, from which the court was justified in finding that the defendant had sufficient notice to put him on inquiry. It seems to us that the main object of the master of the vessel was to obtain a cargo at the high rate named in the charter party, and then force payment, irrespective of who might be the owner, and of their interests or rights. The object of Morgans' Sons in agreeing to pay to the ship owner ten shillings per ton more than he was to receive from the grower is not apparent; however, with that we have nothing to do in this controversy.

If, as found, Morgans' Sons were carrying on a commission business, and in that business chartered the ship, and in receiving plaintiff's wheat and contracting for its carriage acted as his agents, defendant was put upon inquiry as to the extent of their powers. Such inquiry, if pursued, would have led to the information that their powers extended to contracting for carriage at the rate of £3, 17s, 6d per ton, and that they had no power to make a contract which would subject the wheat to charge for dead freight or demurrage. Defendant refused to recognize any right or claim of plaintiff to the wheat. He also refused to deliver it until his requirements as to dead freight and demurrage were complied with. By such refusal he waived the prepayment or tender by the plaintiff of the amount of freight.

It may be added, it does not appear that at the time of plaintiff's demand any dead freight or demurrage had accrued, even if there had been authority to subject the wheat thereto; but defendant claimed the right to hold it for any possible future accruing loss.

Judgment and order affirmed.

MORRISON, C. J., ROSS, J., and SHARPSTEIN, J., concurred.

McKEE, J., dissented.

Petition for a rehearing denied.

[In Bank. — February 13, 1883.]

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, APPELLANT, v. L. T. STROUP, RESPONDENT.

EJECTMENT — AGREEMENT TO CONVEY — FINDING — DEED.— The plaintiff claimed title to the land in controversy under a conveyance from one Bugbey, which, though absolute on its face, was intended as a mortgage, and had been foreclosed against Bugbey. This conveyance was recorded at the time of its execution, but prior thereto Bugbey had made an agreement in writing with the defendant to convey the land to him. The agreement was not recorded, but the defendant had possession of the land when the agreement was made, and remained in possession continuously thereafter. Subsequent to the conveyance to the plaintiff, Bugbey conveyed the land to the defendant in pursuance of the agreement. The court below found that the plaintiff never was the owner, or entitled to the possession of any part of the land. *Held*, that the fact of notice to the plaintiff of the agreement was included in this finding, and that the deed made by Bugbey to the defendant related back to the agreement, and vested the title in the defendant as against the plaintiff.

APPEAL from a judgment of the late District Court of the county of El Dorado, and from an order refusing a new trial.

The facts are stated in the opinion of MR. JUSTICE McKEE.

B. C. Clark, and J. N. Young, for Appellant.

A. P. Catlin, for Respondent.

McKEE, J.— This was an action in ejectment. The demanded premises are a portion of the southwest quarter of section sixteen, township ten, range eight east, of Mount Diablo meridian, for which and other parcels of real property the State of California, on the 22d of April, 1867, issued a patent to B. N. Bugbey. For several years before this patent was issued Bugbey and the defendant Stroup, adversely to each other, occupied separate portions of the quarter section, a picket fence constituting the division line between their claims. And, being in

possession, on the 24th of July, 1866, they made and entered into the following agreement in writing:—

"Whereas the said B. N. Bugbey seeks to obtain a title from the State of California to that tract of land described as follows, to wit: The southwest quarter of section sixteen, township ten, range eight east, Mount Diablo meridan; now then, the said B. N. Bugbey undertakes and agrees, as soon as he shall acquire a title to said land from the State, to make and execute to said Stroup a good and sufficient deed to all of that portion of said quarter section lying on the north side of a certain picket fence, now used and known as a line fence between the said Bugbey and Stroup on the northerly side of an exact range of said fence from the west line or west boundary of said quarter section to the east line or boundary of said quarter section, at the same price per acre and on the same terms that said Bugbey shall have paid to the State of California for said lands; and the said L. T. Stroup covenants and agrees that he will, in like manner, convey to said Bugbey all of that portion of the northwest quarter of said section sixteen being south or on the southerly side of said fence and range above described, on the same terms as provided above touching the conveyance of the said Bugbey; and it is hereby further agreed that the refusal of one to comply with this agreement that does [not] release the other; but each may be proceeded against, and compelled by law to make good this contract."

The agreement was not recorded, and on the 8th of June, 1870, Bugbey conveyed the land to the plaintiff by a deed, absolute on its face, which was intended as a mortgage to secure payment of a sum of money which Bugbey owed to the plaintiff. The deed was recorded on the day of its execution, and subsequently, the plaintiff by foreclosure proceedings, to which the defendant was not made a party, obtained a judgment and order of sale against Bugbey, under which the land was sold as a portion of the mortgaged premises to the plaintiff, to whom, on November 14, 1877, the sheriff conveyed it by deed, which purported to convey all the interest which Bugbey had in the land at the date of the judgment and decree of foreclosure. But on the 30th of May, 1874, Bugbey, in fulfillment of his agreement of 1866, had conveyed the land to the defendant. The deed was

recorded on the day of its execution. From the date of the agreement of which the deed was the fulfillment the defendant has continuously claimed the land as his own, adversely to Bugbey and all others. He has, also, during all the years of his claim of title before and after the date of the agreement with Bugbey occupied the land openly and notoriously by cultivation and improvements, having upon it a residence, barn, and stable, and having all of it, except what is covered by his improvements, planted in vines. He has thus been all the time in the adverse possession of the land.

The possession of the defendant being, in its inception, adverse to Bugbey, and continued until the date of the agreement of 1866, the defendant lost none of his rights by the agreement. Bugbey, according to the terms of the agreement, undertook to act for the defendant either as agent or trustee in obtaining for him from the State title to the land, of which he was in adverse possession, at the price per acre which the State asked for it from parties in possession. In either case Bugbey, when he obtained the State patent in 1867, held it, so far as it covered the defendant's land, for the benefit of the defendant. In holding it he was simply a trustee of the bare legal title, and was bound to convey it to the defendant upon the payment of the price which was stipulated to be paid. He himself could gain no title by failing to convey, nor could he transfer any title by mortgaging or conveying it to the plaintiff as against the defendant, who had received nothing, not even possession from him. Defendant was in no sense the trustee of Bugbey as to the possession of the land; he claimed and held it of his own right, for his own benefit, subject to no right of Bugbey. The only right which the latter had was a right which arose out of the agreement to recover the money which he had advanced for defendant in procuring the patent.

Being in the exclusive possession of the land under an independent right, that possession was sufficient to put the plaintiff upon inquiry as to the right under which the possession was held. (*Dutton v. Warschauer*, 21 Cal. 611; *Moss v. Atkinson*, 44 Cal. 1; *Thompson v. Pioche*, 44 Cal. 508.) "That the actual possession of land," says Mr. Justice Crockett, "with the exercise of the usual acts of ownership and dominion over it, operate

in law as constructive notice to all the world of the claim of title under which the possessor holds is too well settled to merit discussion." (*Talbert v. Singleton*, 42 Cal. 395.) Presumptively, therefore, the plaintiff knew when it took its mortgage from Bugbey of the adverse possession and right of the defendant; and when Bugbey in 1874, in performance of his agreement to convey the title which he had obtained for the defendant in 1867, conveyed the title to the defendant, the deed of conveyance related back to the date of the agreement, and transferred the legal estate to the defendant as of the date at which he himself had obtained it, and the continuous adverse possession of the defendant thereafter, under his claim of title from the date of the patent to Bugbey, vested the defendant with absolute title to the land, under sections 322, 323, 326, of the Code of Civil Procedure, long before the commencement of the action. (*Arrington v. Liscom*, 34 Cal. 365; *Morris v. De Celis*, 51 Cal. 50; *Cannon v. Stockmon*, 36 Cal. 535; *McManus v. O'Sullivan*, 48 Cal. 7.)

But it is contended that the defendant took a lease of the land from the plaintiff, and that the taking of the lease estops him from denying the title of the plaintiff as his landlord.

The record shows as fact that, on the 21st of April, 1877, ten years after the date of the patent, plaintiff leased the land to the defendant for the term of eight months at the nominal rent of one dollar with the privilege of buying the land from the plaintiff at the expiration of the lease. The defendant testified at the trial that he did not know how he came to execute the lease; that he signed it at the solicitation of some agent of the plaintiff, rather through fear and misapprehension. "I did not," he says, "understand the thing at all. I did not understand my rights."

Being the owner and in possession of the land at the date of the lease, without ever having at any time received the possession from his landlord or his grantor, and having accepted the lease through misapprehension of his rights, the defendant was not estopped by the lease. (*Franklin v. Merida*, 35 Cal. 558; *Tewksbury v. Magraff*, 33 Cal. 245.)

It is also urged that the defendant is estopped because he offered to buy the title of the plaintiff.

The offer, if any was made at all, was made in 1877, many

years after the title of the defendant had become absolute under the Statute of Limitations. Such an offer when made by one in adverse possession before the Statute of Limitations had run in his favor is an acknowledgment of the title of the true owner, which will interrupt the running of the statute. (*Abbey Homestead v. Willard*, 48 Cal. 615; *Lovell v. Frost*, 44 Cal. 47; *McCracken v. San Francisco*, 16 Cal. 591.) But when made after the statute has run, and title under it has become absolute, it does not affect the title, nor estop the person making the offer from maintaining his title in any litigation concerning it in which he may be involved. The defendant had the same right as any other owner of property to fortify the title by which he held possession by the purchase of any other title which in his judgment might protect him in the quiet enjoyment of his own against the annoyance or expense of litigation.

We find no errors in the record.

Judgment and order affirmed.

MORRISON, C. J., ROSS, J., MYRICK, J., THORNTON, J., MCKINSTY, J., and SHARPSTEIN, J., concurring specially.—The general finding in favor of the defendant includes a finding that the plaintiff had notice of the agreement between Bugbey and defendant of date July 24, 1866. The deed subsequently made by Bugbey to defendant related back to the agreement, and vested the title to the property in question in defendant as against the plaintiff. For these reasons we concur in the judgment.

[Department Two. — February 15, 1883.]

JOHN D. BENNETT, APPELLANT, v. N. PARDINI ET AL.,
RESPONDENTS.

INJUNCTION — DISSOLUTION — ACTION ON UNDERTAKING.—One Grondona brought an injunction suit against John D. Bennett, the plaintiff herein. An undertaking was given, and a preliminary injunction issued as prayed for in the complaint. Bennett moved to dissolve the injunction on the ground that the complaint did not state facts sufficient to constitute a cause of action, and the motion was granted. He also demurred to the complaint on the same ground, and the demurrer was sustained, and notice thereof duly given. Twenty-one

days after the service of the notice, the complaint not having been amended, and nothing further done in the case, an action was commenced on the undertaking. The defendants objected that the action was prematurely brought. *Held*, that the proceedings in the injunction suit amounted to a final determination that Grondona was not entitled to the injunction, and that the objection made by the defendants was untenable.

FINDINGS — JUDGMENT. — If findings are not waived it is error to enter judgment without them.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

Pillsbury & Titus, for Appellant.

Aug. D. Splivalo, for Respondents.

PER CURIAM.— This is an action upon an undertaking on injunction.

It was contended in the court below that the action was prematurely brought. That court sustained the contention, and gave judgment for the defendants, who were sureties on the undertaking.

The injunction order, upon the granting of which the undertaking sued on was given, was made in the case of *Grondona v. Bennett*, plaintiff here, and the writ of injunction was issued thereon on the 3d day of November, 1879. On motion of Bennett on the 12th of December, 1879, the injunction was dissolved. It appears that the motion to dissolve the injunction was made on the complaint alone, and the order granting this motion was based on the sole ground that the complaint did not state facts sufficient to constitute a cause of action. A demurrer to the complaint on the same ground was, on the 14th of January, 1880, sustained, and the plaintiff had leave to amend within ten days. Notice of the ruling on the demurrer was served on Grondona on the same day. Grondona did not amend, and nothing further has ever been done in the cause.

This action was commenced on the 4th of February, 1880, twenty-one days after the service of the notice above mentioned.

We think the foregoing facts show that it was finally decided that Grondona was not entitled to the injunction on which the undertaking was given. To hold the contrary because a judgment was not entered upon the failure of Grondona to amend,

would be adhering to form and disregarding substance. We think that this action was not prematurely brought.

No findings were filed or waived in this case, and this was error.

Judgment and order reversed, and cause remanded.
Hearing in Bank denied.

[Department Two. — February 15, 1883.]

**J. H. BARTLETT ET AL., RESPONDENTS, v. THE CITY
AND COUNTY OF SAN FRANCISCO, APPELLANT.**

MOB — DESTRUCTION OF PROPERTY — EVIDENCE. — In an action to recover damages for the destruction of property alleged to have been burned by a mob, evidence was given on the part of the plaintiffs as to the disturbed condition of the city of San Francisco at and about the time of the fire, and particularly the excitement existing in regard to the Chinese, riotous meetings, and demonstrations on the subject accompanied with acts of violence, the inability of the city authorities to maintain the laws and enforce order, the formation of a committee of safety, and the means adopted to protect property, and preserve the public peace. This evidence was admitted against the objection of the defendant. *Held*, that the evidence was relevant, and that the objection was properly overruled.

INSTRUCTION — REFUSAL TO REPEAT. — It is not error to refuse to repeat an instruction already substantially given in clear and distinct terms.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

William Craig, city and county attorney, for Appellant.

Gray & Haven, and *Chickering & Thomas*, for Respondents.

PER CURIAM. — There are many exceptions to the testimony in this case, reserved by the defendant. They were fully argued, and we have since considered them. We think the testimony related to the condition and circumstances of the city at or about the time of the fire by which the property was destroyed, to recover damages for which this action was brought, and that such testimony was relevant.

It was argued that the evidence was insufficient to sustain the verdict. We are of the opinion that this contention is untenable.

An exception was reserved to the refusal of the court to give

an instruction asked by the defendant. On an examination of the charge of the court we are satisfied that the instruction was substantially given in clear and distinct terms. It was not error to refuse to repeat it.

We find no error in the record, and the judgment and order are affirmed.

[Department One. — February 15, 1883.]

**NORTHERN INSURANCE COMPANY, RESPONDENT, v.
EDWARD E. POTTER, APPELLANT.**

PARTNERS — JOINT LIABILITY — RELEASE. — Partners are jointly liable for the debts of the partnership, but one of several joint debtors is not discharged from liability by a release to the others; and where it is expressly agreed that the release shall not operate in his favor, the liability continues independent of section 1543 of the Civil Code.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts sufficiently appear in the opinion of the court.

For & Kellogg, for Appellant.

Lloyd Baldwin, for Respondent.

McKINSTRY, J.— The defendant, Julius Jacobs, and George Easton, were co-partners, doing business as insurance agents, and, as such, were agents of plaintiff. In March, 1879, an account was stated between plaintiff and defendant, Jacobs and Easton, by which a balance of \$2,359.02 was found due from the three to plaintiff.

In September, 1879, Jacobs and Easton paid to plaintiff on account of such balance \$1,800. At the time of the payment plaintiff released Jacobs and Easton from all further claim or liability with respect to the indebtedness of them and defendant, but it was particularly specified and agreed by and between plaintiff and Jacobs and Easton that the release should not operate, or be construed to release or discharge the defendant.

This action is to recover of defendant the part of the said balance \$2,359.02 unpaid by Jacobs and Easton. The partners

were joint debtors. (Civ. Code, § 2442.) Section 1543 of the same Code provides: "A release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from him." Independent of the Code the release of Jacobs and Easton would not have discharged the defendant, because it was expressly provided by the parties to it that it should not have that effect.

In *Solly v. Forbes*, cited and approved by Wilde, C. J., in *Thompson v. Lack*, 3 Conn. B. 551, it was authoritatively decided that a release of a joint debtor or surety might be qualified and prevented from operating a release of a co-debtor or surety. And Patterson, J. (*North v. Wakefield*, 13 Q. B. 541), said: "Now the deed contained an express clause that the release to Goddard should not operate to discharge any one jointly or otherwise liable to plaintiff for the same debts. It is plain, therefore, that it did not release the defendant. The reason why a release to one debtor releases all jointly liable is, unless it be held to do so, the co-debtor after paying the debt might sue him who was released for contribution, and so in effect he would not be released; but that reason does not apply when the debtor released agrees to such a qualification of the release as will leave him liable to the rights of the co-debtor."

As the debtors released in the case before us agreed to the continuation of the right of contribution on the part of the defendant, the latter was not discharged.

Section 1543 of the Civil Code seems to give the same effect to a release in general terms as was given by the English courts to the qualified release, expressly providing that the joint debtors not mentioned in the release should not be discharged. The section provides in effect that the joint debtor who accepts a release shall be held to have consented that the liability of his joint debtor should be continued together with his own liability to contribution. It is enough for the present case, however, to decide that defendant was not discharged by the release of Jacobs and Easton.

Judgment affirmed.

ROSS, J., and McKEE, J., concurred.

[Department Two. — February 15, 1883.]

M. M. ODELL ET AL., RESPONDENTS, v. HANNAH WILSON ET AL., SAMUEL KAY, APPELLANT.

MORTGAGE FORECLOSURE — TAX TITLE — JUDGMENT. — In an action to foreclose a mortgage, the mortgagors and one Samuel Kay were made defendants. The complaint alleged that Kay had or claimed some interest in the premises subsequent and subject to the mortgage. Kay answered denying that the interest claimed by him was subsequent or subject to the mortgage. It appeared from the evidence that his claim was founded upon a deed executed on a sale for taxes made after the mortgage was given. The court found that the claim was invalid, that Kay had no interest in the premises, and that the allegations of the complaint were true. A judgment was rendered accordingly. *Held*, that the judgment was erroneous, that the title claimed by Kay was adverse, and not subject to the mortgage; that its validity could not be determined in such an action, and that the judgment should have been without prejudice to the rights of Kay under the tax deed.

ID. — CROSS-COMPLAINT TO QUIET TITLE. — In addition to the answer, Kay filed a cross-complaint against the plaintiffs, alleging that he was the owner of the premises, and praying that his title be quieted. *Held*, that the cross-complaint was not a proper proceeding, and should have been dismissed.

APPEAL from a judgment of the Superior Court of the county of Sacramento, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Dunlap & Van Fleet, for Appellant.

L. S. Taylor, for Respondents.

THORNTON, J.— This action was brought to foreclose a mortgage on certain lots in the town of Folsom. One Samuel Kay was made a party defendant, and it was alleged that he had or claimed to have some interest or claim upon the mortgaged premises, which was subsequent and subject to the lien of the mortgage. This Kay denied.

In the view we take of the case the other pleadings need not be noticed.

The court found that the claim of Kay was invalid, that he had no interest in the premises, and that all the allegations of his answer were untrue. It further found that all the allegations of the complaint were true.

In finding the allegations of the complaint to be true the court did not find according to the evidence; for the evidence shows that the title of Kay was one arising upon a sale for taxes

for which he held a tax deed, executed by the sheriff as tax collector, and this was not a title subject to the mortgage, but adverse to the title of mortgagors and those claiming under them. Any decree made against Kay should have been without prejudice to his claim of title under the tax deed. (*San Francisco v. Lawton*, 18 Cal. 465; 21 Cal. 590; *Elias v. Verdugo*, 27 Cal. 425; *Hibernia S. & L. Society v. Ordway*, 38 Cal. 681.)

The cross-complaint of Kay should have been dismissed, and a decree of foreclosure should have been rendered as above indicated. The issues arising on the cross-complaint and answer thereto should be determined in another action. We see no case made for a cross-complaint. (*Moyle v. Porter*, 51 Cal. 639.) Further, the proper parties are not made to determine the issues arising on it. The mortgagors holding the legal title should have been made defendants. The only parties made defendants were the plaintiffs, who were the mortgagees.

The judgment and order are reversed, and the cause remanded for proceedings in accordance with this opinion.

SHARPSTEIN, J., and MYRICK, J., concurred.

[Department Two. — February 15, 1883.]

LA SOCIETE FRANCAISE D'EPARGNES ET DE
PREVOYANCE MUTUELLE, RESPONDENT, v. MAT-
TIE A. BEARDSLEE ET AL., J. L. L. F. WARREN,
APPELLANT.

JUDGMENT BY CONSENT — APPEAL. — The Supreme Court will not entertain an appeal from a judgment entered by consent of the party prosecuting the appeal.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing to modify the judgment.

The action was unlawful detainer. The defendant Beardslee was a tenant of the plaintiff, and sublet to defendants McCarthy and Warren. Moses G. Cobb as attorney for all the defendants entered into a stipulation that judgment be entered against them

for the amount of the rent due, and for restitution of the premises, in consideration of which plaintiff granted a stay of proceedings, and waived its right to have the damages trebled.

After the entry of the judgment the defendant Warren made application to the court to modify the judgment so as to relieve him from liability, on the ground that he was only a sub-tenant, and was made a party in order that he as sub-tenant might redeem the term of Beardslee. The court denied the application, and subsequently Warren again applied to the court for a modification of the judgment as to him, on the ground that Moses G. Cobb had no authority to appear for him and make the stipulation referred to. The motion was supported by the affidavit of Warren, Cobb, and Moore, the clerk of Cobb. The court denied the motion.

Moses G. Cobb, for Appellant.

Stanly, Stoney & Hayes, for Respondent.

PER CURIAM.—There are two appeals in this cause prosecuted by defendant Warren; one from the judgment, and one from an order made after judgment, denying Warren's motion to modify the same.

The judgment was taken and entered against Warren by his consent. This disposes of the appeal from the judgment. We will not hear an appeal from a judgment entered by the consent of the party prosecuting the appeal. The judgment must be affirmed.

As to the appeal from the order denying the motion of Warren above stated, we are of opinion from the papers used on the motion that the court was justified in denying the motion aforesaid.

Judgment and order affirmed.

[Department Two. — February 15, 1883.]

WILLIAM P. LAMBERT, RESPONDENT, v. E. A. Mc-
CLOUD, APPELLANT.

REPLEVIN — CONTRACT OF SALE — FINDINGS. — The action was replevin to recover a horse in the possession of the defendant. The possession was acquired from one Coates, to whom the horse had been delivered by the plaintiff under a contract of sale subject to certain conditions to be performed before the title should pass. The case was tried by the court without a jury, and written findings were filed, on which a judgment was entered in favor of the plaintiff. On a review of the findings, held, that the facts found did not support the judgment.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Chickering & Thomas, for Appellant.

Dudley & Dudley, and *Van Ness & Moore*, for Respondent.

THORNTON, J.— This is an action of claim and delivery of a horse alleged to be of the value of seven hundred dollars. Judgment passed for plaintiff. Defendant moved for a new trial, which motion was denied, and defendant appeals from the judgment and the order denying the motion above mentioned.

The principal question arises on the decision of the court below, which, so far as necessary to be stated, is contained in the following findings of fact:

“ 1. That in the month of May, 1876, the plaintiff was the owner, and entitled to the immediate possession of the personal property described in the complaint filed in this action.

“ 2. That in the month of May, and while still the owner of said horse, and so in possession of the said horse, the said plaintiff agreed with one W. D. Coates to sell the said horse to said Coates upon the following terms and conditions, to wit:—

“ That the said Coates should purchase for the said plaintiff as much stock as one thousand dollars would carry upon a margin, to wit, the customary margin allowed in the office of the firm of Hunt & Coates, and should carry such stock for said plaintiff, at the risk of said W. D. Coates, until a profit was realized upon the same of one thousand dollars; and when said

profit was so realized, the said Coates should notify the said plaintiff, and that upon the receipt of said notice the said plaintiff should elect to draw down the said profit of one thousand dollars, or carry at his own risk the stock so purchased as aforesaid.

"3. That a bill of sale of said horse from the said plaintiff to said Coates was made and signed by the plaintiff, and was, by the consent and agreement of the said plaintiff and the said Coates, placed in the hands of one John L. Hunt, to be held by him in trust for both parties, until the said Coates should notify the said plaintiff of the realization of a profit of one thousand dollars upon the stock purchased as aforesaid, and that thereupon the said Hunt should deliver the said bill of sale of the said horse to the said Coates.

"4. That it was agreed and understood by and between said parties that the title to said horse should not vest in the said Coates until the delivery to him of the said bill of sale in the manner hereinbefore set forth.

"5. That upon the completion of the said contract, in the month of May, 1876, aforesaid, the said plaintiff, under the terms of said contract, delivered the said horse into the possession of the said Coates.

"6. That the firm of Hunt & Coates, composed of John L. Hunt and W. D. Coates, failed and became bankrupt in the month of January, A. D. 1878.

"7. That thereupon the said plaintiff demanded of said Coates the return of said horse, which demand the said Coates failed and refused to comply with.

"8. That subsequent to the making of the contract hereinbefore set forth, and prior to this action, the said Coates transferred the possession of the said horse to the defendant in this action.

"9. That the said W. D. Coates has not, at any time since the making of the contract hereinbefore set forth, notified said plaintiff of the realization of the profit of one thousand dollars, or given the said plaintiff any notice whatsoever in relation thereto; and that the stock purchased by said Coates has not realized a profit of the said amount since the day of its purchase by the said Coates."

The court held as conclusions of law from the foregoing facts that the sale to Coates was a conditional sale, and that the title of the property in dispute was not to pass to Coates until the performance of the conditions; that the conditions had not been performed, and no title passed to Coates or to defendant. Therefore plaintiff was entitled to judgment.

It is clear that the sale of the horse, as found, was a sale on credit or time; for the stock was to be bought at a future day, and the horse was to be delivered at once. This is the meaning of the findings. (See findings one to five, both inclusive.) On such a sale the right of property and right of possession vest in the purchaser (Coates), unless it is stipulated to the contrary. (*Bloxam v. Sanders*, 4 Barn. & C. 941; Benjamin on Sales, 3d Am. Ed. § 678.) In this case it was stipulated, and it is so found, that the right of property should not pass until Coates, the purchaser, should notify the plaintiff of the realization of the profit fixed by the contract upon the stock to be purchased by Coates. But it was not stipulated that Coates should not have the right of possession of the horse; and this right is sufficient to maintain the possession of the defendant claiming under Coates, unless such right has terminated. Coates having purchased the stock, as long as he carried it he was entitled to the possession. He was then complying with his contract, and was in no default. There is evidence that Coates purchased the stock in accordance with his agreement, and none to the contrary, and such seems to have been assumed as a fact in the ninth finding, though it is not expressly found. There is no finding that Coates was not carrying the stock purchased by him as above stated, and as long as he was carrying the stock, as we have seen, he was entitled to the possession. To put Coates in default he must have ceased to carry the stock, or it must appear that though he was carrying it, there was no probability that the profit of one thousand dollars would be realized upon it within a reasonable time. We cannot hold as matter of law or fact that he was not carrying the stock as agreed on. This, if true, should have been found. It is assumed by the court below as a fact that he purchased the stock as required by the agreement, and it does not appear but that he was doing all that was necessary to carry it. We cannot know that there was

any assessment to be paid on the shares purchased, or anything else to be done by Coates in order to carry the stock in the absence of a finding to that effect. It may be that there was no assessment to be paid, and that nothing was to be done in order to carry the stock; that all that was required was to hold it for a rise.

If it be true that Coates was and is carrying the stock, and there is no reasonable probability that the profit of one thousand dollars will be realized within a reasonable time, this must be made to appear to the court by a finding to that effect, or it cannot be noticed here. This court cannot judicially know that such is the fact. The court below should find it if it be so.

The finding that a firm of Hunt & Coates failed and became bankrupt in January, 1878, shows no breach of the contract on the part of Coates. Coates may still be solvent and able to comply, and actually comply with the contract. There is nothing strange in a firm becoming insolvent, and one of the partners remaining solvent.

Should it appear that Coates has abandoned all idea of carrying out the contract, the plaintiff would be entitled to recover.

It follows from the foregoing that the judgment and order must be reversed, and the cause remanded for a new trial, and it is so ordered.

MYRIOK, J., and SHARPSTEIN, J., concurred.

[In Bank. — February 15, 1883.]

THE PEOPLE, RESPONDENTS, v. JOSE DE LA COUR
SOTO, APPELLANT.

MURDER — INFORMATION. — An information for murder is sufficient if it charges the offense committed in the language of the statute defining it; and under such an information the defendant may be convicted of murder in any degree.

12. — INSTRUCTIONS — GOOD CHARACTER. — The court instructed the jury with reference to the evidence of good character that "such evidence is to be considered and applied by the jury in the case in this way: as a circumstance tending to throw some light upon the principal question involved. Did or did not the defendant fire this shot? Did or did not he commit this offense?"
Held, not error.

1D. — INSTRUCTIONS — DRUNKENNESS. — The court also instructed the jury that evidence of drunkenness of the defendant at the time of the alleged crime "can only be considered by the jury for the purpose of determining the degree of the crime." *Held*, not error.

APPEAL from a judgment of conviction, and from an order denying a new trial in the Superior Court of the county of Santa Clara. BELDEN, J.

The facts are stated in the opinion of the court.

L. Quint, for Appellant.

A. L. Hart, Attorney-General, for Respondents.

Ross, J.— The point chiefly argued for the defendant is that, under the information against him, he could not be legally convicted of murder of the first degree. The information is in the language of the statute defining murder, which is: "Murder is the unlawful killing of a human being with malice aforethought." (Pen. Code, § 187.) Murder, thus defined, includes murder in the first degree and murder in the second degree.

It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case included both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence.

The point is made for defendant that the charge of the court below is erroneous in that it did not define the crime of manslaughter, and instruct the jury that under the information defendant might be convicted of that crime. It is a sufficient answer to this to say that the record does not contain the evidence, and hence it does not appear that a case was made that called for or would have justified such an instruction.

It is contended that the charge of the court below in respect to the good character, of the defendant was erroneous, as also that in respect to the defendant's drunkenness. In neither respect do we think any substantial error was committed.

Judgment and order affirmed.

MCKINSTRY, J., THORNTON, J., MYRICK, J., SHARPSTEIN, J., and McKEE, J., concurred.

[In Bank.— February 16, 1883.]

THE PEOPLE, RESPONDENTS, v. JOHN WELSH,
APPELLANT.

EVIDENCE — EXAMINATION OF A CHILD — IRREGULARITY.— A child nine years of age was examined as a witness on the part of the prosecution. His testimony was taken without a preliminary examination as to his competency, but at the close of his testimony, and before he left the witness stand, the court examined him in the presence of the defendant, and the jury touching his competency, and found him to be competent. On a previous trial of the case the witness had been examined, and his competency established before he was permitted to testify. *Held*, that no error prejudicial to the defendant had been committed.

ID.— CONDUCT INDICATING A GUILTY INTENT.— Evidence was given at the trial of the escape, recapture, and conduct of the defendant immediately after his arrest. *Held*, that the evidence was admissible as indicating a guilty intent.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

Horace Hawes, for Appellant.

A. L. Hart, Attorney-General, for Respondents.

McKEE, J.— The defendant was twice tried for the offense of which he was ultimately convicted. The first trial resulted in a disagreement of the jury. On that trial a child of the age of nine years, after having been preliminarily examined as to his competency as a witness, was found to be competent and testified. On the second trial he was permitted, against the objection of the defendant, to testify without having been *then* examined as to his competency; but at the close of his testimony and before he had left the witness stand, the court, in the presence of the jury and the defendant, again examined him touching his competency, and found him to be competent, and to this no objection was made by defendant's counsel, nor did he move to reject the testimony of the witness on the ground of irregularity in his examination, or on the ground of incompetency.

While it is true that a defendant in a criminal case is entitled to have the question of the competency of a presumably incompetent witness heard and determined in his presence, and on his trial before the court and jury, yet the right of the defendant, in that regard, was not violated in this case. The examination of the witness as to his competency was twice had in the

presence of the defendant as prescribed by law. One was a preliminary examination, and the fact that the other was made at the close of the witness' testimony, was not, under the circumstances, prejudicial to the right of the defendant. There was, therefore, no substantial error in the admission of the testimony.

Nor did the court err in admitting the testimony of a witness to prove the conduct, flight, and recapture of the defendant immediately after his arrest.

It is the animus with which an act is done which constitutes its criminality. There must be a joint union of act and intention in every crime (§ 20, Pen. Code); and the intention, like the act, may be proved by direct or indirect evidence of the circumstances connected with the crime. Hence the conduct of a party before and after the principal fact in issue is admissible not as part of the *res gestæ*, but as a circumstance connected with the act indicating the guilty intent. (*People v. Strong*, 46 Cal. 302; *People v. Stanly*, 47 Cal. 114; *People v. Collins*, 48 Cal. 277; *People v. Wong Ah Ngow*, 54 Cal. 151; *Fox v. People*, 95 Ill. 71; *Cummins v. People*, 42 Mich. 142; *Matthews v. The State*, 9 Tex. App. 138.)

Judgment and order affirmed.

MORRISON, C. J., ROSS, J., MYRICK, J., and MCKINSTRY, J., concurred.

[In Bank.—February 16, 1882.]

THE PEOPLE, RESPONDENTS, v. WILLIAM JONES,
APPELLANT.

HOMICIDE — DRUNKENNESS.—The court charged the jury that insanity produced by intoxication will not destroy responsibility if the party, when sane and responsible, makes himself voluntarily intoxicated; and that drunkenness is no excuse for crime, but is a circumstance for the consideration of the jury in determining the degree of the crime. The evidence proved that the homicide was committed on Sunday about one o'clock, P. M., and that the defendant had bought a pint of pure alcohol on the Friday before the homicide, brought it home with him on Friday evening, and drank it, without water, all the next day. Held (1), that the charge was not erroneous; (2), that the evidence tended to prove voluntary intoxication, and that the charge on the subject was relevant.

PUNISHMENT — DISCRETION OF JURY UNDER SECTION 190 OF THE PENAL CODE.—It was not error to instruct the jury that if they find the defendant guilty of murder in the first degree, with some extenuating fact or circumstance in the

case, it is within their discretion to pronounce such a sentence as would relieve him from the extreme penalty of the law. Section 190 of the Penal Code invests a jury in a criminal case for murder with that discretion; but the discretion is not an arbitrary one, and it is proper for the court to instruct them as to its exercise.

APPEAL from a judgment of the Superior Court of Lake County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Noel & Bishop, for Appellant.

Attorney-General, for Respondent.

MCKEE, J.— This appeal is from a judgment of conviction of murder, and an order denying a motion for a new trial.

Insanity, from the long continued use of intoxicants, was the only defense made on behalf of the defendant. In substance the court charged the jury to the effect that insanity produced by intoxication would not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated, and that drunkenness was no excuse for crime, but it was a circumstance for the consideration of the jury in determining the degree of the crime. The charge upon the subject in the very language by which it was given to the jury was considered and approved by this court in the cases of *The People v. Ferris*, 55 Cal. 592; *People v. Williams*, 43 Cal. 345; *People v. Lewis*, 36 Cal. 531. But it is contended that while it was appropriate to the facts of those cases it was irrelevant to this case, because there was no proof of voluntary intoxication by the defendant at the time of the commission of the homicide, and therefore the charge was erroneous, because it was calculated to mislead the jury.

The homicide was committed on Sunday, the 7th of May, 1882, about one o'clock P. M., and the evidence given on behalf of the defendant proved that he had bought a pint of pure alcohol on the Friday before the homicide, brought it home with him on Friday evening, and drank it without water all of the next day. This evidence certainly tended to prove voluntary intoxication, and the charge on the subject was relevant.

It was not error to instruct the jury that if they found the

defendant guilty of murder in the first degree, with some extenuating fact or circumstance in the case, it was within their discretion to pronounce such a sentence as would relieve the defendant from the extreme penalty of the law. Section 190 of the Penal Code invests a jury in a criminal case for murder with that discretion; but the discretion is not an arbitrary one, and it was proper for the court to instruct them as to its exercise.

There is no error in the record prejudicial to the defendant, and the judgment and order appealed from are affirmed.

MORRISON, C. J., ROSS, J., MCKINSTRY, J., and MYRIOK, J., concurred.

[Department Two.—February 16, 1883.]

GEORGE DOUGHERTY, RESPONDENT, v. MAURICE
DORE, APPELLANT.

INJUNCTION — STATUTE OF LIMITATIONS.—A cause of action upon an undertaking for an injunction does not accrue until the final determination of the action in which the injunction was obtained.

Id.—FINDING — DAMAGES.—The injunction was obtained to restrain the plaintiff herein, who was the defendant in the injunction suit, from prosecuting certain street work in San Francisco under a contract with the superintendent of streets. The court found in substance that the plaintiff had procured materials for the work of the value of twelve hundred dollars, and that by reason of the injunction these materials were lost and destroyed without any fault on the part of the plaintiff. Damages were awarded in accordance with this finding. *Held*, that the damages were sufficiently proximate to warrant their recovery.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

Action upon an undertaking for an injunction. The complaint was filed March 19, 1879. The action in which the injunction was obtained was commenced in 1870, and on the 1st of October, 1870, the court vacated the order previously made granting an injunction. The cause was afterwards tried, and on the 12th of March, 1877, a final judgment was entered therein in favor of the defendant—the plaintiff in this action—from which no appeal was taken. The other facts appear in the opinion of the court.

Harmon & Galpin, for Appellants.

The cause of action accrued when the District Court finally decided that the plaintiffs were not entitled to the injunction to procure which the bond was given, that is to say, October 1st, 1870, and the action is barred by § 337, Code Civ. Proc. (*Webber v. Wilcox*, 45 Cal. 301; *Fowler v. Frisbie*, 37 Cal. 35.)

The conclusion of law that plaintiff is entitled to payment for twelve hundred dollars costs to replace sixteen hundred cubic yards of grading washed away by reason of said injunction is not sustained by the finding. The injunction was neither cause, proximate nor remote, of the damage. (*Polack v. Pioche*, 35 Cal. 417; §§ 3300, 3801, Civ. Code; Sedgwick Measure Damages, pp. 58-62; *Dorwin v. Potter*, 5 Denio, 306.)

J. C. Bates, for Respondent.

PER CURIAM.—In *Clark v. Clayton*, 61 Cal. 634, we held that an action brought upon an undertaking for an injunction after the dissolution of the injunction, but before the final determination of the action in which the injunction was obtained, was prematurely brought. There are several reported cases which sustain that doctrine. (*Gray v. Veirs*, 33 Md. 159; *Penny v. Holberg*, 53 Miss. 567; *Bemis v. Gannett*, 8 Neb. 286.)

In *Dowling v. Polack*, 18 Cal. 625, this precise question was not involved, but the court in its opinion indicates very clearly that its views upon this question were in accord with the doctrine of the cases above cited.

In *Fowler v. Frisbie*, 37 Cal. 34, the court held that an order dissolving an injunction was *prima facie*, at least, an adjudication that there was no foundation for the injunction, and that it ought not to have issued, and refused to reverse the judgment on the ground that the action was prematurely brought, but reversed it on another ground. In the reporter's statement of the case it is said that "no judgment in *Frisbie v. Fowler et al.* was offered in evidence." From which we feel authorized to infer that it did not appear whether or not there had been a final determination of the action in which the injunction was sued out. In the case now before us it does appear that the action in which the injunction was sued out was not finally

determined until within three years before the commencement of this action. No case or text-writer was cited in support of the doctrine laid down in *Fowler v. Frisbie*, *supra*, and we very much doubt its soundness.

In High on Injunctions it is said (§ 1649) that "the general rule is that upon the dissolution of an injunction and failure on the part of the obligors to comply with the conditions of the bond, a right of action at once accrues," and two cases, and two only, viz., *Tallahassee R. R. Co. v. Hayward*, 4 Fla. 411, and *Sizer v. Anthony*, 22 Ark. 465, are cited to support that assertion. But in each of those cases the condition of the bond was that the party who sued out the injunction should, in the event of its being *dissolved*, pay such sum as should be adjudged against him. In the case at bar the defendants' promise, "that in case said injunction shall issue the said plaintiffs will pay to the said parties enjoined such damages, not exceeding the sum of five thousand dollars, as such parties may sustain by reason of the said injunction if the said District Court finally decide that the said plaintiffs were not entitled thereto." If our Code had provided for the giving of a bond or undertaking with a condition that if the injunction should be dissolved the obligors would pay the obligee the damages which he might sustain by reason of the injunction, a right of action upon such a bond would undoubtedly accrue as soon as the injunction should be dissolved. Not because the court had *finally* decided that the party who sued out the injunction was not entitled thereto, but because the obligors had agreed to pay said damages if the injunction should be dissolved.

On the whole we are satisfied with the decision of *Clark v. Clayton*, *supra*, and we do not think that the court erred in overruling the demurrer to the plaintiff's complaint.

The appellant further insists that the findings do not support the judgment. The findings show that the plaintiff was a street contractor, and that he had a contract for doing the work which he was temporarily enjoined by the injunction above mentioned from prosecuting, and "that by reason of said injunction and service thereof, and delay caused thereby, a large amount of material placed in said part of said street by said plaintiff, to wit, sixteen hundred cubic yards, which constituted

a portion of the grading of said street under said contract, was left without protection or any one to protect same, and was washed away by the action of the water, without any fault of plaintiff, and which said plaintiff had to and did replace at a cost and value of seventy-five cents per cubic yard."

It is urged that "the injunction was neither cause, proximate nor remote, of the damage."

It is doubtless well settled that "the liability upon an injunction bond is limited to such damages as arise from the suspension or invasion of vested legal rights by the injunction." (High on Injunctions, § 1663.)

But the finding is to the effect that the plaintiff in this action did sustain damages by reason of a forced suspension of his work. The injunction did not wash away the work or any part of it, but it prevented the plaintiff from taking measures to protect it against the action of the water. Such at least is the finding. It has been held that one who is enjoined from selling his property until after it has greatly depreciated in value may recover the amount of such depreciation against the party who wrongfully sued out the injunction. (*Meysenburg v. Schlieper*. 48 Mo. 426.)

In *Riddlesbarger v. McDaniel*, 38 Mo. 138, the court says: "If the party has been injured in consequence of the injunction, he is entitled to whatever damages he has sustained. Destruction of the premises or their deterioration, . . . and all matters where the party has suffered loss or injury, may be taken into the account in assessing damages."

We are of opinion that the damages which the plaintiff is found to have sustained by reason of the suing out of an injunction which prevented him from prosecuting his work, are sufficiently proximate to justify the decision of the court below.

Judgment affirmed.

[Department One.— February 16, 1883.]

SYLVESTER HULL, PETITIONER, v. THE SUPERIOR COURT OF SHASTA COUNTY, RESPONDENT.

OFFICE — INCUMBENT — SUMMARY PROCEEDING TO RECOVER BOOKS AND PAPERS.—

Under sections 1015 and 1016 of the Political Code, the actual incumbent of an office may maintain a summary proceeding by petition to recover the books and papers pertaining to the office, and the court may order their delivery, and enforce the order by attachment or warrant. His right to the office can only be called in question by an information against him in the nature of a *quo warranto*.

ID.— QUALIFICATION OF INCUMBENT — INSUFFICIENCY OF BOND AS MATTER OF DEFENSE.— The fact of the incumbency being established, an objection to the qualification of the incumbent on the ground that the penalty of the bond given by him was less than the law required, is not available as a defense to the proceeding. (McKEE, J., and ROSS, J.)

ID.— CLASSIFICATION OF COUNTIES — CENSUS.— Where a county of the third class is found by a new census to have the requisite population for a county of the second class, it may be organized by the board of supervisors as a county of the latter class, but until such organization it remains a county of the third class, and the provisions of the statute fixing the penalty of official bonds in counties of the second class have no application. (McKINSTRY, J.)

CERTIORARI to the Superior Court of the county of Shasta to review certain orders made in a summary proceeding to recover books and papers pertaining to the offices of sheriff and tax collector of that county.

The facts are sufficiently stated in the opinion of MR. JUSTICE McKEE.

Clay W. Taylor, A. M. Rosborough, and R. A. Redman, for
Petitioner.

I. S. Belcher, and Chipman & Garter, for Respondent.

McKEE, J.— This is a proceeding by *certiorari* to review a proceeding had in the Superior Court of Shasta County. It appears by the record returned in the proceeding that on the 8th day of January, 1883, W. E. Hopping, claiming to be the sheriff and tax collector of the county of Shasta, and the incumbent in office, commenced the proceeding by filing a petition against Sylvester Hull and Robert Kennedy to compel them to deliver to him the books and papers belonging to the office in their possession, which it was alleged they had refused to deliver to him on demand. Hull and Kennedy appeared in the pro-

ceeding; one of them answered the petition, the other did not. Neither denied any of its allegations. The answer of Hull merely averred that the petitioner had not qualified.

But the petition alleged, and the court found that the petitioner was on the 8th of January, 1883, and ever since had been the duly elected and qualified sheriff and tax collector of the county, and the incumbent in office, and as such was entitled to the books and papers of the office in the defendant's possession. It therefore ordered such books and papers to be delivered to the petitioner, and enforced the order by an order for a warrant, directed to a constable of the county, commanding him to make search for, and to take and deliver such books and papers to the petitioner. These orders are now claimed to have been made without, or in excess of, the jurisdiction of the court.

But upon the filing of the petition, the court was authorized by sections 1015 and 1016 of the Political Code to proceed in a summary way after notice of the petition to the adverse parties, and to make the order applied for, and to enforce it by attachment or warrant. By these sections of the Code the court had jurisdiction of the subject-matter of the petition; and as it acquired jurisdiction of the persons of the defendants, it had jurisdiction to make the orders which were made and entered in the proceeding.

The real contention, however, is that the court exceeded its jurisdiction in making the orders, because the petitioner had not alleged in his petition that he was the "actual incumbent" of the office. The allegation is: "That on the 8th of January, 1883, he was, and ever since has been, and he now is, the duly elected and qualified sheriff and *ex officio* tax collector of Shasta County, State of California, and at said times he was, and he now is, the incumbent of the said offices." It was also alleged, "that he was formerly, to wit, immediately prior to said 8th day of January, 1883, an incumbent of said offices, and the said Robert Kennedy was, immediately prior to said last named date, under-sheriff and deputy tax collector of said county." These allegations were admitted, and from them, as facts, the inference is fairly deducible that the petitioner Hopping was the complete incumbent, and Hull had been the former incumbent of the office.

Besides, the record shows that Hopping was elected by the people of Shasta County at the general election of 1882; that he received his certificate of election, and within the statutory time after receiving the same took and subscribed the oath of office and gave two bonds; one as the official bond of the sheriff in the sum of ten thousand dollars, and the other as the bond of the tax collector in the sum of fifteen thousand dollars, both of which were approved, filed, and recorded, and at the time of the proceeding he was peaceably acting as sheriff, and engaged in performing the duties of the office.

Of course, election alone did not constitute Hopping the incumbent of the office. The law required him, after receiving his certificate of election, to take the oath of office, and give bonds within the time required by law. If he failed to do these things according to law, and within the time required by law, the office was vacant. (Sections 907, 947, 996, Pol. Code; *Payne v. San Francisco*, 8 Cal. 125; *People v. Taylor*, 57 Cal. 620.) Until an officer-elect takes the oath of office and gives bonds according to law, he is not authorized to discharge the duties of the office. He is not an incumbent.

But the allegations and proofs in the proceeding under review were sufficient to sustain the findings and decision of the court that Hopping was the actual incumbent.

In the case of *The People v. Clingan*, 5 Cal. 389, which was a proceeding by *quo warranto* against one who claimed to exercise the duties of sheriff of Marin County, the fact that the claimant acted as sheriff was, in connection with his certificate of election, held sufficient to raise the presumption that he had executed his bond and taken the oath of office. So in the proceeding under review — a proceeding which involved only the question of right to the books and papers of the office, and not of the right to the office itself — there was not only that presumption in favor of incumbency of the office, but the people themselves made out a *prima facie* case of election, qualification, and incumbency in favor of the petitioner.

But, it is answered, there was no qualification, because, under the United States census of 1880, Shasta County had a population of 9,492 inhabitants, and was, by operation of section 4007 of the Political Code, classified as a second-class county, the

sheriff and tax collector of which was required by law to qualify by giving bonds, as sheriff for twenty-five thousand dollars, and as tax collector for the sum of thirty thousand dollars. Such bonds were not given by Hopping; the bonds which he gave were for the amounts fixed by law for counties of the third class; therefore, it is contended, the bonds were wholly insufficient and not according to law, and did not qualify Hopping to discharge the duties of the office, or to become the incumbent of it.

Prima facie, however, the bonds under which he qualified were sufficient. Being sufficient, his right to the office and its incidents was unquestionable. But even if the bonds were insufficient, that circumstance would merely affect his right to the office; it would not touch the question of his incumbency. Being the actual incumbent of the office, he was in possession under color of right; he was at least a *de facto* officer, and had a vested right to act as such until his right was questioned by some one in a proper proceeding for that purpose. Such a contest could not be originated by *certiorari*. It can be made only by an original proceeding by information in the nature of a *quo warranto* against him as incumbent of the office. (*People v. Olds*, 3 Cal. 176; *People v. Scannell*, 7 Cal. 432; *Satterlee v. San Francisco*, 23 Cal. 320; *People v. Sassovich*, 29 Cal. 480.)

We think the Superior Court regularly pursued its authority, and the orders are affirmed.

Ross, J., concurred.

McKINSTRY, J., filed a concurring opinion as follows:—I concur. Section 4006 of the Political Code reads: "Whenever a new census is taken, the counties on the first day of July thereafter are, by operation of law, classified under such census." If it should be admitted that section 4006 refers to a United States census, that we take judicial notice of the completion of the census of 1880, and of the fact that, by the return of such census Shasta, has a population of more than eight thousand; and it should further be admitted that under the law the failure of the sheriff to file within the time limited by the statute a proper bond, necessarily deprived him of his character as an

actual incumbent, the results claimed by petitioner would not follow.

It would not be the effect of the new census to reorganize Shasta as a county government of the second class. Each supervisor must be an elector of the district he represents. (Pol. Code, § 4023.) The new census would impose upon the existing board of supervisors the duty of redistricting the county — a duty which could perhaps be enforced by mandamus. (Pol. Code, § 4023.) The increased population would give Shasta a right to a governmental organization as a second-class county, but the Code provides the only mode by which such organization may be given an actual existence and operation. Until the county is redistricted, and provision made for the selection of the appropriate number of supervisors, Shasta remains of the third class. Otherwise it would be a second-class county as to the sheriff's bond, but a third-class county with reference to the far more important matter of the number of its governing body, their powers and duties.

The *title* of the Code in which are found the sections above referred to is "The Government of Counties." A county government of the second class is one with five supervisors. Shasta has three supervisors, and cannot have more until the three shall redistrict the county. Until they discharge their duty of providing five districts, so that the county government may be made to accord with other county governments of the second class, Shasta remains a third-class county, although it may be, in a sense, classified as of the second-class, and entitled to a second-class government. Its officers are officers of the third class. The Code contemplates no such anomaly as that a third-class county shall have a second-class sheriff. Section 4122 of the Political Code requires of county officers official bonds corresponding to the class of the county "of which they are officers." All are officers of the same class. Hopping is sheriff of a county of the third class, until the government of a second-class county is set into operation.

[Department One.—February 16, 1883.]

SYLVESTER HULL, PETITIONER, v. THE SUPERIOR
COURT OF SHASTA COUNTY ET AL., RESPONDENTS.

PROHIBITION — COURT — OFFICER.— Prohibition does not lie to prevent a court from recognizing and taking judicial notice of the acts of a ministerial officer either *de facto* or *de jure*, nor to set aside judicial acts already done.

APPLICATION for a writ of prohibition. The facts are stated in the opinion of the court.

Clay W. Taylor, A. M. Rosborough, and R. A. Redman, for Petitioner.

I. S. Belcher, and Chipman & Garter, for Respondents.

PER CURIAM.—The demurrer to the petition in this proceeding must be sustained. The petition alleges that the Superior Court, "has recognized, does recognize, and, unless prohibited, will continue to recognize and take judicial notice of the acts of W. E. Hopping," who claims to act as sheriff and tax collector of Shasta County.

Prohibition is not available as a remedy to prevent the acts of a *de facto* or *de jure* ministerial officer (*People v. Board of Election*, 54 Cal. 404; *Le Conte v. Berkeley*, 57 Cal. 269); nor to prevent judicial acts already done.

The right of one claiming to act as sheriff of a county can only be questioned in a proper proceeding by information in the nature of a *quo warranto*. (*Hull v. Superior Court, ante.*)

Demurrer sustained and writ dismissed.

[Department Two.—February 17, 1883.]

SAN JOSE SAVINGS BANK, RESPONDENT, v. THE
SIERRA LUMBER COMPANY, APPELLANT.

CORPORATION — ACTS OF DIRECTOR WHO CEASES TO BE A STOCKHOLDER.— A director of a corporation, who ceases to be a stockholder during the term for which he was chosen, but continues to act as a director, no judgment of ouster having been pronounced against him, is a director *de facto*, and his acts are valid as to third persons.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts sufficiently appear in the opinion of the court.

Mastick, Belcher & Mastick, for Appellant.

J. Alexander Yoell, for Respondent.

PER CURIAM.—Action on a promissory note, alleged to have been executed by the defendant to D. M. Delmas, and by Delmas indorsed and transferred to the plaintiff. The defense is that the note in suit was never executed by the defendant.

It is said, and such appears to be the fact from the statement, that Hayward with four others had been regularly chosen and constituted the board of directors of the defendant corporation in October, 1878, when it (the corporation) was organized, that Hayward was then an owner of stock in the corporation, and continued to be such until the 28th of May, 1879, on which day he sold his stock, and it was transferred to the purchaser on the books of the company. The subject of the note came up for consideration at a meeting of the board held on the 1st day of August, 1879, at which time objection was made by one of the board to Hayward's acting as a director on the ground that he was no longer a stockholder of the company. Hayward acted and voted with two members of the board for the execution of the note sued on, the other members voting against it.

It is now contended that as Hayward had ceased to be a stockholder before this vote was cast, his vote was a nullity, and inasmuch as without his vote the authority to execute the note was not conferred by a majority of the board, that the note was made and delivered without authority and was void.

If, as contended, Hayward ceased to be a director when he parted with his stock, the point urged might be maintained. But in our opinion he did not cease to be such director. In fact it appears that he not only acted as director on this occasion, but subsequently during the term for which he was chosen, with the consent of all the members of the board except one.

It may be that on a direct proceeding to determine Hay-

ward's right to hold the position of director a judgment of *ouster* would have been entered against him, but his title to the place cannot be tried in this action, or impeached collaterally. Until he was ousted on a direct proceeding he was a director *de facto*, and his acts as director would be valid as to third persons. This, in our judgment, is settled beyond controversy. To hold otherwise would be to render insecure all the operations of corporations.

We find no error in the transcript.

Judgment and order affirmed.

[Department Two.—February 20, 1883.]

HORACE W. BOWMAN, RESPONDENT, *v.* THE CALIFORNIA STEAM NAVIGATION COMPANY, APPELLANT.

PLEADING — CARRIER — CONTRIBUTORY NEGLIGENCE.— A complaint which alleges that the plaintiff took passage on defendant's steamer and delivered his baggage to defendant, and that shortly before the arrival of the steamer at its destination, he went down on the main deck to look for his baggage — no check therefor having been given him — and while so doing fell down the main hatchway which had been left open negligently and carelessly, with no light placed near it to warn passengers of danger, and sustained injuries thereby, is not demurrable, on the ground that it shows contributory negligence on the part of the plaintiff.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts appear in the opinion of the court.

Milton Andros, and Charles Page, for Appellant.

Tyler & Howard, for Respondent.

PER CURIAM.— The complaint alleges that the defendant was the owner of the steamer *Washington*, which was running between the city and county of San Francisco and the town of Rio Vista in the county of Solano; that plaintiff took passage on said boat from the former to the latter place; that he delivered to defendant his baggage — a trunk; that a short time before the arrival of the vessel at Rio Vista he went down on

the main deck to look for his baggage (no check therefore having been given him by the defendant), and while so doing he fell down the main hatchway and was greatly injured; that such hatchway was left open negligently and carelessly, and no light was placed near it to warn passengers of danger.

There was a demurrer to the complaint which was overruled by the court, and the sufficiency of the complaint is the only question before us on this appeal.

It is claimed that contributory negligence on the part of the plaintiff appears on the face of the pleading, but we are not prepared to say the point is well taken. It does not appear that the plaintiff had no right, as is claimed, to go upon the main deck to look for his baggage, or that he was guilty of contributory negligence by doing so.

Judgment affirmed.

[In Bank.—February 20, 1883.]

ANDREW J. DONNELLY ET AL., RESPONDENTS, v. B. STRUEVEN, APPELLANT.

ATTACHMENT — CONTRACT — TORT.—Plaintiffs sued on a contract, by the terms of which they promised to sell, and defendant promised to buy and pay for, certain personal property at a stipulated price. The breach alleged was that the defendant refused to receive and pay for the property as provided by the terms of the contract, whereby the plaintiffs sustained the damage sued for. An attachment was issued, and the defendant moved to discharge the same on the ground that the action was founded in tort and not in contract. *Held*, that the action was founded in contract, and the motion was properly denied.

APPEAL from an order of the District Court, Twelfth Judicial District, city and county of San Francisco, refusing to discharge an attachment.

The facts sufficiently appear in the opinion of the court.

H. H. Lowenthal, for Appellant.

Wm. Matthews, for Respondents.

PER CURIAM.—Plaintiffs sued on a contract, by the terms of which they promised to sell, and defendant promised to buy

and pay for, certain hides, at the rate of five dollars each. The breach is that defendant refused to receive and pay for the hides as provided by the terms of the contract, whereby plaintiffs have sustained damages, etc.

An attachment was issued in the case, and defendant served a notice of motion to discharge the same on the following grounds:—

“1. That the undertaking filed herein in behalf of plaintiffs is insufficient in form and substance, and does not comply with the statute in this; that the same does not provide for the payment of attorney’s fees, etc.

“2. That it appears upon the face of the complaint that the cause of action herein, and upon which the attachment is predicated, is one in tort for damages, and not on contract, and is, therefore, not one of the causes authorizing an attachment.”

The second point is the only one we are called upon to consider, and that simply involves the inquiry whether the plaintiffs’ action is founded in tort or contract. Section 556, Code Civ. Proc., requires that a defendant applying to have a writ of attachment discharged shall state in his notice the particular ground upon which he relies: “The notice should have specified the grounds of the motion, and wherein it would be urged that the writ was improperly issued.” (*Freeborn v. Glazer*, 10 Cal. 337; *Loucks v. Edmondson*, 18 Cal. 203.)

It appears from the complaint as well as from the affidavit that the plaintiffs’ action was founded in *contract*, and not in *tort*, and therefore defendant’s ground of motion was not well taken.

Order affirmed.

[Department Two. — February 20, 1883.]

P. B. HEWLETT, APPELLANT, v. SIMON EPSTEIN
ET AL., RESPONDENTS.

CORPORATION — DIRECTORS — PLEADING.— In an action against the directors of a mining corporation for failing to make and cause to be posted monthly statements of the receipts, expenditures, and liabilities of the corporation, as required by the Act of the 23d of April, 1880, it must be alleged in the complaint that money had in fact been received and liabilities incurred. An allegation that the directors *pretended* to have received large sums of money and incurred large liabilities is not sufficient. It should also be alleged that the corporation has an office or place of business.

CONSTITUTIONAL LAW.— The act in question is not in violation of the Constitution.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The defendants were directors of the Henrietta Gravel Mining Company, a corporation organized for mining purposes, and the plaintiff was a stockholder. The act under which the suit was brought will be found in the Statutes of 1880, p. 400.

H. C. Firebaugh, for Appellant.

Van Dyke & Powell for Respondent.

PER CURIAM.— The order of the court sustaining the demurrer in this case must be affirmed. The averment in the complaint that the “defendants as directors of said corporation *pretended* to have received and expended in the name of, and on behalf of said corporation large sums of money, and incurred large liabilities,” is not sufficient. The averment should have been that they did in fact receive money and incur liability, and the averment in the complaint is not the equivalent thereof.

We would suggest that it would be well for the pleader in an action of this character to set forth the fact that the mining company of which the defendants are the directors had an office or place of business where the itemized account of the affairs of the company should have been posted.

We are of opinion that the act in question is not in violation of any provision of the Constitution.

Judgment and order affirmed.

[In Bank.—February 20, 1883.]

P. B. HEWLETT, APPELLANT, v. MARK A. MILLER,
RESPONDENT.

SPECIFIC PERFORMANCE — WRITTEN CONTRACT — SUBSEQUENT PAROL AGREEMENT.

— The action was brought to specifically enforce a written contract to convey real estate. At the trial the defendant was allowed to show that by a subsequent parol agreement he was to retain the title until certain money loaned by him to the plaintiff, and not named in the original contract, should be repaid. *Held*, that the evidence was competent.

APPEAL from a judgment of the Superior Court of the county of Sacramento, and from an order refusing a new trial.

H. C. Firebaugh and Rhodes & Barstow, for Appellant.

Estee & Boalt, and *Beatty & Beatty*, for Respondent.

PER CURIAM.— The opinion in this case rendered by Department One is hereby approved and adopted as the opinion of the court in Bank, and the following additional authorities are referred to in support of the same. (*Joslyn v. Wyman*, 5 Allen, 62; *Stone v. Lane*, 10 Allen, 74; *Upton v. National Bank*, 120 Mass. 153.)

Judgment and order affirmed. Rehearing denied.

Opinion of the Department:

PER CURIAM.— In an action for the specific performance of a written contract to convey real estate, it is competent for the defendant to show that by a subsequent parol agreement he was to retain the title until other money than that named in the original contract (which had been loaned by him) should be repaid; and he may properly refuse to convey until such other money be repaid. (*Clark v. Grant*, 14 Ves. Jr. 519; *Quinn v. Roath*, 37 Conn. 16.) This is practically the only question involved in this case. The judgment is therefore affirmed.

[In Bank.—February 21, 1883.]

TERESA E. MACNEVIN, APPELLANT, v. HENRY P.
MACNEVIN, RESPONDENT.

APPEALABLE ORDER — JUDGMENT.—An order for judgment is not a final judgment, and an order subsequently made cannot be treated as an order made after "final judgment" and appealable as such.

APPEAL from an order of the late District Court of the Fifteenth Judicial District, city and county of San Francisco, vacating certain orders granting alimony and counsel fees.

The facts sufficiently appear in the opinion of the court.

J. P. Phelan, C. T. Botts, and J. E. McElrath, for Appellant.

Garber, Thornton & Bishop, and McAllister & Bergin, for Respondent.

PER CURIAM.—This was an action for divorce. Pending proceedings in the case, the court below from time to time made orders requiring the defendant to pay to the plaintiff several sums of money for alimony and counsel fees. Those orders were made enforceable by executions, but they were never enforced, and the court after it had heard the cause upon the merits decided in favor of the defendant; and on the 22d of January, 1879, ordered "that plaintiff's prayer for a decree of divorce be denied, and that defendant have judgment for costs." After the making of this order, on motion of defendant's counsel all the orders formerly made granting to the plaintiff alimony and counsel fees were vacated and set aside by an order made by the court on December 15, 1879. From this order the plaintiff appeals as from an order made after final judgment. But there is no final judgment; the record only shows an order for judgment; hence the order of December 15, 1879, is not an order after final judgment, and is not appealable. (*Schaeffer v. The French Savings & Loan Society*, 7 Pac. C. L. J. 155; *Lake v. King*, 16 Nev. 217.)

Appeal dismissed.

[In Bank.—February 23, 1883.]

WILLIAM DRESBACH, RESPONDENT, v. HIS CREDITORS, H. P. MERRITT, OPPOSING CREDITOR, APPELLANT.

INSOLVENCY — DISCHARGE OF INDIVIDUAL MEMBER FROM FIRM DEBTS.—Under the Insolvency Act of 1852, the discharge of an individual member of a firm from all his debts operates as a discharge of his liability for partnership debts.

ID. — ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignment by a member of a firm of all his property of every description for the benefit of creditors, under the provisions of the Civil Code, does not preclude him from applying for and receiving a discharge under the insolvent law.

APPEAL from a judgment of the Superior Court of Yolo county, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

J. C. Ball, John T. Carey, and J. W. Armstrong, for Appellant.

A. P. Catlin, Henry Edgerton, and Wallace, Greathouse & Blanding, for Respondent.

PER CURIAM.—One question involved in this appeal is already disposed of by the recent decision of this court in *Hawley v. Campbell*, 62 Cal. 442, that an insolvent may, under the Act of 1852, be discharged of his liability for partnership debts.

The other question presented is this: November 23, 1878, Dresbach, a member of a partnership, made his individual assignment of all his property of every description, in trust for the benefit of his creditors. On the 3d day of February, 1879, he commenced these proceedings of voluntary insolvency. Schedules were annexed to his petition, but it is not claimed that at the commencement of the insolvency proceedings he had acquired any property since the assignment of November 23, 1878. It is urged that if a person, being actually insolvent, makes an assignment for the benefit of his creditors, he cannot apply for relief under the insolvent law, and be discharged from liability; that the assignment was of itself a fraud upon the insolvent law, in that it was a transfer of the property to an assignee of the insolvent's selection, and by it he deprived him-

self of any property to surrender to his creditors in the insolvency proceedings; that he thus deprived his creditors of all right to have a voice in the selection of a person to administer the estate, which is given by the insolvent law.

The assignment to an assignee of his own selection was authorized by the Civil Code (§ 3449), therefore it cannot be said to be fraudulent in itself; the statute gave the insolvent the right of selection; and the fact that that assignee had the property of the insolvent would not prevent the latter from having the benefit of a discharge in insolvency. We cannot say that nothing passed to the assignee in insolvency. If the property first assigned should yield more than sufficient to pay debts then existing, the assignee in insolvency would doubtless be entitled to the surplus. The right to a discharge in insolvency does not depend on the character or condition of the property assigned, but upon the good faith of the applicant in his proceedings.

The Act of May 4, 1852, section 39, declared that "no assignment of any insolvent debtor, otherwise than as provided in this act, shall be legal or binding upon creditors"; but the enactment of the Code of 1873 (Civil Code, part 2, title 3, "Assignment for the Benefit of Creditors") had the effect of repealing *pro tanto*, section 39 of the Act of 1852; and thereafter, while the Act of 1852 remained in force, the two systems of assignments under the Code, and assignments in insolvency, were not necessarily antagonistic, and the latter was not entirely exclusive. Judgment and order affirmed.

[In Bank.—February 23, 1883.]

HERMAN ENKLE, PETITIONER, v. WILLIAM M. EDGAR,
AUDITOR OF THE CITY AND COUNTY OF SAN FRANCISCO,
RESPONDENT.

OFFICER — SALARY — ALLOWANCE BY THE BOARD OF SUPERVISORS. — DUTY OF THE AUDITOR. — An "extra clerk" appointed by the tax collector of the city and county of San Francisco, under an authorization of the board of supervisors, at a salary of one hundred dollars per month, is an officer of the city and county with a fixed salary, and when a demand for the salary has been presented to and allowed by the board, and there is money in the treasury applicable to the payment thereof, it is the duty of the auditor, on the presentation of the demand to him, to audit the same in the manner provided by law.

APPLICATION for a mandamus. The facts are stated in the opinion of the court.

J. P. Langhorne, and T. B. Bishop, for Petitioner.

William Craig, for Respondent.

SHARPSTEIN, J.— The petitioner alleges, and the respondent does not deny that under and by virtue of an authorization of the board of supervisors said petitioner was duly appointed for the month of January, 1883, an "extra clerk" by the tax collector, at a salary of one hundred dollars per month. That within the time prescribed by law said petitioner presented his salary demand to said board of supervisors, and that the same was duly approved and allowed by said board. That thereafter said petitioner presented said demand to the respondent, who is the auditor of said city and county, and requested him to audit the same in the manner provided by law. And that said respondent, as such auditor, refused, and still refuses, to audit said demand.

The grounds upon which the respondent bases his refusal to audit said demand are in effect that he has made a computation of the amount of revenue which the city and county will derive this year from all available sources, and ascertained that the same will not be sufficient to pay the salaries of the salaried officers of said city and county for said entire year.

If, however, the petitioner is an officer of said city and county whose salary is fixed, and stands on the same footing in that respect as other officers of said city and county with fixed salaries, the question whether, in the event of it appearing that the amount of revenue which the city and county will realize within the year will not exceed or equal the total amount of fixed salaries of its officers for the entire year, it is the duty of the auditor to refuse to audit any other claims than those of officers with fixed salaries does not arise in this case.

By an act of the legislature approved March 30, 1872 (Stats. 1871-72, p. 735), the board of supervisors of said city and county is authorized and empowered to authorize the employment of such extra clerks as may be required by the tax col-

lector in his office from time to time, at a salary not to exceed one hundred and fifty dollars per month each.

It was by virtue of the authority conferred by that act upon the board and tax collector that the petitioner was appointed, and his salary fixed at one hundred dollars per month.

The fixed salaries or compensation of the officers of said city and county are payable out of the general fund in the treasury (Consolidation Act, § 95, subd. 3), and must "be paid out of any moneys in the treasury in preference to any and all other demands whatsoever (payable out of that fund); and in case of any deficiency of funds for the payment of any of the said demands when presented, then all such demands, being presented and registered by the treasurer as in this act required, shall be paid out of any moneys afterward coming into the said treasury, applicable thereto, in the order in which the same are registered." (Consolidation Act, § 96.)

The question whether it would be the duty of the auditor to audit the demand of the petitioner, if there was no money in the general fund out of which it could be paid, does not arise in this case, because the answer admits that there is now in the treasury the sum of one hundred and ninety-three thousand dollars to the credit of said fund.

The only question presented to us by the petition and answer is whether the petitioner is shown to have been, during the month of January, an officer of said city and county with a fixed salary. Upon that question we entertain no doubt. The law which authorized his appointment has been complied with, and that law required that his salary should be fixed at a sum not exceeding one hundred and fifty dollars per month. It was fixed at the sum of one hundred dollars per month.

Ordered that a writ of mandate issue according to the prayer of the petition.

MORRISON, C. J., ROSS, J., MCKINSTRY, J., THORNTON, J., and MCKEE, J., concurred.

[Department Two.—February 23, 1883.]

**A. W. ROYSDON, RESPONDENT, v. WILLIAM B. CARR,
APPELLANT.**

PLEADING — COMPLAINT — DEMURRER.—The complaint contained four counts. The first count alleged in substance that on the 10th of February, 1878, the defendant, in consideration that the plaintiff would within a reasonable time thereafter, procure and deliver to him certain letters and correspondence between one George M. Pinney, J. C. Corey, Joseph A. Crawford, and W. H. Culver, promised and agreed to pay the plaintiff the sum of five thousand dollars, that the plaintiff did accordingly procure and deliver to the defendant the said letters and correspondence, and that the defendant, though often requested, had not paid to the plaintiff the said sum of five thousand dollars or any part thereof. The defendant demurred to this count for ambiguity and uncertainty, specifying as the particular grounds of demurrer, that it did not state the nature, subject-matter, or substance of the letters or correspondence, or the number or dates of the letters, or by or to whom they were written. The court overruled the demurrer. *Held*, that it was properly overruled.

PRACTICE — WITHDRAWAL OF COUNTS — EVIDENCE.—Where a complaint contains several counts, and the case goes to trial, and after the evidence is in, the plaintiff elects to proceed upon one of the counts, and withdraws the others, the withdrawal carries with it the evidence admitted under the counts withdrawn.

CONTRACT — VALIDITY — PUBLIC POLICY.—Where an attorney at law, in the course of his professional employment, receives letters and papers from a client, and agrees, with the consent of the client, to deliver the same to a third person, the contract is not void as being against public policy.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts, except as to the matters involved in the demurrer, sufficiently appear in the opinion of the court.

Stewart, Vanchief & Herrin, and W. W. Fouts, for Appellant.

D. S. & S. L. Terry, for Respondent.

PER CURIAM.—The demurrer to the first count of the complaint was properly overruled. As the other three counts were withdrawn from the consideration of court and jury, it is not necessary to express any opinion on the demurrer to them.

It was contended on behalf of appellant that the evidence was insufficient to establish the cause of action set forth in the first count of the complaint—the count on which only the cause was submitted and determined. We have examined the evidence,

and are of opinion that the contention of appellant is well maintained, and that the evidence fails to establish such cause of action.

It is urged, however, by respondent, that inasmuch as the evidence did establish a contract between the parties, which evidence went to the jury, without objection by appellant (defendant below), and as such evidence showed a right on the part of respondent to recover as much as the jury gave him by its verdict, that this court ought not to reverse. But it is set forth in the statement on motion for a new trial, following a distinct declaration that this was all the evidence introduced at the trial, that the plaintiff withdrew from the consideration of the court and jury all claims and causes of action alleged in the second, third, and fourth counts of his complaint, and relied at the trial solely upon the cause of action stated in the first count, and that the cause was tried solely upon the issues made upon the first count.

In our judgment, this withdrawal carried with it all evidence which had been put in under the three counts withdrawn, and the defendant was not called on to make any objection to such evidence as not admissible under the first count.

A question is presented on an instruction as to the character of the contract sued on. It is contended by appellant that such contract is opposed to public policy and void. We do not think that such a position is sound. Royson procured the letters from Pinney, his client, and disposed of them with his consent. He was attorney for Pinney only, and as he acted with the consent of the latter violated no obligation which he owed to him. We say so much as to this last point, as the cause goes back for a new trial.

Judgment and order reversed and cause remanded.

Hearing in Bank denied.

[Department Two.—February 25, 1883.]

CHARLES STEDMAN, APPELLANT, v. THE CITY AND
COUNTY OF SAN FRANCISCO, RESPONDENT.

MUNICIPAL CORPORATION — POLICE OFFICERS — ARREST AND IMPRISONMENT —
TAKING AND DETENTION OF PROPERTY — DAMAGES.— The city and county of
San Francisco is not liable in damages for a wrongful arrest and imprison-
ment by police officers under an ordinance adopted by the board of super-
visors, nor for the taking and detention of property by such officers from
the person so arrested.

APPEAL from a judgment of the Superior Court of the city
and county of San Francisco.

The complaint alleged in substance that the plaintiff was
arrested by members of the police department of San Francisco,
and imprisoned for the period of four and a half months, and
that they also took from him certain property, and detained the
same fourteen months; that these acts were done through the
procurement of the defendant under an ordinance previously
adopted by the board of supervisors, that there was no cause for
them, and that the plaintiff was damaged in the sum of sixty
thousand dollars. The defendant demurred for insufficiency,
and the demurrer was sustained. The plaintiff declined to
amend, and a final judgment was entered against him.

Moses G. Cobb, and George W. Chamberlain, for Appellant.

John L. Murphy, and Wm. Craig, for Respondent.

PER CURIAM.— We are unable to perceive upon what theory
the defendant could be held responsible by reason of the matters
set forth in the complaint. The demurrer was properly sus-
tained.

Judgment affirmed.

[Department Two.—February 26, 1883.]

**JAMES FARRELL, RESPONDENT, v. WILLIS JONES
ET AL., J. S. CARMICHAEL, APPELLANT.**

MORTGAGE FORECLOSURE — COMPLAINT — JUDGMENT.—Action to foreclose a mortgage. The appeal was heard on the judgment roll. The appellant objected that the judgment was in excess of the amount due shown by the complaint. After examining the allegations of the complaint, *held*, that the objection was not well founded.

PARTIES — SUBSTITUTION.—Where a third person, during the pendency of an action, succeeds to the rights of the plaintiff, the court has power to substitute such person as plaintiff in the action, and notice of the substitution need not be given to a defendant whose default has been entered for failing to appear.

APPEAL from a judgment of the Superior Court of Placer County.

The facts are sufficiently stated in the opinion of the court.

Henley, Whipple & Oates, for Appellant.

John M. Fulweiler, for Respondent.

SHARPSTEIN, J.—This is an appeal from a judgment in an action to foreclose a mortgage. The mortgage was executed by the defendants Jones and Dougherty, who conveyed the mortgaged premises to the defendant McGillivray, who conveyed to the defendant, "The Dardanelles Consolidated Mining Company," which was the owner of said premises at the time of the commencement of this action. None of the defendants appeared in the action with the exception of the defendants McGillivray and Carmichael, who were alleged to have or claim some interest in said premises, or some part thereof, which claim or interest was subsequent to and subject to the lien of the plaintiff's mortgage.

The appearance of McGillivray was entered by his attorneys, and defendant Carmichael filed a demurrer specifying that the complaint did not state facts sufficient to constitute a cause of action, which was overruled with leave to him to answer within ten days, which he failed to do. Defendant McGillivray neither answered nor demurred. The defaults of all the defendants were duly entered, and a decree of foreclosure was thereupon ordered by the court. From the decree entered pursuant to said order the said defendant Carmichael appeals.

The first ground upon which appellant's counsel claim that the judgment should be reversed is that the decree "is excessive in amount by at least the sum of three payments of interest."

If these payments were made at all they were made by the execution and delivery of a promissory note which purports to be made by the "Dardanelles Con. G. M. Co., by Joseph McGillivray, superintendent," and in regard to that the plaintiff alleges that "he has been informed and believes, and upon such information and belief avers that said Joseph McGillivray had not, as such superintendent or otherwise, any power or authority to bind the said Dardanelles Consolidated Gravel Mining Company thereby, or execute and deliver the said promissory note in the name of said corporation, and that therefore the said promissory note is valueless and in fraud of said plaintiff's rights under and by virtue of said mortgage, and that the plaintiff has not received any consideration for the indorsements as aforesaid, upon said promissory note of Jones and Dougherty, except the sum of seven hundred and fifty dollars, and that the credit thereon and towards the payment thereof should not be more than seven hundred and fifty dollars."

But appellant says "that it does not appear but that the note of the Dardanelles Mining Company was actually paid." It is alleged in the complaint that the plaintiff indorsed the amount of said note on the note which the mortgage was given to secure the payment of, and that he has not received any consideration for that indorsement, which if the note had been paid would be a false allegation. We think that those allegations, taken in connection with the allegation that McGillivray had no power or authority to execute and deliver said note, is substantially an allegation that it had not been paid.

The second ground upon which appellant relies is that after the defaults of the defendants had been entered, Jo Hamilton was substituted for the original plaintiff, and the decree is in his favor. The decree recites that Hamilton was "substituted as plaintiff in said action, he having during the pendency of the action succeeded by assignment to the said James Farrell's interest and rights in and to said debt, and the mortgage given to secure the same." Such being the case the court had the power to substitute Hamilton in the action or proceeding, and

we know of no reason why the defendants, whose defaults had before been entered, should have had notice of a motion to have such substitution made. And if such notice had been given, the fact would not appear in the judgment roll.

We do not think that the record discloses any error for which the judgment should be reversed.

Judgment affirmed.

THORNTON, J., and MYRIOK, J., concurred.

[In Bank.—February 27, 1883.]

JEROME B. COX, RESPONDENT, v. CHARLES McLAUGHLIN, APPELLANT.

CONTRACT — PLEADINGS — EVIDENCE — FINDINGS — VARIANCE — LAW OF THE CASE.—The action was brought on an alleged contract in writing by which the plaintiff and his associates agreed to do certain work for the defendant in the construction of a railroad, and to furnish the materials therefor. The complaint purported to state the contract according to its substance and effect, but the answer denied the contract thus stated, and averred that the contract between the parties was embodied in two instruments therein set forth, one being supplemental to and explanatory of the other. The facts on the subject were proved and found in accordance with the answer. By the terms of the contract payments were to be made from time to time as the work progressed, but these payments were to be based on estimates made by the engineer of the road and reported to the parties. There was no allegation in the complaint, nor any proof in relation to such estimates. After stating, however, that the work had not been completed, the complaint alleged that the completion was prevented by the defendant. In support of this allegation, evidence was given on the part of the plaintiff to the effect that the payments were not made as provided for by the contract, that the failure in the payments rendered it impossible for the plaintiff and his associates to complete the work for want of means necessary to enable them to do so, and that their pecuniary condition and reliance upon the payments were known to the defendant when the contract was made. The facts were found in accordance with this evidence, and it was also found that the work had not been voluntarily abandoned by the contractors, but was wholly and entirely suspended by the defendant. The contract provided in substance that the defendant should have the right, subject to certain conditions as to notice, to cause an increase or diminution of the force of laborers or other means necessary to carry on the work, or to suspend the work entirely, provision being made for delays arising from the exercise of this right, and in regard to the terms of payment in case the work should be entirely suspended. It was proved that the defendant had at different times required the force of laborers employed upon the work to be reduced, and had directed portions of the work to be suspended. On former appeals in the case, the court had decided that the action could not be maintained unless the completion of the work was prevented by the defendant, and that neither a failure in the payments nor the exercise of a right secured to

the defendant by the contract was sufficient to constitute prevention. *Held*, 1. That these propositions had become the law of the case. 2. That no effect could be given to the evidence in regard to the pecuniary condition of the plaintiff and his associates, and that in view of the terms of the contract, this evidence was inadmissible. 3. That the finding as to the entire suspension of the work by the defendant was not sustained by the evidence, and *further*, that it was inconsistent with another finding on the subject, and in conflict with the complaint. 4. That it was necessary to allege and prove the making of the estimates provided for, or to show some legal cause why they were not made. 5. That the contract set up in the answer and found by the court was different in substance and effect from the contract stated in the complaint, and that the variance was fatal.

APPEAL from a judgment of the Superior Court of the county of Alameda, and from order refusing a new trial.

The parties to the contract were Jerome B. Cox, Thomas J. Arnold, and Jackson R. Myers, known by the firm name of Cox, Myers & Co., of the first part, and Charles McLaughlin, of the second part. After the work was commenced Myers assigned his interest in the contract to Cox and Arnold, and the work from that time was carried on by them. The action was brought by Cox and Arnold, but Arnold subsequently died, and the action was continued in the name of Cox. As originally commenced, one of the objects of the action was to enforce a lien for the work done and materials furnished, and there were certain defendants in addition to McLaughlin. But the complaint has been repeatedly amended, and in the last complaint filed, McLaughlin was the only defendant, and the relief sought was a personal judgment against him. The pleadings and evidence are very voluminous, and it would be useless labor to attempt an analysis of them. The facts stated in the head notes and those appearing in the opinion of the court are sufficient to explain the points decided, and the grounds on which the court proceeded.

S. M. Wilson, and Tully R. Wise, for Appellant.

This case has been before the court on several different appeals. The decisions on the former appeals are to be found as follows: *Cox v. Western Pacific R. R. Co.* 44 Cal. 18; S. C. 47 Cal. 87; *Cox v. McLaughlin*, 52 Cal. 590; S. C. 54 Cal. 605.

On these appeals the whole law of the case arising on the present appeal has been settled.

"A previous ruling by the appellate court upon a point distinctly made may be only authority in other cases, to be followed or affirmed, or to be modified or overruled according to its intrinsic merits, but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves." (*Phelan v. San Francisco*, 20 Cal. 45; *Davidson v. Dallas*, 15 Cal. 75; *Haynes v. Meeks*, 20 Cal. 311; *Mulford v. Estudillo*, 32 Cal. 136; *Donner v. Palmer*, 51 Cal. 629; *Jaffe v. Skae*, 48 Cal. 543; *Meeks v. S. P. R. R. Co.* 56 Cal. 517; *Wittenbrock v. Bellmer*, 62 Cal. 558.)

These previous rulings on the former appeals not only were binding on the court below, but are binding also upon the appellate court, and apply as well to the construction of the pleadings as to other questions. (*Lucas v. City of San Francisco*, 28 Cal. 594.)

The series of complaints in this record from first to last all count upon the same special contract in writing according to its alleged legal effect.

On the first appeal it was held that the contract between *McLaughlin* and *Cox, Myers & Co.* was "an entire contract," and that the provision for payments from time to time on the estimates "does not change the character of the contract in this respect and make it severable."

It was also held that the complaint was bad because it did not allege that the work had been completed, nor that its completion had been prevented by *McLaughlin*, nor that the contract had been rescinded.

On the second appeal, after the complaint had been amended by inserting therein an allegation that *McLaughlin* prevented the completion of the work, the court held that the complaint was sufficient, but reaffirmed its former decision that the contract was an "entire contract," and not severable.

On the third appeal the court again held that the contract was "an entire contract," and that "assuming the failure to pay as alleged constituted a breach of the contract, the plaintiffs could have treated the specific contract as rescinded, and have brought suit on the implied promise of defendant to pay the value of the work actually done." But the court looking at

"the whole frame of the complaint," held that the action was not on an implied promise arising upon a rescission of the special contract, but was based upon a breach of the express contract resulting from the alleged prevention.

The present complaint, in all the particulars above referred to, is exactly like the complaint before the court on the last preceding appeal. The special contract counted upon is the same, and the same allegation is made as to the completion of the work having been prevented by the defendant. We have it then as the settled law of the case now no longer open to discussion.

1. That the action is not *indebitatus assumpsit* upon an implied promise arising on a rescission of the contract.

2. That the action is based upon the contract, part performance and prevention being alleged as the cause of action.

The answer here is the same as upon the preceding appeal, and denies as well the averment of *prevention* as the contract sued on, and avers that the contract actually made by the parties was a different contract from that described in the complaint, and annexes copies, which are made part of the answer. Thus it appears that the issues now are the same as upon the last appeal, and it was decided on that appeal that *prevention* was a vital issue, and the judgment there was reversed because there was no finding of *prevention*. (52 Cal. 590; 54 Cal. 605.)

On the present appeal, therefore, the judgment below cannot be affirmed here, unless the court can see in the record (1) a finding of prevention; (2) evidence sufficient to sustain such finding.

What is prevention? Nothing more or less than what the word in its ordinary meaning signifies. If McLaughlin did any act, or omitted to do any act, notwithstanding which Cox & Co. could legally proceed to fulfil their contract, they were not prevented. No such act was done, nor was anything omitted. At all times Cox & Co. had the legal right to go on, and McLaughlin protested against their abandonment of the contract.

A party to a contract has the legal power to stop the work under it, but thereby becomes liable to pay to the other party such damages as the latter may suffer by such prevention. If A. agrees to build a house for B. with lumber to be furnished

by B., and the latter fails to supply the lumber, he prevents A. from performing, and becomes liable. In neither of these events can A. proceed. But if A. is to build for B., and furnish as well the material as the labor, upon payments from time to time to be made by B., the failure of the latter to pay is not prevention, for, notwithstanding such non-payment A. may still go on.

This, too, was settled on the last appeal, where it was held "that the mere failure to pay the money due upon the contract before the completion of the work did not constitute such 'prevention' as justified a recovery in the present action."

This court adopts also, and fully concurs in the opinion of the Supreme Court of Illinois in *Palm v. The Ohio & Miss. R. R. Co.* 18 Ill. 219, and makes a long extract from the opinion in that case, delivered by Mr. Justice Caton. This, by adoption, becomes the language of this court. That extract says: "It is undoubtedly true that the failure to make such payments may, in point of fact, leave the other party without the means or credit to go on and complete the job; but such is not the necessary result of such a failure, and we cannot safely adopt it as a conclusion of law that it does prevent the party from going on. The prompt payment of such instalments might be indispensable to enable a party of small means and credit to go on, while another of larger means and more extended credit might be able to complete the contract without embarrassment or sacrifice. Can we inquire into the actual fact, and see whether the non-payment did really stop the plaintiff or not, and thus administer one measure of law to the poor man, and another to the rich?"

The court then demonstrates that no such inquiry could be made.

But the court below, against the objection of the defendant, allowed the plaintiff to introduce evidence as to the pecuniary condition of Cox, Myers & Co. when the contract was made, and the knowledge of the defendant on the subject, for the purpose of showing that the parties contracted with the understanding that a failure in the payments would put an end to the work. This evidence was admitted on the theory of interpretation, but its object was to add to the terms of the contract by

construing into it a provision making the payment of the instalments a condition precedent to the further prosecution of the work. It is clear that such evidence was inadmissible. A contract may be read by the light of surrounding circumstances, but the strongest light does not enable the court to make a new contract for the parties. All previous and contemporaneous understandings are merged in the contract as written, and it cannot be contradicted, altered, added to, or varied by parol evidence. (*London Tramway Company*, appellants, v. *Bailey*, respondents, 28 Eng. 199, and notes; S. C. 3. Q. B. Div. 217; *The Tharsis Sulphur and Copper Co.*, appellants, v. *McElroy & Sons and others*, respondents, 8 Appeal Cases, 1040; S. C. 24 Eng. 638, and notes; *Bristow v. Catlett*, 92 Ill. 17; *Andrus v. Mann*, 92 Ill. 40; *Driver v. Ford*, 90 Ill. 595; *Leopold v. Salkey*, 89 Ill. 412; *Wood v. Surrells*, 89 Ill. 107; *Schroer v. Wessell*, 89 Ill. 115; *Lucas v. Beebe*, 88 Ill. 427; *Knowlton & Co. v. Cook*, 70 Me. 143; *Stevens v. Haskell*, 70 Me. 202; *Whitmore v. Learned*, 70 Me. 277; *Witzler v. Collins*, 70 Me. 290; *McGovern v. Heissenbuttel*, 8 Ben. 46; *Blackman v. Dowling*, 63 Ala. 304; *Glover v. McGilvray*, 63 Ala. 508; *Crouch v. Woodruff*, 63 Ala. 466; *Fore v. Hibbard*, 63 Ala. 410; *Copeland v. Cunningham*, 63 Ala. 394; *Larzear v. National Union Bank of Md.* 52 Md. 119; *Smith v. Flanders*, 129 Mass. 323; *Way v. Batchelder*, 129 Mass. 361; *Trager v. Louisiana etc.* 31 La. An. 235; *Perry v. Burton*, 31 La. An. 262; *Heffield v. Meadows*, L. R. 4 C. P. 596; *Evans v. Pratt*, 3 Mann. & G. 759; *Smith v. Wilson*, 3 Barn. & Adol. 728; *Shore v. Wilson*, 9 Clark & F. 555; *Broughton v. Mitchell*, 64 Ala. 210; *Straus v. Meertiff*, 64 Ala. 299; Whart. on Ev. vol. 2, §§ 940, 941, and notes; *Estate of Garraud*, 35 Cal. 340; *Young American Engine Co. v. Sacramento*, 47 Cal. 594; *Hendrick v. Crowley*, 31 Cal. 476; *Lennard v. Vischer*, 2 Cal. 37; *Adler v. Friedman*, 16 Cal. 138; *Osborne v. Hendrickson*, 7 Cal. 286; S. C. 8 Cal. 33; *Pierce v. Robinson*, 13 Cal. 126; *Smith v. Moynihan*, 44 Cal. 64; *Hill v. Shields*, 31 Am. Rep. 499; *Taylor v. French*, 31 Am. Rep. 609; *Hypes v. Griffin*, 31 Am. Rep. 71; *Martin's Exec. v. Lewis' Exec.* 32 Am. Rep. 682.)

In regard to the supposed prevention arising from the total suspension of the work by McLaughlin, it was held on the last

appeal, in view of the terms of the contract, that he was authorized to suspend the work, and therefore *suspension* was not *prevention*. But the court finds that the work was suspended immediately after the execution of the supplemental contract on the 2d of October, 1865, and it is also found that the work was continued up to the 15th of September, 1866. There is, however, no truth in the finding as to the suspension of the work. It is directly in the face of the evidence.

The learned counsel further argued that as the payments were to be made upon estimates of the engineer, and there was no allegation or proof in relation to such estimates, the plaintiff could not recover, citing *Holmes v. Richet*, 56 Cal. 307; *Vanderwerker v. Snyder*, 27 Vt. 130; *Herrick v. Belknap*, 27 Vt. 673; *Wilson v. N. Y. & Md. Line Railroad Co.* 11 Gill. & J. 58; *Kidwell v. Baltimore & Ohio Railroad Co.* 11 Gratt. 676; *Morgan v. Birnie*, Langdell's Select Cases on Contracts, 508; *Clarke v. Watson*, Langdell's Select Cases on Contracts, 598; *McMahon v. New York & Erie R. R. Co.* 20 N. Y. 468.

They also contended that the contract stated in the complaint was essentially different from the contract between the parties as set up in the answer and shown by the evidence and findings of the court, and that the plaintiff could not sue on one contract, and recover upon another, citing *Washington etc. Steam Packet Co. v. Sickles*, 10 How. 419; *Hart v. Rose*, Hemp. 238; *People v. Jackson*, 24 Cal. 632; *Rogers v. Cody*, 8 Cal. 324; *Gilmore v. Lycoming Fire Ins. Co.* 55 Cal. 124.

S. W. Sanderson, and *Fox & Kellogg*, also for Appellant, argued the same questions in part, and others not passed upon by the court.

McAllister & Bergin, *J. P. Hoge*, and *M. G. Cobb*, for Respondent.

1. A previous decision of the appellate tribunal establishes the law of the case, but it does not make the facts of the case; or, as expressed by this court, "facts are not settled by judicial precedents, but only questions of law." (*Swift v. Kramer*, 13 Cal. 531; or, as stated in *Nieto v. Carpenter*, 21 Cal. 488.)

"We admit that a previous ruling of the appellate court

upon a point directly made is as to all subsequent proceedings a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves." (*Phelan v. San Francisco*, 20 Cal. 39.) But such ruling, if relating to a matter of fact, can only be invoked when the fact re-appears under the same circumstances in which it was originally presented." (*U. S. v. Arredondo*, 6 Peters, 736-741.)

2. Parol evidence of all the facts and circumstances surrounding the parties is admissible for the purpose of enabling the court to correctly construe the terms of the contract. (*U. S. v. Peck*, 12 Otto, 65; *Saunders v. Clark*, 29 Cal. 304.)

3. Subtraction or withholding from the contractors the means of enabling them to perform their contract may constitute prevention. (*U. S. v. Peck*, 12 Otto, 65; *School Dist. v. Hayne*, 46 Wis. 513; *Phillips v. Seymour*, 1 Otto, 649; *Canal Co. v. Gordon*, 6 Wall. 569; *Bean v. Miller*, 69 Mo. 393; *Jones v. Mial*, 82 N. C. 252; *Dobbins v. Higgins*, 78 Ill. 440; *Lincoln v. Schwartz*, 70 Ill. 184; *Oates v. Kendall*, 67 N. C. 241; *Kingsley v. City of Brooklyn*, 78 N. Y. 216; *Freeth v. Burr*, Law Rep. 9 C. P. 218; *Schulte v. Hennessy*, 41 Iowa, 356; *Grand Rapids and Bay City R. R. Co. v. Van Duzen*, 29 Mich. 444; *Howard v. Wilmington and Susquehanna R. R. Co.* 1 Gill, 322-343; *Graves v. Donelson*, 24 Conn. 635; *Central Military Park R. R. Co. v. Spurck*, 24 Ill. 588; *Schwartz v. Saunders*, 46 Ill. 23; *Court v. Ambergate*, 6 E. L. & E. 230; *Hochester v. De La Tour*, 20 E. L. & E. 160; *Thompson v. Lane*, 8 Bosw. 485; *Lamoroux v. Rolfe*, 36 N. H. 36; *Shaw v. Grandy*, 5 Jones (N. C.) 57.)

4. The evidence as to the pecuniary condition of Cox, Myers & Co. was clearly admissible on the question of prevention. It tended to show that McLaughlin, by failing to pay the instalments, knowing that such failure would compel an abandonment of the work, not only violated his obligations under the contract, but prevented its completion. True, mere non-payment in and of itself, as announced by this court, and we hope simply for the purposes of this contract, does not constitute prevention. Yet, most assuredly, in connection with other circumstances, it has a bearing, and is relevant as evidence upon the question as to whether or not McLaughlin did prevent performance of the

contract; and does not the pecuniary condition of the parties have a like bearing? The case of *The United States v. Peck* is strongly in point.

5. Only since July 1, 1874, has it been the statute law of this State that "no variance between the allegation in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." (Code Civ. Proc. § 469.)

How a party can be misled by the adverse party claiming relief upon the contract he himself sets up as the true one, is not readily apparent. Especially is this the case when the litigation for years has been between the same parties upon the same contract. Parties cannot thus play fast and loose. The law will not sanction it.

Upon the former appeal appellant procured reversal of judgment in favor of respondent upon the ground that the contract set up in the answer was the true contract determinative of the rights of the parties, and that according to the same, respondent was not entitled to retain the judgment recovered, and this court so adjudged and ordered a new trial to determine the rights of the parties under the contract. Upon this retrial counsel say this is not the contract in controversy at all.

They are estopped from so claiming. (*Philadelphia & Wilmington R. R. v. Howard*, 13 How. 336; *Lilley v. Adams*, 108 Mass. 52; *Hooker v. Hubbard*, 102 Mass. 241.)

Such practice is simply trifling with the administration of justice.

Briefs in reply were filed by *S. M. Wilson*, *Tully R. Wise*, *Fox & Kellogg*, and *Rhodes & Barstow*.

Ross, J.—For many reasons the judgment of the court below is erroneous. The action is one at law, on a special contract, the plaintiff alleging part performance of the contract on his part, and that of his predecessors in interest, and the preventing of the completion of it by the defendant. The case has been here repeatedly, the complaint on which the last trial was had being the *seventh* complaint filed in the action. Naturally enough, therefore, certain propositions have become the law of

the case. Among them that averment and proof of prevention is essential to a recovery by plaintiff, inasmuch as there is no pretense of the work contracted for having been completed or the contract rescinded. (44 Cal. 18; 47 Cal. 87; 54 Cal. 605; 52 Cal. 590.) It has also become the law of the case that neither the mere failure of the defendant to pay the instalments as they became due, nor the exercise by defendant of a right secured to him by the contract itself, constituted prevention. (52 and 54 Cal. *supra*.)

For the purpose of overcoming the first of these last-mentioned obstacles, the plaintiff was permitted on the last trial in the court below, against the defendant's objections, to introduce testimony to the effect that both parties knew at the time of making the contract that the contractors relied, and were compelled by their pecuniary resources to rely, upon the payment by the defendant of the instalments as they became due; and the court below so found. In rightly holding such testimony erroneously admitted, MR. JUSTICE MYRICK, speaking for the court, when the case was last under consideration, said: "Parol evidence of surrounding circumstances may be given to aid in the proper interpretation of an instrument; but where the parties have themselves used words which require no interpretation, where the words are understood, there is no occasion for aid to their proper interpretation or meaning. In this case the parties had, by their contract, clearly expressed two ideas or agreements: First, that the contractors were to perform certain work; second, that the defendant was to make payments therefor in instalments. The words as to these agreements are of very plain signification. This court had decided non-payment of instalments was not prevention; therefore, by the terms of the contract payment was not a condition precedent. In order to make payment a condition precedent a clause would have to be inserted, injected into the contract, which the parties themselves did not see fit to place there. It is not in evidence that the parties agreed by parol that the payments should be conditions precedent; but even if they had so agreed, the well-known rule would apply, that their final conclusions were as they have expressed them in writing." (10 Pac. C. L. J. 263.)

Of course this testimony was introduced, and the finding

made thereon—the ninth—was made as bearing upon the question of prevention. Neither could have any other bearing. From the findings themselves it is sufficiently obvious that the prevention found by the court below was based upon the facts detailed in the ninth and tenth findings; and this becomes perfectly plain when the evidence is considered, from which it appears that the only attempt made to show prevention was to show the non-payment of the instalments by the defendant, the “surrounding circumstances” just alluded to, and suspension of the work by the defendant. In the tenth finding the court found that the defendant *entirely* suspended the work immediately after October 2, 1865. But this finding, as was justly said by MR. JUSTICE MYRICK in the opinion already referred to, “is not sustained by the evidence. The evidence is that McLaughlin directed the diminution of the laboring force to but a few men. This he had a right to do according to the express terms of the contract. (54 Cal. 605.)” It may be added that by the express terms of the contract between the parties, the defendant was authorized to *entirely* suspend the work, the contract prescribing the consequences of such suspension. *Prevention* implies *ex vi termini*, a breach of contract, and, of course, a party cannot commit a breach of contract by exercising a right secured to him by the contract. The finding that the defendant *entirely* suspended the work is, therefore, insufficient to constitute prevention. (54 Cal. 607.) Besides, the finding is, as already shown, unsupported by the evidence; and is in conflict with another (the fourth) finding made by the court, in which it is found that the plaintiff furnished material and performed labor and service of great value in and about the execution of the contract up to September 15, 1866. It is also in conflict with the averment of the complaint itself, in which it is expressly charged that Cox and Arnold, as the successors in interest of Cox, Meyers & Co., diligently prosecuted the work until September 15, 1866.

Moreover, there is in this case neither averment nor proof that the estimates of the engineer, on which alone, according to the terms of the contract between the parties as proved and found, the defendant was to pay, were made, nor is there any legal cause shown, or attempted to be shown, why such esti-

mates were not made. This question has recently been before us in two cases, one of which is *Loup v. C. S. R. R. Co.* 63 Cal. 97, and the other *Holmes v. Richet*, 56 Cal. 307, in which the conclusion was reached, to which we adhere, that in such cases averment and proof of the making of such estimates is essential to put the party making the agreement in default, unless legal cause is averred and proved why they were not made.

But further and beyond all this, the contract declared on by the plaintiff is essentially different from the contract set up by the defendant and proved and found by the court to have been made between the parties; and the respective rights and obligations of the parties under the one are essentially different from what they are under the other.

By the contract stated in the complaint, the obligation of Cox, Meyers & Co. was limited "to the extent of doing, and furnishing materials for, all the gradation, masonry, and bridging, and all other things necessary and proper to place said roadbed (of the railroad referred to) ready for the cross-ties and iron equipment, and no more." By the contract proved and found their obligation went far beyond this. By that, the work to be done by them was to include all bridges, viaducts, embankments, excavations, road-crossings, culverts, drains, and all other things necessary, usual, and proper to place the part of the railroad described complete for the cross-ties and iron equipment to be placed thereon, and *according to certain plans and specifications* annexed to the contract and made part of it. The work to be done by them was to be done in the best and most thorough manner, and all that portion of the railroad undertaken to be built by them was to be equal to the best constructed railroad in the State, and *was to be in full compliance with the contract then existing between McLaughlin and The Western Pacific Railroad Company, and in full compliance with the requirements of the board of directors of that company.* It is manifest that performance of the obligations imposed on Cox, Meyers & Co. by the contract alleged in the complaint would by no means be a compliance with the obligations imposed on them by the contract proved and found.

Furthermore, the *defendant's* obligations, as well as his

rights, are essentially different under the two. The contract proved and found is not alleged in the complaint to have been made, is not alleged to have been performed in whole or in part by the plaintiff, nor to have been broken by the defendant. The alleged contract, for the breach of which the action was brought, was not proved.

Judgment and order reversed and cause remanded for a new trial.

MORRISON, C. J., MYRICK, J., MCKINSTY, J., and THORNTON, J., concurred.

Petition for a rehearing denied.

[In Bank.—February 27, 1883.]

CHARLES McLAUGHLIN, RESPONDENT, v. CHRISTOPHER HEID, APPELLANT.

EJECTMENT — CONGRESSIONAL GRANT — PATENT.—In an action of ejectment based on a patent purporting to have been issued in pursuance of a grant by Congress, it is competent for the defendant to attack the validity of the patent on the ground that the land was excepted from the grant.

APPEAL from a judgment of the late District Court of the Fifth Judicial District, county of San Joaquin, and from an order refusing a new trial.

J. H. Budd, for Appellant.

Lands within the limits of the tract of land called "Moquele-mos" were not sold or granted under the authority of the United States to the Western Pacific Railroad Company. (*McLaughlin v. Fowler*, 52 Cal. 203; *Newhall v. Sanger*, 92 U. S. 761.)

The patent for the defendant having been for land reserved from such appropriation is void.

To the same effect are the cases of *Patterson v. Winn*, 11 Wheat. 380; *Easton v. Salisbury*, 21 How. 432; *Kissell v. St. Louis Schools*, 18 How. 27; *Summers v. Dickenson*, 9 Cal. 554;

Carr v. Quigley, 57 Cal. 394; *Doll v. Meador*, 16 Cal. 325; *Terry v. Megerle*, 24 Cal. 609.

Patents issued without authority of law, for land, are absolutely void. (*Summers v. Dickenson*, 9 Cal. 554; *Parker v. Duff*, 47 Cal. 554; *People v. Carrick*, 51 Cal. 325; *Easton v. Salisbury*, 21 How. 432; *Stoduard v. Chambers*, 2 How. 318; *Polk's Lessee v. Wendal*, 9 Cranch, 87; *Patterson v. Winn*, 11 Wheat. 380; *Wilcox v. Jackson*, 13 Peters, 511; *Kissell v. St. Louis Schools*, 18 How. 27; *Reichart v. Felps*, 6 Wall. 160; *Wright v. Rutgers*, 14 Mo. 585.

Mich. Mullany, of counsel for Appellant.

Tully R. Wise, for Respondent.

The question is whether in an action of ejectment a person having no title can give in evidence facts that would render a patent perfect on its face null and void. We maintain that such evidence is inadmissible. (*Bledsoe's Devises v. Well*, 4 Bibb. 329; *Doll v. Meador*, 16 Cal. 327; *Jackson v. Lawton*, 10 Johns. 24; *Patterson v. Tatum*, 3 Sawy. 172; *Dodge v. Perez*, 2 Sawy. 654; *Jackson v. May*, 16 Johns. 184; *Jackson v. Hudson*, 8 Johns. 374; *Mowry v. Whitney*, 14 Wall. 434; *U. S. v. Atherton*, 102 U. S. 372; *U. S. v. Schurz*, 102 U. S. 404; *Marquez v. Frisbie*, 101 U. S. 475; *Chapman v. Quinn*, 56 Cal. 256; *French v. Fyan*, 93 U. S. 169; *Shepley v. Cowan*, 91 U. S. 339; 93 U. S. 169.)

Upon questions of fact the decision of the land office is conclusive. (*Dilla v. Bohall*, 53 Cal. 710; *Powers v. Leith*, 53 Cal. 711.)

Whenever authority is given to issue a patent upon a prior state of facts, the authority to ascertain the facts is implied.

The judicial department has no authority to decide questions except when the law gives it. (*Berry v. Cammet*, 44 Cal. 347; *Hosmer v. Wallace*, 47 Cal. 461; *Hestres v. Brennan*, 50 Cal. 211; *Weaver v. Fairchild*, 50 Cal. 360.)

There is nothing in the world that is more a question of fact than the location of a Mexican grant. (*Hildebrand v. Stewart*, 41 Cal. 387; *Burrell v. Haw*, 40 Cal. 373; *Hess v. Bolinger*, 48 Cal. 349; *Rutledge v. Murphy*, 51 Cal. 388.)

In this case the appellant did not appeal to the commissioner and he could not defeat us in equity. (See *Sac. Savings Bank v. Hynes*, 50 Cal. 196.) *Shipley v. Cowan*, 91 U. S. 340, also holds that the rulings of the land officers are conclusive.

The Statute of Limitations has run in our favor against all the world but the government. (See *Lord v. Sawyer*, 57 Cal. 65.)

F. T. Baldwin, and *J. O. Campbell*, also for Respondent.

The facts sufficiently appear in the opinion of the court.

PER CURIAM.—This was an action of ejectment in which judgment was rendered for plaintiff. This appeal is prosecuted by defendant.

The plaintiff claimed under a patent of the United States purporting on its face to have been issued under a grant of land made to the Central Pacific Railroad Company, and the Western Pacific Railroad Company, by acts of Congress passed in the years 1862 and 1864. This patent was offered in evidence, together with other evidence, and to both patent and the evidence referred to, various objections were made by defendant. These objections were overruled by the court, and exceptions were reserved by defendant to its rulings, as to which we consider it only necessary to say that we find no error in the rulings excepted to.

To defeat the recovery by plaintiff defendant offered to show that at the time of the grant by Congress under which the patent to plaintiff's grantor purports to have been issued, the land in controversy was included within the exterior limits of a tract of land claimed as a Mexican grant, and known as "Moquelamos," which was reserved from the grant to the railroads mentioned; that afterwards, on the 5th of December, 1876, he (defendant) was a qualified pre-emptor, and as such entered on the land in dispute for the purpose of acquiring the title thereto under the pre-emption laws of the United States, and has improved the land and continued to reside thereon ever since; that at the time of his settlement the land was and ever since has been surveyed agricultural land of the United States, and subject to pre-emption; that on the 1st day of February, 1877, he (defendant)

prepared and offered to file in the land office of the proper district his declaratory statement in due form of law, of his claim to the land, and that the register of the land office, without right refused to permit him to do so, from which decision of the register he appealed, and his appeal is still pending and undetermined before the commissioner of the general land office at Washington. This offer was excluded by the court, and defendant reserved an exception to the ruling.

This was held to be error in *Carr v. Quigley*, 57 Cal. 395, which cause was decided by Department One, and on petition for rehearing was approved by the court in Bank. On the authority of that case the judgment and order are reversed and cause remanded for a new trial.

Ross, J., dissenting.—I dissent. The action is ejectment for the recovery of the possession of the northeast quarter and the east half of the northwest quarter of section 19, township 4 north, of range 9 east, containing two hundred and forty acres of land.

Judgment for plaintiff. Appeal by defendant.

The statement on motion for new trial recites:—

“On the trial of the action, plaintiff offered and read in evidence, under the objection of defendant, a patent in due form of law, signed by the President of the United States, which patent recited that a grant of land had been made by the United States to the Central Pacific Railroad Company, and to the Western Pacific Railroad Company by acts of Congress in the years 1862 and 1864, and by joint resolution of Congress passed in 1865, which purported to convey the land in question; and plaintiff also offered in evidence articles of consolidation between the Central Pacific Railroad Company of California and the Western Pacific Railroad Company of California, showing that the two corporations were united under the name of the Central Pacific Railroad Company.

“The defendant objected to said patent as evidence on the grounds:—

“1st. Said land described in said patent does not appear to have been granted to said Western Pacific Railroad Company.

“2d. There was no evidence that the said Central Pacific

Railroad Company was the successor in interest of the Western Pacific Railroad Company.

"3d. There was no evidence that the land in complaint mentioned was ever granted to said Western Pacific Railroad Company or said Central Pacific Railroad Company, or to either of said companies.

"4th. There was no evidence that said Western Pacific Railroad Company ever was or now is a corporation *de facto* or *de jure*.

"The court overruled the objections and the defendant excepted.

"And plaintiff under similar objection and exception read said patent in evidence, and also a deed from said Central Pacific Railroad Company to plaintiff, purporting to convey said land to the plaintiff in this action.

"Defendant admitted that he was in possession of the land sued for in this action at the time of the commencement of the action, and has been in such possession ever since.

"It was further admitted on the part of defendant that the value of the use and occupation of said land and premises is thirty cents per acre per annum. Plaintiff rested."

The objections to the patent were properly overruled. The patent being in due form of law, every presumption is in favor of the regularity of the proceedings preceding its issue. According to the record, it recites that the United States by acts of Congress passed in the years 1862 and 1864, and by joint resolution of Congress passed in 1865, purported to convey the land in question to the Central Pacific and Western Pacific Railroad Companies. The United States thus purporting to convey the land, *prima facie*, at least, did convey it.

The record further shows that the plaintiff introduced in evidence, without objection, articles of consolidation between the two named companies, "showing that the two corporations were united under the name of the Central Pacific Railroad Company," and followed this with the introduction of a deed from the last-named company to the plaintiff, purporting to convey to him the same land. This made a *prima facie* case of title in plaintiff from which the right of possession of the premises followed. But to defeat the plaintiff's recovery, the defendant offered to show that at the time of the grant by Congress to the

railroad companies, the land in question was included within the exterior limits of a tract of land claimed as a Mexican grant and known as "Moquelamos" and was therefore reserved from the railroad grant; that subsequently, to wit, December 5, 1876, he, defendant, was a qualified pre-emptor, and as such entered on the tract in dispute for the purpose of acquiring the title thereto under the pre-emption laws of the United States, and has improved the land and continued to reside thereon ever since; that at the time of his settlement the land was, and ever since has been, surveyed agricultural land of the United States, and subject to pre-emption; that on the 1st day of February, 1877, defendant prepared and offered to file in the land office of the proper district his declaratory statement in due form of law, of his claim to the land, and that the register of the land office wrongfully and unlawfully refused to permit him so to do, from which decision of the register defendant appealed, and which appeal is still pending and undetermined before the commissioner of the land office at Washington.

In the offer no reason is assigned for the refusal of the register to permit the filing of the declaratory statement, but in his answer the defendant avers that such refusal was based "on the sole ground that said pretended patent for said land had been issued by the United States."

If that be accepted as the ground, the reason was a good one, because as the patent is regular on its face, and as every presumption is in favor of the regularity of the proceedings on which it is based, the case presented to the register was one in which there was an application on the part of a pre-emptor to file a declaratory statement for a piece of land to which the government had already conveyed away all of its title by patent duly issued.

But the defendant's offer of proof did not disclose the ground on which the register refused to file the statement, nor the date of the issuance of the patent, and the plaintiff's objections to the proposed testimony, which were sustained by the court below, went principally to the point that the defendant's position was not such as entitled him to call in question the validity of the patent under which the plaintiff claimed. That position, I think, should be sustained. That the defendant has no title to

the land is obvious. When he sought to obtain it through the only channel through which it could be obtained — the land department of the government — he was met at the threshold by a refusal on the part of the government officer to permit him to take the first step in the proceedings prescribed by Congress for the acquisition of title from the government.

As already observed, the defendant's offer does not disclose the ground of that refusal. But in the absence of a showing to the contrary, we are bound to presume that the officer acted rightly — perhaps for the reason stated in the defendant's answer, that the government had already executed a patent to another party for the same land — perhaps because the defendant's declaratory statement did not show that he had ever settled on the land. But whatever the reason, the fact remains that he did refuse. In no sense is the defendant in privity with the government. Proof of his settlement and improvement of the land it was essential for him to make before he could be entitled to enter it; and of this proof, as we held in *Chapman v. Quinn*, 56 Cal. 274, "the register and receiver are the exclusive judges, subject to the supervision and control of their superior officers of the land department. The courts have no power to substitute their judgment upon the facts of the defendant's alleged settlement and improvement of the land for that of the officers to whose judgment Congress has confided the determination of those questions." So that we have here the case of a defendant who has never filed a declaratory statement, never made proof of settlement, never paid any money, never received any certificate or other recognition from the officers of the land department, seeking in an ordinary action of ejectment to attack the validity of a patent which is regular on its face, and which purports to convey the land from the government to the plaintiff's grantor. If that can be done, of what avail is the government patent?

If the proceedings on which it is based can be called in question by every stranger who chooses to enter into the possession of the land described in it, where is the security intended to be conferred by it? It is, indeed, difficult to perceive the use of such an instrument if the antecedent proceedings are open to controversy to the same extent after as before its issue.

"The object of the patent," said the court in *Doll v. Meador*,

16 Cal. 326, "is to give security and quiet to its holder, as to the title of the property which it purports to transfer to him; but such patent would be anything but an instrument of security and repose, if every one not in privity with the original owner of the title, but simply hoping that by some future action of the government he may possibly possess some interest in the property, could compel the patentee in every instance in which he may seek the aid of the legal tribunals, to establish the validity and regularity of the action of the officers of the State in the selection of the land, and in the issuance of the patent."

It is true that if a patent is issued without authority it may be collaterally attacked in a court of law. But this exception from the general doctrine respecting the presumptions attending such instruments is, as was held by the Supreme Court of the United States in the recent case of *The St. Louis Smelting & Refining Company v. Kemp*, 104 U. S. 645, "subject to the qualification, that when the authority depends upon the existence of particular facts, or upon the performance of certain antecedent acts, and it is the duty of the land department to ascertain whether the facts exist, or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack, as is its determination upon any other matter properly submitted to its decision."

In the case before us, the patent, as has been already observed, is in due form of law, and the land it purports to convey is within a section embraced in the railroad grant. Read, therefore, in the light of the law, or of anything of which the court must take judicial notice, it cannot be said that the patent is invalid. It is true that if the particular piece of land embraced in the patent was included within the limits of a claimed Mexican grant, it was reserved from the grant to the railroad company. (*Newhall v. Sanger*, 92 U. S. 761.) But upon what department of the government devolved the duty of ascertaining the fact in relation to that matter? That it was a question of fact cannot be doubted. It could only be ascertained by a survey of the premises. It was one of the facts the officers of the land department were called upon to determine before they could issue the patent to the grantee; and being one of the facts properly determinable by those officers, their deter-

mination in favor of the grantee, as evidenced by the patent, is conclusive on a collateral attack in an action at law, more especially by a stranger to the common or paramount source of title. (*The St. Louis Smelting and Refining Company v. Kemp*, *supra*; *French v. Fyan*, 93 U. S. 169; *Marquez v. Frisbie*, 101 U. S. 475; *United States v. Atherton*, 102 U. S. 372; *United States v. Schurz*, 102 U. S. 404; *Patterson v. Tatum*, 3 Sawy. 172; *Bladsoe's Devises v. Well*, 4 Bibb, 329; *Alexander v. Greenup*, 1 Munf. 134; *Churchill v. Anderson*, 56 Cal. 55; *Chapman v. Quinn*, 56 Cal. 266.)

There is a recent case entitled *Carr v. Quigley*, 57 Cal. 394, decided by this court since the cases of *Churchill v. Anderson*, and *Chapman v. Quinn*, which, without noticing them, contravenes the doctrine of those cases and of the other cases cited. The cases cited by Department One (57 Cal. 395), in support of the conclusion reached by it in *Carr v. Quigley*, were *Doll v. Meador*, 16 Cal. 295, and *Newhall v. Sanger*, 92 U. S. 761. But a closer examination of those cases shows that neither of them sustains the conclusion reached in *Carr v. Quigley*.

Doll v. Meador was an action of ejectment brought to recover the possession of a lot of land in the town of Red Bluff, county of Tehama, the plaintiff basing his right to recover upon a patent issued by the State. The defense rested, as stated by the court itself (16 Cal. 320), "upon the alleged reservation of the tract embraced in the patent to the plaintiff, from location by the State, as part of the land granted to her, on the ground of its previous selection as a town site. On the trial the defendant offered to prove various facts showing its selection and survey into blocks and lots, and its settlement and occupation by citizens of the United States and of this State, as early as June, 1850, and its continued use and occupation by them as a town site, and for the purposes of trade, and not agriculture, ever since; and the possession and use of the lot in controversy by the defendants, or parties through whom they claim, for the like purpose, continuously since the original selection; also that the tract was first officially surveyed, and the survey thereof approved under the laws of the United States, and by their proper officers, on the thirty-first of March, 1855; that the tract was then designated as such town site in the official plat of the

survey; that a certified copy of the plat was on file in the office of the receiver and register of the United States land office at Marysville, at the time of the location referred to in the patent to the plaintiff, and that no patent from the United States for the tract, or certified list embracing the same, made by the commissioner of the general land office of the United States, has ever been issued to the State. The proof offered, except as to the issuance of a patent by the United States, or a certified list by the commissioner of the general land office, was, under the objection of the plaintiff, excluded, and as to the patent and certified list the proof was held incompetent, and it is upon exceptions taken to the rulings in these respects that the defendants seek a reversal of judgment."

In *Doll v. Meador*, therefore, the defendants sought to show, by matters *dehors* the patent, that the disputed premises were reserved from the grant to the State because within the town site of Red Bluff, and thus to avoid the State patent; while in the case now before us the defendant seeks to show, by matters *dehors* the patent, that the disputed premises were reserved from the grant to the railroad company, because within the limits of a claimed Mexican grant, and thus to avoid the patent of the United States.

The difference, if any, in the position of the respective plaintiffs, is undoubtedly in favor of the plaintiff in the present case who claims under a patent from the United States, while the defendants in each are without title and without privity with the paramount or common source of title.

In *Doll v. Meador* the court distinctly decided the relation of the defendants to the title was not such as to allow them to question the validity and efficacy of the patent under which the plaintiff claimed, and concluded the opinion in these words: "Until some one appears prepared to trace title to himself from a common or paramount source, parties who are clothed with the solemn evidence of title furnished by the patent of the State may rest in security without fear of any successful disturbance in the enjoyment of the property held by them, whether that property be a portion of the school lands or swamp lands granted to the State by the general government."

In *Newhall v. Sanger*, 92 U. S. 761, both parties had a patent

for the disputed premises, the plaintiff claiming under a patent issued in professed compliance with the requirements of the acts of Congress commonly known as the Pacific railroad acts, and the defendant under a patent of a later date, which recited that the land was within the exterior limits of the Moquelamos grant, and that a patent had, by mistake, been issued to the railroad company. The object of the suit, which was a bill in equity, was to determine the ownership of the land.

Enough has been said to show that neither *Doll v. Meador* nor *Newhall v. Sanger* at all support the decision in *Carr v. Quigley*, while *Doll v. Meador* is really an adjudication the other way.

When the petition to have the case of *Carr v. Quigley* heard before the court in Bank was denied (57 Cal. 395), the refusal was based on the case of *McLaughlin v. Powell*, 50 Cal. 64. Yet that case does not sustain it either, for there the patent itself contained, as a part of the description, an express exception of "all mineral lands," should any be found in the tracts described in it; and the court held that parol evidence was competent to show that the demanded premises were mineral lands.

I am convinced that the cases cited in support of *Carr v. Quigley* do not support it; that it is opposed to the other cases cited, is wrong in principle, and therefore ought to be overruled.

In my opinion the judgment and order appealed from should be affirmed.

McKEE, J., concurred in the dissenting opinion of Mr JUSTICE ROSS.

Petition for a rehearing denied

[In Bank.—February 28, 1883.]

THE PEOPLE, APPELLANT, v. GEORGE L. JORDAN,
RESPONDENT.

FORMER ACQUITTAL.—JUDGMENT ON DEMURRER TO INFORMATION.—Pending a demurrer to an information, a new information was filed, and afterwards the demurrer to the former information was sustained, but no order was made or requested permitting a new information to be filed, nor was any opinion expressed that the objection raised could be avoided by a new information as provided for in section 1008, Penal Code. *Held*, the judgment on demurrer to the first information was a bar to another prosecution.

APPEAL from an order of the Superior Court of the city and county of San Francisco, discharging the defendant.

A. L. Hart, Attorney-General, for Appellant.

J. M. Lucas, for Respondent.

PER CURIAM.—On the 26th of May, 1882, an information was filed accusing the defendant of a misdemeanor, to which information the defendant demurred. The demurrer was argued and submitted. On the 15th of July, after the court had in open court intimated its intention to sustain the demurrer, the district attorney filed a second information based on the same offense. No leave of the court was asked or given for filing the second information. On the 22d of July the court made an order sustaining the demurrer to the first information—but no order was made or requested, or opinion expressed, as provided for in section 1008 of the Penal Code. The defendant then moved to dismiss the prosecution on the second information, which was granted, on the ground that the sustaining of the demurrer to the first information, without directing the filing of a new information, the second being substantially the same as the first, and for the same offense is final under section 1008 of the Penal Code, and is a bar to another prosecution; and the defendant was discharged and his bail exonerated.

From this order the people appealed.

We think the action of the court below, as to the second information, was correct. It makes no difference that the second information was filed before the judgment on the demurrer. When the judgment on demurrer was rendered, there being no

direction for a new information or re-submission, it became and was a bar to another prosecution for the same offense. The legislature seem, in the section referred to, to have made a second prosecution in case of demurrer sustained, depend upon the judicial opinion of the court that the objection raised by the demurrer may be avoided on a new information; and in the absence of such opinion the prosecution for that offense is at an end. *People v. Allen*, 61 Cal. 140, was not the case of demurrer sustained.

Order affirmed.

[Department One.— March 2, 1888.]

HAMILTON W. GRAY, APPELLANT, v. MATTHEW
NUNAN, SHERIFF, ETC., RESPONDENT.

WRIT OF POSSESSION — HUSBAND AND WIFE.— It is the duty of the sheriff, under a writ of possession against the husband, to dispossess the wife found in possession, notwithstanding she may have instituted divorce proceedings prior to the commencement of the action for possession, if her only claim to the property is such as she has by reason of her marital relations.

PRACTICE — NEW TRIAL — NOTICE OF MOTION — PRESUMPTION.— Respondent objected on appeal to the consideration of the statement on motion for new trial, because no notice of intention to move for new trial was filed or served. The transcript contained a stipulation giving plaintiff further time within which to serve his statement, and when it was served on defendant's attorney, the latter, in acknowledging its receipt, reserved the right to object that it was not served in time, but at no time in the court below objected to its settlement or consideration on the ground that proper notice of intention to move for a new trial had not been given. The court below, in denying the motion, did not proceed upon the supposed want of notice of intention, but upon the determination of the question presented by the motion itself. *Held*, that it would be presumed the court below found that proper notice was given, or that defendant had waived the objection.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

William Reade, for Appellant.

The evidence is insufficient to justify the verdict.

No evidence was introduced or offered to prove any title in Jane Canavan, except such as she derived as the wife of James under the lease to him.

The mere pending of divorce proceedings does not change the relations of husband and wife so as to confer upon the wife an interest in the realty, or create a distinct title and possession from the husband.

Wife cannot set up adverse possession during coverture. (*Frink v. Alsip*, 49 Cal. 104; *Lord v. Hough*, 43 Cal. 581; *Van Maren v. Johnson*, 15 Cal. 308.)

The possession of premises occupied by husband and wife, which is either common property or the separate property of the husband, is deemed in law to be in the husband. (*Bernal v. Gleim*, 33 Cal. 675.)

A judgment in unlawful detainer is sufficient authority to put out any member of his (defendant's) family. (*Saunders v. Webber*, 39 Cal. 287.)

M. C. Hassett, for Respondent.

Ross, J.—Objection is made to the consideration of the statement on motion for a new trial, because, as is said, no notice of intention to move for a new trial was filed or served. We find in the transcript a stipulation on the part of defendant, giving the plaintiff further time within which to serve his statement on motion for new trial; and when the statement was served on defendant's attorney, the latter in acknowledging its receipt, reserved the right to object that the statement was not served in time, but at no time in the court below objected to the settlement or consideration of the statement on the ground that proper notice of intention to move for a new trial had not been given. The court below, in denying the motion, does not appear to have proceeded upon the supposed want of notice of intention, but upon the determination of the questions presented by the motion itself. We must presume, therefore, that the court below found that proper notice was given, or that defendant had waived the objection.

The action is against the defendant, as sheriff, for his failure to execute a writ of possession issued on a judgment rendered in

one of the late County Courts in favor of the plaintiff, and against one James Canavan. The writ was placed in the hands of the sheriff by the plaintiff on the 18th of October, 1877, together with his fee for its execution. It appears that Canavan was not personally in possession of the property when the judgment was rendered, nor when the writ was placed in the hands of the sheriff, nor was he there in person at any time afterwards; but his wife was; and the sheriff refused to dispossess her under the writ for the reason that prior to the judgment on which the writ was based, Mrs. Canavan had instituted a suit for a divorce from her husband, and was at the time of the rendition of the judgment and the issuance of the writ in possession of the property. On this state of facts the court below instructed the jury:—

“ In this case, if you are satisfied that prior to the rendition of this judgment in the County Court the wife was in possession of that property, and had commenced an action of divorce against the husband, which involved that very property, then she was holding adversely to him and would not be bound by this writ, and the writ could not be executed against her; but, on the contrary, if you find from the testimony they were living there as husband and wife, or that she entered under the husband subsequent to the rendition of the judgment or the commencement of the action in the County Court, then she would be liable to the writ and should be removed; in other words, if she was holding there adversely to the husband at the time this action was commenced in the County Court, if she had commenced her action of divorce prior to that time, and was holding adversely to him, then it was the duty of the sheriff not to execute the writ of assistance against her, and he would not be liable.”

This instruction was erroneous. There was no testimony introduced tending to show any right to the property on the part of Mrs. Canavan, except such as she may have had by reason of her marital relations with the defendant in the writ. Under the writ against the husband the wife should have been dispossessed. (*Saunders v. Webber*, 39 Cal. 287.)

Judgment and order reversed and cause remanded for a new trial.

McKINSTRY, J., and McKEE, J., concurred.

Hearing in Bank denied.

[Department One.— March 2, 1883.]

JOSEPH BARSOLOU, RESPONDENT, v. R. H. NEWTON
ET AL., R. H. NEWTON, APPELLANT.

SPECIFIC PERFORMANCE — DELAY IN THE PAYMENT OF THE PURCHASE MONEY —
LACHES.— In an action against the vendors to enforce specific performance

of a contract for the sale and conveyance of real estate, where a considerable delay had occurred in the payment of a portion of the purchase money, it was claimed that the vendee had been guilty of such *laches* as rendered it inequitable to enforce the contract. On a review of the facts, *held*, that the charge of *laches* was unfounded, it appearing that the vendee had taken possession with the consent of the vendors, and made valuable improvements upon the land, and that the vendors assented to the delay in the first instance, and subsequently acquiesced therein without giving notice that payment was required.

ID.— PLEADING — TENDER.— The complaint did not allege a formal tender, but there was an allegation of part payment and an offer to pay the balance. *Held*, to be sufficient under the circumstances of the case.

ID.— SUBSEQUENT PAROL AGREEMENT — FINDING — EVIDENCE.— An answer was filed by one of the defendants, in which it was alleged among other things that after the making of the contract, the vendee became indebted to him in a certain amount for lumber and materials used in the construction of the improvements upon the land, and thereupon entered into a parol agreement with the vendors, whereby it was stipulated that he should not be entitled to a conveyance so long as this amount remained unpaid. The court below found that there was no such agreement, and this finding was objected to as being contrary to the evidence. *Held*, that the answer stated a valid agreement, but that the finding was justified by the evidence.

ID.— JUDGMENT — ERROR IN COMPUTING INTEREST.— An objection to the form of the judgment overruled on the authority of *Keller v. Lewis*, 53 Cal. 118, but an objection to the computation of interest upon the unpaid balance of the purchase money was sustained.

APPEAL from a judgment of the Superior Court of the county of Yolo, and from an order refusing a new trial.

The facts are sufficiently stated in the opinion of the court.

W. B. Treadwell, for Appellant.

C. P. Sprague, and P. H. Sibley, for Respondent.

McKEE, J.— This was an action to enforce specific performance of a contract made by the defendants jointly, for the sale

and conveyance of a lot of land in the town of Woodland to Andrew Weaver, the grantor and assignor of the plaintiff. Schardin, one of the defendants, admitted all the allegations of the complaint, and averred his readiness to perform the contract; but his co-defendant Newton denied the allegations, and averred that the plaintiff was not entitled to performance of the contract, because, by a subsequent parol agreement between Weaver and the defendants, Weaver was not to receive a deed under the contract until he paid for certain lumber and materials, which were furnished to him for constructing improvements upon the land which he had purchased.

It appears from the record that the defendants sold the land to Weaver on the 8th of October, 1877, for six hundred and twenty-five dollars, and executed and delivered to him their agreement in writing for a good and sufficient deed, upon payment of the purchase money, on or before October 8, 1879, with interest at the rate of one per cent per month, payable every three months; and to secure payment of that sum Weaver gave them his promissory note, payable on or before the 8th of October, 1879.

Upon the completion of the contract Weaver, by the consent of the defendants, entered upon the land, made valuable improvements upon it, and, in part performance of his contract, paid defendants between the 21st of January, 1878, and the 13th of October, 1880, the sum of five hundred and twenty-eight dollars and fifty cents. Upon receiving the payment of October 13, 1880, the defendants apportioned the amount between themselves, Schardin received his portion as the complement of his share of the purchase money, and Newton consented that Weaver should have his own time to pay the remainder, if he paid promptly the interest as it became due. On September 17, 1881, Weaver paid Newton one hundred dollars, which the latter received and indorsed upon the note. Every year, also, Weaver paid the taxes which were levied upon the land, except the taxes for the last year, which were voluntarily paid for him by Newton.

Soon after the last payment the improvements which had been built upon the land were destroyed by fire. Weaver then offered the land for sale, and on November 11, 1881, he pre-

sented to the defendants the form of a deed of conveyance of the land, which he requested them to execute and acknowledge, offering at the same time to pay the balance due upon the purchase money, including principal and interest. Schardin was ready and willing to execute the deed, but Newton unqualifiedly refused to accept the money or to execute the deed. Next day Weaver sold and conveyed the land to the plaintiff, and assigned to him the "agreement for a deed." The conveyance and assignment the plaintiff had recorded, and on the 14th of November, 1881, he exhibited them, as recorded, to the defendants, and presented to them a conveyance, in form, of the land, which he requested them to execute and acknowledge, offering to pay all the money due and unpaid, according to the terms of the contract between them and his grantor and assignor. Schardin executed and acknowledged the conveyance, but Newton refused to execute it, or to recognize the plaintiff as having any rights at all in the premises. Both offers were made in good faith. Each of the parties making them had, in the time of making them, the ability, and were ready to pay the money.

The contract itself was complete and certain, and fair in its terms; it was also mutual in its remedies, and such a one as a court of equity will enforce. By its terms time for the payment of the purchase money was specified; but although the purchaser failed to pay at the time specified, time was not of the essence of the contract, for the delay in making payment was excusable; the vendors consented to it and acquiesced in it, and never at any time withdrew their consent by giving notice to the purchaser that they required performance within a specified time. Laches was therefore not attributable to the purchaser in making his payments under the contract. When time is not of the essence of a contract for the conveyance of real estate, and has not been made so by notice, then the mere fact that the purchaser, with the knowledge and consent of his vendors, enters upon and occupies the land under his contract, and makes valuable improvements thereon, is ordinarily decisive to entitle him to the favorable interposition of a court of equity. (*Barnard v. Lee*, 97 Mass. 95; *Gibson v. Patterson*, 4 Ves. 90; *Waters v. Travis*, 9 Johns. 457; *Edgerton v. Peckham*, 11 Paige, 352.) And when in addition to the circumstances of entry on the land,

and the erection of valuable improvements upon it, there has been payment of the greater portion of the purchase money and readiness to pay the remainder, a purchaser will be entitled to relief if he has not been guilty of laches in applying for it, or unless there be some circumstances in his case which would render it inequitable to grant relief.

The complaint contains no allegation of a formal tender; but such a tender is not required in every case. (*Dowd v. Clarke*, 54 Cal. 48.) Part performance and readiness to perform the remainder was, under the circumstances of the case, sufficient for the maintenance of the action. (*Brix v. Otto*, 10 Ill. 70; *Buffalo Catholic Inst. v. Bitter*, 87 N. Y. 250.) The plaintiff was therefore entitled to a specific performance upon payment of the remainder of the purchase money, unless Newton had the right to refuse performance until the purchaser fulfilled the agreement averred to have been made between him and the defendants, after the contract for the conveyance of the land.

In *Hewlett v. Miller*, ante, we held that it was competent for a defendant in an action for specific performance to show that by a subsequent parol agreement he was to retain the title until other money than that named in the original contract should be paid; and he could properly refuse to convey until such subsequent contract was performed. That decision rests upon the principle that he who seeks equity must do equity. In the case in hand, however, one of the contracting parties defendant admits there was no such contract between the purchaser and the vendors. The other alleges there was, but the court below finds "that the written agreement or bond set out in the complaint and the promissory note for the sum of six hundred and twenty-five dollars constituted the entire agreement at the time of the making of said note and bond, and that it was never at any time agreed between the parties that said Weaver should not be entitled to the conveyance referred to in the said bond until he should make payment to the defendant Newton for lumber and material furnished said Weaver by said Newton, nor by any other party. And it is not true that no building was erected on said premises except with lumber furnished by defendant Newton."

Exception was taken to this finding on the ground that it was not sustained by the evidence.

The only evidence upon the subject was the testimony of Newton and Weaver. The testimony of the one tended to prove that the lumber was furnished upon such an agreement as he set up in his answer; that of the other, that there was no such agreement. In the entire case there are no circumstances from which an inference can be drawn that the lumber and materials were furnished upon such an agreement. On the contrary, all the circumstances tend the other way; and in the testimony of the only two witnesses upon the subject there was, at least, a sufficient conflict to sustain the finding of the court. The result of all the decisions is that this court will not disturb the order granting or refusing a new trial where there was a substantial conflict of evidence. There was, therefore, no error in denying the defendant's motion for a new trial.

The decree entered in the case was in form such as has been approved by this court in *Keller v. Lewis*, 53 Cal. 118. But there is a slight discrepancy in the computation and compounding of the interest. Correctly compounded and computed the remainder of the principal and interest due on the 14th of November, 1881, when the plaintiff's offer of performance was made and refused, amounted to two hundred and sixty-seven dollars and forty-one cents. The decree should be amended so as to require payment of that amount to the defendants; and as modified the judgment and order are affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

[Department One.— March 2, 1883.]

CARLO CAVAGNARO, RESPONDENT, v. JEAN DON ET AL.,
APPELLANTS.

TRUST — PURCHASE BY TRUSTEE — SUBSEQUENT PURCHASER WITH NOTICE.— A trustee cannot acquire an adverse right to the trust property for his own benefit, and a purchaser from him with notice of the trust stands in the same position.

APPEAL from a judgment of the Superior Court of the city

and county of San Francisco, and from an order refusing a new trial.

Action to quiet title. The facts are stated in the opinion of the court.

Stetson & Houghton, for Appellants, cited *Reed v. Warner*, 5 Paige, 656; *Ringo v. Binns*, 10 Peters, 269; *Hardenbergh v. Bacon*, 33 Cal. 376; *Schedda v. Sawyer*, 4 McLean, 185; *Massie v. Watts*, 6 Cranch, 148; Civ. Code, §§ 2228-2230; *Perry on Trusts*, §§ 790-796; *Gardner v. Gardner*, 3 Mason, 218; *Andrews v. Sparhawk*, 13 Pick. 401; Civ. Code, § 2244.

A. N. Drown, for Respondent.

Ross, J.—Adele Lefevre died seized and possessed of the property in question on the 15th of December, 1866. She left a will which was duly admitted to probate in the Probate Court of the city and county of San Francisco, by which she devised the property to one Silvey. The year before Lefevre's death one Halphen recovered in one of the courts of the city and county of San Francisco a money judgment against Silvey. On the 27th of February, 1867, an execution was issued on that judgment, and by the sheriff levied on all the right, title, and interest of Silvey in the property; and on April 20th, thereafter, his interest therein was sold by the sheriff under the writ to one Torrens. On October 19, 1867, one Le Roy recovered in the Fourth District Court of the State a money judgment against Silvey. By virtue of his judgment Le Roy redeemed the interest of Silvey sold under the Halphen execution, and there being no further redemption he received on the 31st of December, 1867, a deed from the sheriff conveying to him all of Silvey's interest in the property. Meanwhile other money judgments were rendered in the State courts against Silvey — one in favor of Madam Granier, and one in favor of the defendant Don; and after the sheriff's deed to Le Roy a third money judgment against Silvey was recovered by the defendant Martin.

So matters stood thus: All of Silvey's interest in the property as devisee of Lefevre, whatever that interest was, had become vested in Le Roy, while there remained money judg-

ments against Silvey in favor of Madam Granier, Don, and Martin, in the order in which they are here named. In this condition of affairs Madam Granier, Don, and Martin, in order to secure, if they could, payment of their respective judgments, determined to purchase of Le Roy the interest in the property he had acquired through his judgment against Silvey, and the subsequent redemption and sheriff's deed, as well as to purchase the judgment itself. The fund necessary to make the purchase was made up by Madam Granier, Don, and Martin, in the proportions following: Madam Granier contributing \$227.17; Don, \$226.17; and Martin, \$452.35; and with this common fund Le Roy's interest in the property and in the judgment he had recovered against Silvey, were purchased — the conveyance of the property, and the assignment of the judgment being taken, for convenience, in the name of Madam Granier. After this was done the three executed and placed upon the records of the county where the property is situated, the following agreement:—

“ ZOE GRANIER, T. B. MARTIN, }
 AND } Agreement.
 JEAN DON. }

“ Whereas, Madam Zoe Granier, T. B. Martin, and J. Don, have each recovered a judgment against Adolph Silvey; and whereas for the purpose of securing the payment of said judgments the said parties have jointly purchased of Theodore Le Roy a judgment recovered by said Le Roy against said Silvey, which judgment is recorded in judgment book “G” of the judgment records of the Fourth District Court, in and for the city and county of San Francisco, and a certain lot of land in San Francisco, with the tenements thereupon, conveyed to said Le Roy by the sheriff of said city and county by deed dated December —, 1867, recorded January —, 1868, in liber of deeds, page —, to which reference is made for a more particular description; and whereas the said parties have contributed to said purchases in the following amounts; viz., Madam Zoe Granier, \$227.17; T. B. Martin, four hundred and fifty-two dollars and thirty-five cents (\$452.35); J. Don, two hundred and twenty-six dollars and seventeen cents (\$226.17), gold coin of the United States.

" Whereas, for the purpose of greater convenience, the assignment of said judgment, and the conveyance of said property has been made to Madam Zoe Granier, one of the parties hereto.

" Now, therefore, we, the parties hereto, in consideration of the premises and of the sum of one dollar, heretofore paid by each of said parties to the others, the receipt whereof is hereby acknowledged, hereby agree as follows, viz.:—

" That the said judgment and property conveyed as aforesaid to Madam Zoe Granier is and shall be by her held in trust for the use and benefit of each and all the parties hereto in manner following:—

" That any and all the proceeds that shall be derived from the said judgment and property shall be applied as follows, and not otherwise:—

" 1st. To the payment of each of the parties hereto of the amount advanced by them respectively for the purchase of said interest as aforesaid, and in gold coin; 2d, to the payment to Madam Zoe Granier, trustee herein, of the amount of the judgment and costs now held by her against said Silvey, in gold coin; 3d, to the payment to J. Don and T. B. Martin of the amounts of their respective judgments and costs held as aforesaid against said Silvey; said payments to be *pro rata* in proportion to the amounts of their respective judgments, and in gold coin; 4th, if any balance remains after the settlement of the foregoing demands, it shall be distributed equally among the parties hereto; each party shall pay his proportion of the expenses necessarily incurred by said Zoe Granier in prosecuting said interest so conveyed to her for the purpose of obtaining the money due each on their said judgments.

" San Francisco, January 11, 1868.

" ZOE GRANIER. [SEAL.]

" T. B. MARTIN. [SEAL.]

" JEAN DON. [SEAL.]

" Witness, J. GRANIER, Clk."

There can be no doubt that whatever interest passed to Madam Granier by the conveyance and assignment from Le Roy were received, and thereafter held by her in trust for her own benefit, and that of Don and Martin, in the proportions stated in the agreement. Among those interests was all the right, title,

and interest of Silvey in the property in question. Silvey, as has been seen, was sole devisee under the will. On the death of the testatrix her title to the property vested in him, subject, however, to be divested by a sale of the property for the payment of the debts, etc., in the course of the administration of the estate. It so happened that there were debts proved against the estate of Adele Lefevre; and for the purpose of paying those debts, together with costs of administration, the Probate Court in which the estate was pending entered an order on the 14th of April, 1869, authorizing and directing the administrator of the estate to sell this property. At the probate sale Madam Granier became the successful bidder. The sale after two advance bids was finally confirmed for the sum of ten thousand five hundred dollars to her, by the Probate Court, and on the 7th of September, 1862, there was executed to her by the administrator a deed to the property. Afterwards, to wit, on the 14th day of July, 1871, Madam Granier conveyed by deed, in consideration of the sum of twelve thousand five hundred dollars to the plaintiff in the present action, who had notice of the trust agreement, all of her interest in the property; and plaintiff has since been in possession, receiving the rental thereof. The decree of the court below is to the effect that the plaintiff is the absolute owner of the property as against Don and Martin, who set up their rights under the trust agreement.

The decree cannot be sustained. The plaintiff, having notice of the relation existing between Don and Martin, and Madam Granier has no greater rights than the latter would have. "It is a universal rule that if a man purchases property of a trustee with notice of the trust, he shall be charged with the same trust in respect to the property as the trustee from whom he purchased. And even if he pays a valuable consideration, with notice of the equitable rights of a third person, he shall hold the property subject to the equitable interests of such person." (Perry on Trusts, § 217.)

Madam Granier as the grantee (through Le Roy) of Silvey's interest held the testatrix's title to the property, subject, however, to the same being divested through a sale of the property duly made in the course of the administration of the estate. But the title Madam Granier thus held, she held in trust for

herself, and Don and Martin, in the proportions they had contributed to the fund with which that title was acquired. Occupying that trust relation she could not, upon the most obvious principles of equity, purchase at the administrator's sale the interest of the deceased Lefevre, to the exclusion of her *cestui que trust*. The interest thus acquired by her must be held to have enured to their benefit, to the extent of their interest under the original agreement of trust, upon the payment of their proportionate share of the amount necessarily paid by the trustee in acquiring the interest of the deceased. Such would have been the equitable rights of Madam Granier, Don, and Martin, and such are the equitable rights of the plaintiff, Don, and the estate of Martin — Martin being now deceased.

Judgment and order reversed, and cause remanded for a new trial, with leave to the respective parties to amend their pleadings in such particulars as they may be advised.

McKEE, J., and McKINSTY, J., concurred.

Hearing in Bank denied.

[Department One.— March 7, 1883.]

JAMES F. WHITE ET AL., RESPONDENTS, v. JONATHAN LONGMIRE, DEFENDANT, JACOB GREENEBAUM ET AL., GARNISHEES, APPELLANTS.

ORDERS AFTER JUDGMENT — APPEAL — IDENTIFICATION OF PAPERS.— Certain orders made after final judgment affirmed because the papers contained in the transcript were not identified as the papers used on the hearing in the court below.

APPEAL from two orders of the Superior Court of the city and county of San Francisco.

The facts are sufficiently stated in the opinion of the court.

Naphtaly, Freidenrich & Ackerman, for Appellants.

John A. Wright, for Respondents.

PER CURIAM.— The appeal in this case is from two special

orders made after final judgment taken by virtue of the third subdivision of section 939 of the Code of Civil Procedure. On such appeal, the appellant must furnish the court with a copy of the notice of appeal, of the orders appealed from, and of the papers used on the hearing in the court below. (Code Civ. Proc. § 951.)

As the papers found in the transcript are not identified as having been used on the hearing of the court below, the orders appealed from must be affirmed. (*Baker v. Snyder*, 58 Cal. 617.)

Orders affirmed.

[Department One.— March 7, 1883.]

WILLIAM H. BATE, APPELLANT, v. GEORGE MILLER
ET AL., RESPONDENTS.

MOTION FOR NEW TRIAL — STATEMENT — FINDINGS.— Where a motion is made for a new trial on the ground that the findings are not sustained by the evidence, the statement must specify the particulars in which the evidence is insufficient.

SURPRISE AND NEWLY DISCOVERED EVIDENCE.— A motion for a new trial on the ground of surprise or newly discovered evidence must be supported by affidavit.

FINDINGS — MOTION TO AMEND AND MAKE ADDITIONAL.— It is not error to refuse to amend the findings or to make additional findings after a judgment has been entered and a motion for a new trial denied.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, from an order refusing a new trial, and from an order refusing to amend the findings or make additional findings.

The facts are sufficiently stated in the opinion of the court.

William H. Bate, Appellant in person.

B. S. Brooks, for Respondents.

PER CURIAM.— The judgment and orders must be affirmed. The findings are sufficient to sustain the judgment and the statement on motion for new trial contains no sufficient specification of particulars wherein the findings are unsustained by the evidence. There is no affidavit in support of the alleged

grounds of surprise and newly discovered evidence, which by statute is made essential to the granting of a motion for new trial on either of those grounds. And with respect to the plaintiff's motion to "amend and make additional findings," it is sufficient to say that this motion was made long after the entry of the judgment and the denial of the motion for a new trial.

Judgment and orders affirmed.

[Department One.— March 7, 1883.]

WILLIAM SHARON, RESPONDENT, v. MATTHEW
NUNAN, APPELLANT.

REPLEVIN — MONEY — SEIZURE UNDER EXECUTION.— The action was replevin to recover money seized by the defendant as sheriff of the city and county of San Francisco under an execution against one Little. The money was drawn by Little from the Bank of California on a check signed by one Dobinson in the name of the plaintiff, and at the time of the seizure it was sealed up in a canvas bag marked with a tag on which was written the name of Little, and deposited in one of the vaults of the Safe Deposit Company. Little was an agent or employee of the plaintiff, and the money was furnished to pay taxes due from the latter. *Held*, that the authority of Dobinson to sign the check was an immaterial matter, that the money belonged to the plaintiff, and that replevin was a proper remedy to recover it.

ID.— DEMAND.— No demand was necessary before commencing the action.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

C. S. Roe, for Appellant.

Lloyd, Newlands & Wood, for Respondent.

ROSS, J.— We see no merit in the appeal. Beyond question, the money sued for was the property of the plaintiff. It was in the possession of one Little, an employee of plaintiff, to be used by him in paying certain of plaintiff's taxes. The money was in gold and silver coins, sealed up in a canvas bag, marked with a tag, on which was written Little's name, and deposited in one of the vaults of the Safe Deposit Company, in the city and county of San Francisco. It was in this condition when it was

seized by the defendant as the property of Little, under and by virtue of an execution against him. For the defendant, who is the appellant here, it is contended that replevin is not a proper remedy for the recovery of money thus situated. The authorities are clear that it is. (3 Blackst. Com. 151; *Skidmore v. Taylor*, 29 Cal. 619; *Griffith v. Bogardus*, 15 Cal. 410.)

Next it is said that demand on defendant for the money was necessary before plaintiff could maintain the action, and that there was no demand made. As no demand was necessary, we find it unnecessary to decide whether the demand proved was or was not a sufficient demand. (*Boulware v. Craddock*, 30 Cal. 190; *Wellman v. English*, 38 Cal. 583.)

We do not perceive the relevancy to the case before the court of the question of Dobinson's authority to draw the check in plaintiff's name, on which Little drew the money from the Bank of California. The bank did not question the authority, but paid the money. The money was the plaintiff's, and that was the important question, aside from those already disposed of.

Judgment and order affirmed.

McKINSTRY, J., and McKEE, J., concurred.

[Department One.— March 7, 1883.]

D. ALBERT HILLER, RESPONDENT, v. CHARLES J. COLLINS ET AL., APPELLANTS.

INJUNCTION — MOTION TO DISSOLVE — REMEDY AT LAW.— Where a motion is made to dissolve an injunction on the ground that an adequate remedy exists at law, it is not enough that the facts stated in the complaint would be sufficient to sustain a criminal prosecution.

Id. — COMPLAINT — ANSWER — AFFIDAVITS — DISCRETION OF THE COURT.— The discretion exercised in refusing to dissolve an injunction will not be interfered with merely on the ground that some of the allegations of the complaint are on information and belief, a portion of these allegations not being denied by the answer, and the others supported by affidavits.

Id. — ANSWER AS AN AFFIDAVIT — RIGHT TO USE COUNTER-AFFIDAVITS.— Where an answer is used on the motion to dissolve, it is treated as an affidavit, and the plaintiff may use affidavits in opposition thereto.

Id. — AVERMENTS OF ANSWER ON INFORMATION AND BELIEF.— It appearing from the complaint and affidavits that the plaintiff was entitled to the injunction, a refusal to dissolve it on averments in the answer made upon information and belief was not an abuse of discretion.

REMEDIES — CUMULATIVE OR ADDITIONAL.— The remedy given by section 8, article 12, of the Constitution is additional to and does not supersede other remedies existing when the Constitution was adopted.

APPEAL from an order of the Superior Court of the city and county of San Francisco, refusing to dissolve an injunction.

The action was brought by the plaintiff as a stockholder of the Equitable Tunnel and Mining Company, a corporation, to enjoin a sale of his stock under an assessment levied by the directors, and to declare certain shares of stock claimed by one of the defendants to be the property of the corporation, and to enjoin the sale thereof and their transfer on the books of the company. An injunction was granted in accordance with the prayer of the complaint. The defendants filed an answer, and thereupon gave notice of a motion to dissolve the injunction on the pleadings. An amendment was subsequently made to the complaint, but it was filed on the hearing of the motion, and seems to have been used merely as an affidavit. Several affidavits were used by the plaintiff in opposing the motion. In the portion of the answer referred to in the opinion of the court as charging a fraudulent attempt by the plaintiff to acquire the property of the company, it was alleged in substance that the property had been sold under an execution against the company to one French, that the purchase was made by French for the benefit of the plaintiff, and that the money to make it was furnished by the latter through his wife; that the assessment was levied to obtain the means to redeem the property, that the company was destitute of money, and that the action was not prosecuted in good faith, but to prevent a redemption. The allegations as to the money for the purchase being furnished by the plaintiff, and his motive in bringing the action, were on information and belief. The additional facts involved in the questions decided sufficiently appear in the opinion of the court.

Cowdery & McCutchen, for Appellants.

Wm. M. Pierson, for Respondent.

PER CURIAM.— Defendants moved the court below to dissolve an injunction. The motion was submitted upon the

original complaint and amendment thereto, the answer, and certain affidavits filed and used by plaintiff. The motion was denied, and this appeal is by defendants from the order denying the motion.

Appellants claim: 1. If the averments in the complaint and amendment thereto are true, plaintiff has a complete remedy at law by prosecuting some of defendants for a criminal offense.

2. That the injunction ought to have been dissolved, because some of the allegations of the complaint are "upon information and belief."

3. That the equities of the complaint are denied by the answer.

It is also suggested that it appears from the allegations of the answer the process of the court is being abused by the plaintiff for the purpose of preventing the redemption by the corporation, of property sold under judgment against the corporation, at a sale at which plaintiff became the real purchaser, in the name of another, plaintiff thus intending to defraud the corporation of such property.

1. A criminal prosecution, in which *the people* would be plaintiff, would not be subject to the control of present plaintiff, nor would its success give plaintiff the relief which he seeks, or its equivalent.

2. Some of the averments of the complaint, "upon information and belief," are not denied by the answer; others were sustained by positive affidavits at the hearing. Assuming the allegations which are not denied by the answer, those which are themselves positive, and those sustained by positive averments in affidavits to be true, we cannot say the court below abused its discretion in refusing to dissolve the injunction.

3. All the equities of the complaint are not denied by the answer. With reference to such of them as are denied by the answer, it seems to be the established practice in this State to permit the use by plaintiff of affidavits against the sworn answer, which, on the application to dissolve, is treated as an affidavit. (*Falkinburg v. Lucy*, 35 Cal. 52; *Hicks v. Compton*, 18 Cal. 206.)

The averment in the answer with reference to alleged abuse of process and intended fraudulent acquisition of the property

of the corporation by plaintiff, "defendants are informed and believe that the money paid to purchase the said property at said sheriff's sale was furnished by plaintiff, through his wife, and said plaintiff caused the said purchase to be made," is met by the affidavit of plaintiff. In this he positively swears: "It is not true that I caused J. W. French (the person named in the answer as purchaser) to purchase the property of the defendant corporation at sheriff's sale. It is not true that the money paid to purchase the same was furnished by me through my wife. I have no interest whatever in said purchase." If it should be admitted that the resort to the injunction was made by plaintiff with intent to secure title to the property of the corporation—the complaint and affidavits showing plaintiff is entitled to the injunction—is material, and that plaintiff, pending the injunction suit could acquire title which could be asserted adversely to the corporation, we cannot say that the court below would have abused its discretion in refusing to dissolve upon the averment of the answer, "on information and belief," and the positive oath of plaintiff in his affidavit.

The facts alleged in the pleadings and affidavits are complicated, and although some of the facts stated by plaintiff are denied by defendants, yet we cannot say the refusal to dissolve the injunction under the circumstances appearing in the case was an abuse of discretion. (*Coolot v. C. P. R. R. Co.* 52 Cal. 67; *Parrott v. Floyd*, 54 Cal. 534; *White v. Nunan*, 60 Cal. 406; *De Godey v. Godey*, 39 Cal. 167; *McCreery v. Brown*, 42 Cal. 457.)

It is to be distinctly understood that neither the order of the court below denying the motion, nor the affirmance of that order by this court, has any controlling influence upon the decree which may be entered in the cause. If the action has not already been tried, the judgment of the court below must, of course, be based upon the evidence which shall be taken at the trial. Order affirmed.

A petition was filed asking that the cause be heard in Bank, and on the 6th of April, 1883, the following opinion was delivered thereon:—

PER CURIAM.—The rehearing in this case is denied.

It is stated in the petition that the court (Department One) did not pass on a point made on the argument.

The appeal in this case is prosecuted from an order refusing to dissolve an injunction, and the point relied on is this: Admitting that respondent had been injured by the acts of the officers of the corporation, he could not maintain this action, because he has his remedy by *civil action* under section 3, article 12, of the Constitution. The section of the Constitution referred to only affords an additional remedy, without taking away any that existed when the Constitution became the law of the land. When such additional remedy is given, and the old one is not taken away, it is common law and common learning that the old one still continues. We see nothing in the point urged which affects the correctness of the conclusion reached by Department One.

[Department One.— March 7, 1883.]

JAMES W. HULME AND JAMES H. WALLACE,
PETITIONERS, v. THE SUPERIOR COURT OF THE
CITY AND COUNTY OF SAN FRANCISCO, AND
CHARLES HALSEY, JUDGE, ETC., RESPONDENTS.

CERTIORARI — JURISDICTION — INSOLVENCY — ESTOPPEL.— The petitioner Hulme as receiver of the estate of an insolvent debtor took into his possession certain property then in the possession of Wise & Denigen, claiming it as a part of the estate of the insolvent. Wise & Denigen consented, and it was ordered that the property might remain in the possession of the receiver, specially reserving all rights. Subsequently the court ordered the property sold because of a perishable nature. Upon an order directed to the receiver to show cause why the property should not be restored, the court ordered that the property or its proceeds be returned and delivered to Wise & Denigen. Petitioners prayed for a writ of review alleging that the court exceeded its jurisdiction. *Held*, (1) that the court had jurisdiction to order its restoration: (2) that the consent of Wise & Denigen did not estop them from asserting their rights as they were specially reserved when consent was given.

PETITION for writ of review.

Eyre & Frank, for Petitioners, cited *In re Marter*, 11 Nat. Bky. Reg. 185; *Smith v. Mason*, 14 Wall. 419; *Marshall v. Knox*, 16 Wall. 551; *Eyster v. Gaff*, 91 U. S. 525; *Hartman v. Olvera*, 51 Cal. 503; *Larrabee v. Selby*, 52 Cal. 508.

A. D. Splivalo, for Respondents, cited *High on Receivers*, §§ 139, 149, 192; *Riggs v. Whitney*, 15 Abb. Pr. 388; *Brooks v. Greathed*, 1 Jacob & W. 176; *Skinner v. Maxwell*, 68 N. C. 400; *Smith v. Mason*, 14 Wall. 419; *Marshall v. Knoz*, 16 Wall. 551.

PER CURIAM.—Even if, without previous order of court, but with the consent of the parties defendant to the litigation, a receiver may take possession of property in their hands, such consent cannot be appealed to as authorizing him to take property out of the possession of a third person claiming title thereto.

The sworn petition of Wise for a return of the property alleged that he and his partners were owners of and had actual possession of the personal property described therein when the same was taken out of their possession without right by the receiver Wallace. In his counter-affidavit Wallace denied that Wise or his partner ever had possession of the property, and averred the same was in possession of the insolvent, and was taken from him. Upon the cross-affidavits the Superior Court ordered that the receiver forthwith return and deliver to Wise & Denigen the property, describing it.

The court had *jurisdiction* to order its restoration. If the receiver without previous order of the court took the property out of Wise's adverse possession, under such circumstances as that the court would have denied an application of the receiver (made prior to the actual taking) for leave to take possession, the court was certainly authorized to direct a return of the property.

The rights of the parties were in no way affected by the consent order of August 13th. That order, by its express terms, reserved all the rights of Wise, and there is no principle of *estoppel* which could prevent him from subsequently asserting them.

Proceeding dismissed.

[Department Two.— March 2, 1883.]

**A. L. THIELE, APPELLANT, v. CAROLINE KOSTER,
EXECUTRIX OF THE WILL OF ALBERT KOSTER, DECEASED,
RESPONDENT.**

NEW TRIAL — CONFLICTING EVIDENCE.— Where the evidence is substantially conflicting, an order refusing a new trial will not be reversed for insufficiency in the evidence.

TRIAL — ERROR — EXCEPTION — REVIEW ON APPEAL.— A ruling of the court at the trial, to which no exception is taken, cannot be reviewed on appeal.

ID.— IRREGULARITIES AS GROUNDS FOR A NEW TRIAL.— The action was tried by the court without a jury. The decision was against the plaintiff, who moved for a new trial, and relied in part upon irregularities in the proceedings of the court. The irregularities consisted in certain remarks made by the judge during the progress of the trial in regard to the nature and effect of the evidence. *Held*, that the irregularities were not such as to prevent the plaintiff from having a fair trial.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was brought on a promissory note. The answer denied the execution of the note, and alleged a want of consideration. The additional facts are sufficiently stated in the opinion of the court.

A. Campbell, Sr., and J. F. Cowdery, for Appellant.

Jarboe & Harrison, for Respondent.

PER CURIAM.— The appellant claims that the court erred in denying his motion for a new trial upon two grounds: (1) Insufficiency of the evidence to justify the decision, and (2) irregularity in the proceedings of the court by which he was prevented from having a fair trial.

As to the first, it is sufficient to say that in our opinion there is a substantial conflict of evidence upon the question of the execution of the note by the alleged maker. Such being the case, it matters not whether the evidence apparently preponderates on the one side or the other. A substantial conflict is sufficient to preclude a review of the facts by this court.

To support the second ground the appellant's counsel relies upon the following facts: At the close of the cross-examination

of the plaintiff's witness, Lackman, the court remarked that there was some doubt in his mind whether the witness saw the alleged maker of the note sign it, and added "he said he did not. I will recall the witness." Thereupon defendant's counsel objected to the witness being recalled to prove what had been pointed out to him. The court sustained the objection, but the ruling is not excepted to. It appears by the record that the witness did testify that he saw the alleged maker of the note sign it, and that the court was in error when it said that the witness had said that he did not see it signed.

If an exception had been taken to the ruling of the court, the question whether the court erred in so ruling would be fairly before us. In the absence of an exception we do not think that it is.

While the defendant's witness Koster was undergoing cross-examination, the plaintiff's attorney asked her this question: "Do you see any difference between that signature and your father's?" She answered that "the great difference that even goes down to the bottom of the 'a.'" Thereupon the court remarked: "The 'a' is sharper than all the other 'a's.' The other 'a's' are rounded, every one of them." Plaintiff's attorney here handed up an undisputed signature of the alleged maker of the note, and said: "There is one 'a,'" but the court interrupted him and said: "That ain't anything like it in any respect."

We are unable to perceive that the plaintiff was prevented from having a fair trial by either of the alleged irregularities.

Judgment and order affirmed.

Hearing in Bank denied.

[Department Two.— March 12, 1883.]

E. S. NEWELL ET AL., APPELLANTS, v. THOMAS DESMOND, SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, RESPONDENT.

NEW TRIAL — STATEMENT — SPECIFICATIONS.— Under section 659 of the Code of Civil Procedure, a specification of insufficiency in the evidence is only required to be full enough to enable the court to understand the question presented.

Id.—DISCRETION OF THE COURT.—An order granting a new trial will not be reversed unless it appear that the discretion of the court has been abused.

PARTNERSHIP — FICTITIOUS NAME — SALE OF THE INTEREST OF ONE PARTNER — STATUTE OF FRAUDS.—Where one of two partners sells to a third person his interest in a stock of goods belonging to the partnership, there must be an immediate delivery and continued change of possession as required by section 2440 of the Civil Code, or the sale will be void as to creditors, and it is immaterial that the business of the partnership is conducted under a fictitious name.

APPEAL from an order of the Superior Court of the city and county of San Francisco granting a new trial.

The action was replevin to recover certain goods and chattels alleged to be the property of the plaintiffs as partners doing business under the fictitious name of H. Keller & Co. The goods were seized by the defendant under an execution against one Cadman, through whom the plaintiffs derived their title. The business was established by Cadman, who subsequently, sold an interest to Max H. Fay, one of the plaintiffs, and thereafter the business was carried on by them as partners, until Cadman sold or pretended to sell his remaining interest to the plaintiff Newell. The fictitious name above mentioned was used from the beginning, and it appeared that Cadman continued to act in the conduct and management of the business until the seizure by the sheriff. There was also evidence showing that after the sale to Newell, Cadman acted merely as the agent of the plaintiffs. The court found in favor of the plaintiffs, and rendered judgment accordingly, but on motion of the defendant a new trial was granted. The motion was heard on a statement of the case, and the only specifications relating to the insufficiency of the evidence were that the *court erred* in failing to find certain facts shown by the evidence as to the fraudulent character of the sales by Cadman, and the want of any delivery or change of possession.

George W. Tyler, for Appellants.

1. Upon this transcript neither the court below nor this court can legally grant a new trial upon the ground that the findings or decision is not sustained by the evidence.

Section 659, Code Civ. Proc., provides: "When the notice of the motion (for a new trial) designates as the ground of the

motion the insufficiency of the evidence to justify the verdict or other decision, the statement *shall* specify the *particulars* in which such evidence is alleged to be insufficient."

In the case of *Brumagin v. Bradshaw*, 39 Cal. 24, this court after the most elaborate argument construed this language. (See pages 33 and 34.)

That case was cited with approval in the case of *Harding v. Vandewater*, 40 Cal. 82, 83, and the authority of that decision has never been questioned. (See also *Eddelbuttel v. Durrell*, 55 Cal. 277; *Strang v. Ryan*, 46 Cal. 33; *Doherty v. Enterprise M. Co.* 50 Cal. 187; *Morris v. De Celis*, 51 Cal. 55.)

The statement contains only specifications of the particulars in which it is claimed the court erred on the trial. This court has decided that this cannot be considered as "specifications of the particulars wherein the evidence was insufficient." (*Smith v. Christian*, 47 Cal. 18; see also *Hill v. Weisler*, 49 Cal. 146; *Coleman v. Gilmore*, 49 Cal. 340; *Beans v. Emanuelli*, 36 Cal. 117; *Kusel v. Sharkey*, 46 Cal. 3; *Reamer v. Nesmith*, 34 Cal. 624; *Pralus v. Pacific M. Co.* 35 Cal. 30; *Butterfield v. C. P. R. R. Co.* 37 Cal. 381.)

It seems, therefore, that upon the first point the order of the court below should be reversed, but in case the court should think differently, we say:—

2. The rule in regard to delivery and change of possession does not apply to a case of this kind, where business is carried on under a fictitious name, and the names of the real owners are never used or known in the business.

It has been truly said that "the reason of the law is the soul of the law," and it is a maxim that "when the reason of a rule ceases the rule itself ceases."

The reason of the rule established by section 3440 of the Civil Code is this: "To prevent a person from having a fictitious credit." The object of the rule is "to give evidence to the world of the claims of the new owner." (53 Cal. 626.)

The sole object of establishing the rule was to protect the public from persons getting credit upon property in their possession which did not in fact belong to them.

Now, in this case, no credit was given to any particular person, but to the firm of "H. Keller & Co."

Cadman did not hold out any false colors to the public. No one, apparently, gave the firm any credit on account of Cadman.

No one could possibly be deceived, and therefore the rule does not apply.

-J. P. Dameron, and J. W. Carter, for Respondent.

PER CURIAM.—First. The assignment of errors in the statement on motion for new trial contained a specification of the particulars in which the evidence was alleged to be insufficient, full enough to enable the court to understand the question presented, and that is the substantial object of the statute. There is a sufficient compliance with section 659, Code of Civil Procedure.

Second. That the business had been conducted by Fay and Cadman under the old name of Keller & Co. is no reason why Cadman when he pretended to sell his interest to the plaintiff Newell should not have complied with the requirements of section 3440 of the Civil Code.

The court, upon the evidence, saw sufficient reason for granting a new trial, and therefore made the order appealed from. According to the well-settled rule of this court such an order will not be interfered with unless the court below abused its discretion in making it. There is not the least evidence that there was such abuse of discretion, and the order should be, and is, affirmed.

[In Bank.—March 12, 1883.]

**SPRING VALLEY WATER WORKS, PETITIONER, v.
WASHINGTON BARTLETT ET AL., RESPONDENTS.**

PROHIBITION — WATER RATES.—The matter of fixing water rates is not judicial, and a writ of prohibition will not be awarded to restrain a board of supervisors from performing that duty.

THIS was an application for a writ of prohibition to restrain the board of supervisors of the city and county of San Francisco from passing an ordinance fixing the price of water to be supplied to the city and its inhabitants for one year, in pursuance of the provisions of article 14 of the Constitution of California.

Frank G. Newlands, and C. N. Fox, for Petitioner.

William Craig, for Respondents.

PER CURIAM.—In our judgment the matter of fixing water rates is not judicial, and for this reason the writ of prohibition cannot be awarded. This has been frequently held by this court. Writ denied and proceedings dismissed.

[Department Two.— March 12, 1883.]

THOMAS McVERRY, APPELLANT, v. J. W.
KIDWELL ET AL., RESPONDENTS.

EVIDENCE — STREET ASSESSMENT — FRAUD.—Where a contract to construct a sewer provides that the work shall be done in a good and workmanlike manner, setting out in detail the character of the materials to be used, and further provides that the work shall be done to the satisfaction of the superintendent of streets, or his deputy, in an action to recover an assessment for the work, the satisfaction of the superintendent or his deputy — where fraud is alleged — is not controlling as to whether the work was properly done and suitable materials furnished respecting the matters specially required by the contract.

APPEAL from an order of the Superior Court of the city and county of San Francisco refusing a new trial.

The facts are stated in the opinion of the court.

J. C. Bates, and J. M. Wood, for Appellant.

Taylor, and Haight, for Respondents.

PER CURIAM.—This is an action to recover an assessment for constructing a sewer in the city and county of San Francisco. The defense was that the sewer was not constructed in accordance with the contract and specifications. The court found that the contract required the work to be done in a good and workmanlike manner, the bricks to be sound and hard-burned, one barrel of cement to be used to each barrel of sand, and no lime to be used; that at least seven per centum of the bricks used were not sound hard-burned bricks, but were of quality inferior thereto, and were used with intent to cheat and defraud the

defendants; that the plaintiff used from ten to fifteen per centum more sand than the specifications called for.

Although the evidence is conflicting, yet there is sufficient to sustain the findings.

The contract also provided that the work should be done to the satisfaction of the superintendent of streets or his deputy. The plaintiff claims that the satisfaction of the superintendent or his deputy must be controlling as to whether the work was properly done and suitable materials furnished. That may be so as to details not specially set forth in the contract and specifications; but as to matters thus specially set forth, the contract and its requirements must be held to prevail.

It may also be true that the satisfaction of the superintendent or his deputy would be *prima facie* evidence of the proper performance of the contract, nothing to the contrary appearing; but fraud on the part of the plaintiff was set up as a defense, and on that issue the court found very clearly against him. Looking at the evidence before us, we will not disturb the action of the court below.

We see no error; the order is therefore affirmed.

[In Bank.— March 16, 1883.]

DANIEL SULLIVAN, PETITIONER, v. JAMES W. SHANKLIN, SURVEYOR-GENERAL AND EX-OFFICIO REGISTER OF THE STATE LAND OFFICE, RESPONDENT.

MANDAMUS — PUBLIC LAND — PURCHASE FROM THE STATE — FAILURE OF TITLE — RIGHT OF THE PURCHASER TO RELIEF.— Mandamus will not lie to compel the register of the State land office to issue a certificate under section 3571 of the Political Code to a purchaser of land from the State, who has paid the purchase money and received a patent, although the land may not have been the property of the State, such purchaser having acquired the title of the United States to the land by availing himself of the provisions of the Act of Congress of the 1st of March, 1877, entitled "an act relating to indemnity school selections in California."

APPLICATION for a writ of mandamus. The facts are stated in the opinion of Mr. JUSTICE McKEE.

J. C. Bates, for Petitioner.

A. L. Hart, Attorney-General, for Respondent.

McKEN, J.—This is an application for a writ of mandate to compel the respondent, as register of the State land office, to issue to plaintiff a certificate under section 3571 of the Political Code.

The facts as they appear upon the petition are, that in the year 1863 the State of California selected a tract of land known and described as the southeast quarter of section eleven, township four north, range one east, Mount Diablo meridian. This land was selected as a portion of the public lands of the United States, to which the State was entitled in satisfaction of certain congressional grants which had been made to her. After selection the State sold and transferred the land, by a certificate of purchase issued under her laws, to the assignor of the petitioner. Subsequently the land was listed to the State by the secretary of the interior of the United States, and upon payment to the State of the purchase money for the land and surrender of the certificate of purchase, the State issued a patent for the land to the petitioner.

Afterwards, on March 10, 1881, the petitioner applied to the United States register, at San Francisco, to purchase the same land from the United States under the provisions of an act of Congress, entitled "an act relating to indemnity selections in the State of California," approved March 1, 1877, and in support of his application made proof to the satisfaction of the register that he was the owner and holder of the State patent to the land, and an innocent purchaser of the same for a valuable consideration, etc. Upon making that proof the commissioner of the general land office granted his application, allowed him to purchase the land from the United States, canceled the listing of the State, and upon payment of the purchase money under the act of Congress issued to him a receipt which entitles him to a United States patent for the land. Yet, although the undisputed owner of the land by titles thus acquired from the United States and the State, the petitioner insists that the State patent "was illegally and improperly issued, and was, and has always been, null and void, for the reason that the land sold was, and is, not the property of the State of California."

Therefore the petitioner, in legal effect, asks that the contract between him and the State be rescinded, and that the purchase money paid to the State be refunded, and as preliminary to that end that the register be compelled to issue to him a certificate under section 3571 of the Political Code.

A purchaser of land from the State is not entitled at law or in equity to recover back the purchase money, unless the State, as an act of grace, consents to it. Such an act is said to be contained in sections 3571 and 3572, Political Code. The first provides "that if any land sold is not the property of the State, the holder of the certificate of purchase or patent may receive in exchange therefor from the register a certificate showing the amount paid and the class of land upon which the payment was made." And the second, for payment of the amount specified in the certificate out of the swamp and overflowed land fund, if the land sold was of that class of land, and if it was not, then out of the fund into which the purchase money was paid.

It is as a holder of the State patent for the land in dispute that the petitioner claims to be entitled to the certificate demanded. But he is not entitled to it unless the land did not belong to the State; for the State register has no authority to issue the certificate unless the land sold was of that character. Upon the ascertainment and determination of that question the demand of the petitioner is founded, and upon it the performance of duty imposed by the law upon the register is made to depend. The mere assertion of the petitioner's demand is not proof of the fact that the land did not belong to the State, nor is it as a fact admitted by the nature of the demand itself, nor does it, self-evidently or otherwise, arise out of the admitted circumstances of the transaction of purchase from the State. For, as admitted owner and holder of the patent from the State for land admitted to have been listed to the State by the authorities of the United States, the petitioner has acquired, under the Act of Congress of July 23, 1866, whatever title passed to the State by that "listing" (*Mastick v. Cave*, 52 Cal. 67), and there is no question, if the land was of the character contemplated by the act of Congress, that the title of the State under the grants to her, attached to the land, for listing, or the act of certifying the land to the State, was the mode established by congressional

enactment for completing the title of the State to such lands as she had selected in part satisfaction of her congressional grants.

But it is contended that the "listing" of this land did not have the effect of transferring or rendering perfect the title of the State to it, because the land was not of the character contemplated by the act of Congress, and intended to be granted, and that the listing and the patent founded upon it are void.

In support of this contention reference is made to *Rosencrans v. Douglas*, 52 Cal. 215. But that case involved a controversy between private parties about a tract of land, which each of them claimed under acts of Congress; and it became necessary for the court to interpret the acts for the purpose of ascertaining and determining the right; and as preliminary thereto it was held that the defendant in the case, as a qualified pre-emptor, who had filed his application to purchase the land under the pre-emption laws, and had offered to prove up his claim and tendered the purchase money, was in such privity with the title of the United States as enabled him to show that the "listing" of the land to the State, through which the plaintiff claimed title, was void, because the land was not of the class of land which, under the acts of Congress, the land department of the United States was authorized to list to the State.

Whatever may be said as to the law of that case, it is wholly inapplicable to the demand of the petitioner; for there is no pending contest between him and any other person in which his right to the land is involved. No one questions the title which he has obtained from the State. To him, therefore, as patentee of the State, the decision of the land department by which the land was "listed" to the State is conclusive (*Wilkinson v. Merrill*, 52 Cal. 424; S. C. 56 Cal. 559; *Mace v. Merrill*, 56 Cal. 554); and, inferentially at least, upon the facts stated in his petition, the title passed from the United States through the medium of the State to him when he received his patent, and its validity or invalidity has never been determined. Who has determined it? The legislature has not, nor has any judicial tribunal; and it cannot be tried by mandamus. *Babcock v. Goodrich*, 47 Cal. 488.) No officer of the State has authority to cancel a patent issued by the State for a tract of land, and refund the purchase money, upon the mere assertion by the patentee

that the State had no title to the land when she sold and conveyed it. The invalidity of the title must be admitted by the State, or by some agency of her appointment, or be judicially determined before the purchase money can be refunded. *Mandamus* is not the remedy.

As we have repeatedly held, the office of a writ of mandate is to compel the performance of a purely ministerial duty. A ministerial duty is one in respect to which nothing is left to discretion. "It is," says Chief Justice Chase, "a simple, definite duty, arising under circumstances admitted or proved to exist, and imposed by law." (*State of Mississippi v. Johnson*, 4 Wall. 475.) No such duty arises out of the circumstances stated in petition, nor is any such imposed by the section of the Code under which the demand in this case was made; and it follows that the application must be denied.

Ordered accordingly.

Rosa, J., concurring specially.—I agree that the petitioner in this case is not entitled to the writ sought. His purpose, as evidenced by the record, is to recover back from the State the money paid by him for certain land for which the State issued to him its patent, he claiming that the State had no title to convey. But it also appears that petitioner has availed himself of the benefits of the Act of Congress of March 1, 1877, entitled "an act relating to indemnity school selections in California." By that act it is provided that when land has been selected and sold by the State, but to which the State has no title, and such land is held by an innocent purchaser for a valuable consideration, such person shall be allowed to prove such facts before the proper land officer, and shall be permitted to purchase the land at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person. Pursuant to the provisions of this act the petitioner made application to purchase the land from the United States, and according to his petition has made proof to the satisfaction of the register and receiver that he is the owner and holder of the State patent to the land, and that he is an innocent purchaser from the State for a valuable consideration. In order, therefore, to acquire the land from the general government at a special rate, and as a pre-

ferred purchaser, he represented to that government that he had already paid the State for it. For that purpose he relied upon the fact that the State had his money, and having thus secured the title, he now seeks by means of mandamus to recover back the very money on the faith and strength of which he secured the advantage. To my mind this does not appear just, and mandamus ought not to be awarded to enforce an inequitable demand. (Wood on Mandamus, p. 17, and authorities there cited.) So far as the equities of the case are concerned, the petitioner would be in an altogether different position could he say here, in effect: The State purported to sell me a piece of land, for which it received my money and gave me its patent. The State had no title, and I got nothing by the pretended sale and conveyance, and am therefore entitled to a return of my money. But this, as shown above, is by no means petitioner's position.

MORRISON, C. J., and MYRIOK, J., concurred in the opinion of MR. JUSTICE ROSS.

McKINSTY, J., SHARPSTEIN, J., and THORNTON, J., dissented.

Garber, Thornton & Bishop, of counsel for petitioner, applied for a rehearing, which was denied.

[In Bank.—March 23, 1883.]

TIERY WRIGHT, APPELLANT, v. B. H. ROSEBERRY
ET AL., RESPONDENTS.

EJECTMENT — SWAMP AND OVERFLOWED LANDS — CERTIFICATION BY COMMISSIONER OF GENERAL LAND OFFICE.—The title to swamp and overflowed lands never vests in the State until the commissioner of the general land office certifies them over to the State as swamp and overflowed; and ejectment by one claiming title to such lands acquired from the State cannot be maintained against persons in possession under United States patents, without showing such certification.

APPEAL from a judgment of the Superior Court of Yolo County, and from an order refusing a new trial.

The action was ejectment. The remaining facts are stated in the opinion of the court.

W. B. Treadwell, and C. P. Sprague, for Appellants.

Belcher & Belcher, and J. C. Ball, for Respondents.

SHARPSTEIN, J.—The defendants are in possession of the demanded premises, and hold United States patents for the same. But it is claimed on behalf of the plaintiff that before defendants acquired any right or title to said land the title to it had passed out of the United States, and become vested in the State of California. The grounds of this claim as stated by one of appellant's counsel are as follows: "That on July 1, 1862, he (plaintiff) acquired the title of the State to the land in controversy; that the State had, prior to July 23, 1866, selected this land as swamp land, and had disposed of the same to purchasers in good faith under her laws; that due notice had been given to the United States land department of this selection; that within the time required by the Act of Congress of March 12, 1860, and before 1866, the State had segregated these lands as swamp; and that, under due and regular proceedings had under the fourth section of the Act of 1866, this segregation was approved by the United States land department, and the tracts here claimed designated swamp on the United States plat of the township."

The clause, of the fourth section of the Act of 1866, to which reference is made reads as follows:—

"That in all cases where township surveys have been made or shall hereafter be made under authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the general land office to certify over to the State of California as swamp and overflowed all the lands represented as such, upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats.

"The commissioner shall direct the United States surveyor-general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward to the general land office for approval."

It is not claimed that "the commissioner of the general land office has ever *certified* over to the State of California as swamp and overflowed," any of the land in controversy. If he had it would be equivalent to a patent, and an action of ejectment might be maintained upon it against any one in possession under a subsequently acquired title. As it is the defendants are in possession, claiming title under United States patents, which purport to convey the entire premises. And the question is, can the plaintiff maintain this action upon the title which he has acquired from the State without showing that the land has been certified over to the State as swamp and overflowed? Counsel for appellant insist that although said land has never been certified over to the State according to the requirement of said act of Congress, the title to said land, nevertheless, became vested in the State. If that be so, the clause which requires the commissioner to certify over to the State as swamp and overflowed all the lands represented as such upon such approved plats, within one year from the passage of said act, or within one year from the return and approval of such township plats, is superfluous. The Act of September 28, 1850, contains a clause somewhat similar to this, and the construction which was given to it by the Supreme Court of the United States in *French v. Fyan*, 93 U. S. 169, seems to us to militate against the position which appellant's counsel seek to maintain in this case. That act made it the duty of the secretary of the interior, as soon as practicable after its passage, to make out an accurate list and plats of the land described in said act, and to transmit the same to the governor of the State, and at his request to cause a patent to issue to it, and that thereupon the fee simple to said lands should vest in the State. In *French v. Fyan*, *supra*, the court held that the issuance of a patent to the State concluded the question of the character of the land, and that parol evidence to prove that it was not swamp and overflowed was, in an action at law, inadmissible. That the law devolved upon the secretary "the duty, and conferred on him the power of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was controlling."

In *Johnson v. Towsley*, 13 Wall. 72, the same court said, "that when the law has confided to a special tribunal the

authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal within the scope of its authority is conclusive upon all others."

Section 4 of the Act of July 23, 1866, makes it the duty of the commissioner in certain specified cases to certify lands over to the State. And it seems to be left to him to decide in each case whether or not it is a proper one for the exercise of that power. The most that can be claimed on behalf of appellant is that the commissioner has not performed his duty in this case. The law makes it the duty of the commissioner to certify over such lands within a specified period, but does not provide that in the event of his failing to do so the title to such lands shall vest in the State. And we are unable to find anything in said section four which impresses us as indicating that such was the intention of Congress.

But it is claimed on behalf of appellant that said section four must be read in connection with section one of the same act, which confirms to the State lands selected by her in part satisfaction of any grant, and under her laws disposed of to purchasers in good faith.

In *Sutton v. Fassett*, 51 Cal. 12, the court said: "The first section of that act does not relate to lands which had been segregated by the State as swamp and overflowed lands. The only section which purports to grant to the State—or in other words to confirm such segregation—is the fourth section." And that appears to us to be a reasonable construction of the language of said first section. It only applies to selections made of any portion of the public domain "in part satisfaction of any grant made to said State by any act of Congress." This would seem to have reference to grants of specific quantities, and not to a grant of an indefinite quantity. There would be no propriety in saying that the State accepted any number of acres of swamp land in part satisfaction of the grant of all the swamp land in the State. But in the cases of grants for school and improvement purposes where the quantities are limited and defined, deductions could be made, and it is expressly provided in said first section "that the State of California shall not receive under this act a greater quantity of land for school or improvement purposes than she is entitled to by law."

We therefore conclude that the title to the demanded premises has never vested in the State, and that the State could not convey a title to the appellant upon which he could maintain an action of ejectment against persons in possession of said premises under patents from the United States.

On the former appeal a remittitur issued out of this court containing the following order and directions:—

“It appearing that the court below has failed to find upon material issues made by the pleadings, to wit: Whether or not the plaintiff is the owner, or entitled to the possession of the north half of the northeast quarter of section thirty-six, the southeast quarter of section twenty-five, and the east half of the southeast quarter of section twenty-four of the lands in suit.

“Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the District Court of the sixth judicial district, in and for the county of Yolo, in the above-entitled cause be, and the same is hereby reversed, and the cause remanded with directions to the court below to find upon the foregoing issues, from the evidence already taken, and such further evidence as may be adduced by the respective parties, and thereupon to render judgment upon the whole case. The respective appellants in said actions severally to recover costs on the appeal.”

The court did find “that at the time of the commencement of this suit the plaintiff was the owner, and entitled to the possession of the south half of the northeast quarter of section thirty-six, in suit, which was unlawfully withheld from him by defendant Roseberry; and of the east half of the northeast quarter of section twenty-five (containing eighty acres), which was withheld by defendant Simmons; and of the northwest quarter of the southeast quarter of section twenty-four, which was withheld from him by defendant Powell; and that plaintiff is damaged by defendant Roseberry in the sum of \$150, by defendant Simmons in the sum of \$150, and by defendant Powell in the sum of \$75.”

In addition to the lands described in this finding the plaintiff in his complaint alleged that he was the owner of the lands described in the remittitur. On the last trial the court set aside its former findings, and found that the plaintiff was not and

never had been the owner, or entitled to the possession of all or any part of the lands described in the complaint, and entered judgment in favor of the defendants. In doing so appellant's counsel insist that the court did not follow the directions of this court, which were in effect that the court below should find, in addition to what it had already found, whether the plaintiff was the owner, or entitled to the possession of the lands described in said remittitur. This might be so, if this court had not reversed the judgment of the court below, and directed it to render a judgment upon the whole case. We think that the order and directions of this court, taken as a whole, amount to a reversal of the former judgment, and an order for a new trial.

There were some exceptions taken to the rulings of the court during the trial, but we are unable to discover any error for which the judgment and order appealed from should be reversed.

Judgment and order affirmed.

THORNTON, J., MCKINSTY, J., ROSS, J., MCKEE, J., and MYRIOK, J., concurred.

[In Bank.—March 23, 1883.]

PEOPLE EX REL. JOSEPH FLINT, APPELLANT, v. C. C.
HARRINGTON, RESPONDENT.

BOARD OF PUBLIC OFFICERS — MAJORITY OF QUORUM MAY ACT.—The majority of a quorum of a board of supervisors, a quorum being present, can perform any act which a majority of the board could perform if all were present.

OFFICE — REMOVAL — VACANCY — PRACTICING PHYSICIAN YUBA COUNTY HOSPITAL.—The office of "practicing physician of the Yuba County Hospital" is a county office, and a vacancy therein cannot be filled by the board of supervisors except upon petition signed by at least thirty qualified electors.

APPEAL from a judgment of the Superior Court of Yuba County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

A. L. Hart, Attorney-General, and J. H. Craddock, for Appellant.

The case shows that only *two* of the *five* members composing the board of supervisors concurred in the order of removal. This was clearly insufficient. That a minority of a board of supervisors, even though such minority be a majority of a quorum, can under any circumstances enact a valid order is a proposition, the public importance of which outreaches the necessities of the case at bar. Even in its broadest aspect it is believed to be not only without the support of legal principle, but in contravention of the positive requirements of section 15 of the Code of Civil Procedure of this State. "Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority." Here the authority is given to the board of supervisors, consisting of five members, without provision in the act giving such authority that any number less than the whole may exercise the authority given, and it is submitted that language will have lost its most useful function when the words, "construed as giving authority to a *majority of them*," are held, as was done by the trial court, to mean a *minority of them*, when such minority constitute a majority of a quorum.

The board was exercising judicial functions. Judge Redfield on this subject observes: "The proper distinction upon the subject seems to be that when the matter is of public concern, or of an executive or ministerial character, the act of a majority of the board will suffice, although the others are not consulted. But where the function is judicial, involving the determination of some definite question, the whole body must be assembled and act together." (1 Redf. on Rail., p. 84, § 6; *Moore v. Ewing*, 1 Coxe, 144, and cases cited; *King v. Wykes*, Andrew, 239; *Billings v. Prinn & Delabere*, 2 Black, 1017; *People v. Coghill*, 47 Cal. 361; *Downing v. Rugar*, 21 Wend. 178; *Lee v. Parry*, 4 Denio, 125; *Keeler v. Frost*, 22 Barb. 400; *Horton v. Garrison*, 23 Barb. 176; *Stewart v. Wallis*, 30 Barb. 344; *Crocker v. Crane*, 21 Wend. 211; *Talcott v. Blanding*, 54 Cal. 290.)

The appointment of the respondent was invalid because unauthorized by law. The reasoning of the trial court, which deduces the power to fill a vacancy from the power to appoint for a full term because the latter is the greater, is a clear

instance of *non sequitur*. True, where there is no *term* fixed by law, the power of removal being incidental to the power of appointment, they may both be exercised at any time. There being no term, there can be no vacancy of the term to be filled. But when the term is fixed by law, and the mode and manner of filling it are prescribed, the mode and manner are the measure of the exercise of the power, and must be followed. Filling a vacancy is a distinct and separate function, in no way deducible from the former, but the subject-matter of distinct statutory provision, and most frequently exercised by a different tribunal. This power, if it existed in the board at all in the case at bar, existed by virtue of the provisions of subdivision 19 of section 4046 of the Political Code, enumerating the general permanent powers of the board. And the manner of its exercise is prescribed by section 4066.

B. W. Howser, W. G. Murphy, and E. A. Davis, for Respondent.

SHARPSTEIN, J.—At the time of the alleged removal of the relator from the office of “practicing physician of the Yuba County Hospital,” the board of supervisors of that county consisted of five members, two of whom had been prohibited by an order of the Superior Court from participating in the proceedings, which it is claimed on behalf of respondent resulted in the removal of the relator from said office.

The three members of said board who had not been prohibited from proceeding in said matter heard evidence upon the charges laid before said board against the relator, and finally, by a vote of two to one, declared said office vacant.

Appellant’s counsel insist that even if said board had the power to declare said office vacant, a majority of a bare quorum of said board had no such power. But Dillon, in his work on “Municipal Corporations,” says that if a board of village trustees consists of five members, and “three only were present, they would constitute a quorum,” and “the votes of two, being a majority of the quorum, would be valid; certainly so where the three are all competent to act.” (1 Dillon on Corporations, 3d ed., 279.)

In *Buell v. Buckingham*, 16 Iowa, 284, Dillon, J., said:—

“Three constituted a quorum. So far all is clear. Advancing in the argument, the first proposition I lay down is, that a majority of the quorum, all being present, have the power to act, and to decide any question upon which they can act. This proposition is clear upon the authorities. Thus in *Rex v. Monday*, Cowp. 538, Lord Mansfield, C. J., says: ‘When the assembly are duly met, I take it to be clear law that the corporate act may be done by a *majority* of those who have once regularly constituted the meeting.’ To the same effect, 2 Kent’s Com. 293: ‘A majority of the quorum may decide.’ (A. & A. on Corp. § 501; *Cahill v. Kalamazoo Insurance Co.* 2 Doug. (Mich.) 124; *Sargent v. Webster*, 13 Met. 497; *In re Insurance Co.* 22 Wend. 591; *Ex parte Wilcocks*, 7 Cowen, 402; *Ex parte Wilcocks*, 7 Cowen, 527, note a.)”

We are not aware of any case in which the contrary has been held, and must regard the law as well settled that in a case like this the action of a quorum is the action of the board, and that a majority of the quorum present could do any act which a majority of the board if present might do.

We are therefore of the opinion that by the removal of the relator from the office a vacancy was created in it which the board of supervisors was authorized to fill in the manner prescribed in sections 4046 and 4066 of the Political Code, and not otherwise. The former section confers upon the board the power “to fill by appointment all vacancies that may occur in county or township offices, except those of county judge and supervisors”; and the latter provides that “no appointment to fill a vacancy in office must be made by the board except upon petition, signed by at least thirty qualified electors of the county, if for a county office.” The law which authorizes the appointment of a practicing physician for said Yuba County Hospital fixes the term for which he shall be appointed, provides for his salary, and prescribes his duties. That, certainly, is sufficient to create an office, which Bouvier defines to be “a right to exercise a public function or employment, and to take the fees and emoluments belonging to it.” And if an office, it is undoubtedly a county office.

As the sections of the Political Code to which we referred

provide how all vacancies in county offices, with two exceptions, must be filled, and as this office is not within the exceptions, we think, in the absence of any provision in the statute which creates this office for filling a vacancy in it, that it cannot be filled "except upon petition signed by at least thirty qualified electors."

Ordered, that so much of the judgment appealed from as adjudges "that the plaintiffs take nothing in this action," and "that the defendant C. C. Harrington is not a usurper of said office of practicing physician of the Yuba County Hospital, that he is entitled to the same," and that he recover costs herein, is reversed; and that so much of said judgment as adjudges "that said Joseph Flint is not entitled to said office of practicing physician of the Yuba County Hospital" is affirmed.

THORNTON, J., MCKINSTRY, J., ROSS, J., and MCKEE, J., concurred.

[In Bank.—March 23, 1883.]

CENTRAL PACIFIC RAILROAD COMPANY, APPELLANT, v. A. R. SHACKELFORD, RESPONDENT.

STATUTE OF LIMITATIONS — ADVERSE POSSESSION — PAYMENT OF TAXES — EJECTMENT.—Section 325 of the Code of Civil Procedure as amended in 1878 is not retroactive; and where a defendant in ejectment shows that his adverse claim and occupancy began three years prior to the amendment of that section, and continued until the commencement of the action, a period of more than five years, and that he had paid all taxes levied and assessed upon the land subsequent to the amendment of the section, his adverse possession is established.

STATUTORY CONSTRUCTION — AMENDMENT OF THE CODES.—The form in which amendments of the Code have generally been made, by declaring that particular sections shall be amended so as to read in a given way, was adopted for the purpose of adjusting them to the original enactments, so that when the system should after repeated amendments become complete, the different parts might be put together without further revision, and thus form a perfect Code. The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts, or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act.

APPEAL from a judgment of the Superior Court of Colusa County.

The action was ejectment. The remaining facts are stated in the opinion of the court, and in the dissenting opinion of Mr. JUSTICE MCKEE.

Goad & Redding, and S. W. Sanderson, for Appellant.

The issue is: Is the plaintiff's right of action barred by the Statute of Limitations? or, put in another way,—

Has defendant, on the 28th day of October, 1881 (the date of the commencement of the suit), established an adverse possession under the facts as agreed upon?

It is plain that there is a vast discrepancy between what the defendant has done, and what the statute in October, 1881, says must have been done to claim the establishment of an adverse possession.

The defendant has not occupied and claimed the land adversely and continuously for five years and paid all the taxes, State, county, or municipal, levied and assessed upon said land.

The defendant has occupied and claimed the land adversely and continuously for five years, and paid all taxes, State, county, or municipal, levied upon said land since April 1, 1878.

He certainly has not performed the letter of the statute as it reads when the suit was brought.

The universal rule is that in disseizin the Statute of Limitations in force when the suit was commenced governs the case, and any deviation from its provision is fatal. (Potter's Dwarria on Statutes, 146, and cases cited; *Manchester v. Doddridge*, 3 Ind. 360; *State v. Swope*, 7 Ind. 91, and cases cited.)

Now, in the case at bar, does the amendment of April 1, 1878, to affect this adverse occupier, take away or impair any vested right that he has acquired under existing laws? Does it create a new obligation or attach a new disability to a *past transaction* in compelling him to pay all the taxes levied and assessed on said land?

This adverse occupier in 1878 is not in existence in the eyes of the law except as a trespasser, a *tort feasor*.

If the amendment of April 1, 1878, does not affect and include him, whom does it affect and include? What standing in court can he possibly have, unless he can show that he has

complied with the strict letter of the statute as it reads five years from the date of his entry?

This we affirm to be the true and only criterion of an adverse occupier's status:—

Has he performed the strict letter of the statute as it reads five years from the date of his entry?

There is no such thing as the establishment of an adverse possession for three years, or for four years eleven months and twenty-nine days.

The establishment of adverse possession means an adverse possession taken and held with the requisites and circumstances specified in the statute for the required time, and until the adverse occupier can prove this, he is a trespasser subject to the will of the legislature. (*Hill v. Saunders*, 6 Rich. 67, 68; *Horton v. Crawford*, 10 Tex. 382; *Tyler on Ejectment*, 165.)

Dyas & Bridgford, for Respondent.

We claim that where a portion of the five years preceded the amendment of section 325 on April 1, 1878, that it is not necessary, in order to establish adverse possession in the defendant, for him to show payment of taxes for that time which elapsed before the date of said amendment.

The admitted facts show conclusively that the defendant complied with the requirements of said section 325 during all of that time which elapsed before the said amendment thereof, as said section stood before said amendment, and has since said time (April 1, 1878), complied with the requirements of said section as amended.

Then, on April 1, 1878, the defendant was, and had been since the 18th day of March, 1875, in the adverse possession of the lands described in the complaint.

The legislature, by the amendment of section 325, did not make that which was, and had been adverse, any the less adverse; and could not have done so without making a law which would have been retroactive, which section 325 does not purport to be. (Code Civil Proc. § 3; *Sharp v. Blankenship*, 59 Cal. 288.)

Counsel for plaintiff argue that the amendment of 1878

operates as a repeal of the old section. The only change made was the adding of the provision requiring the payment of taxes. So far as they are the same it is to be treated as a continuation of the old law, and not as a new enactment. (Code Civ. Proc. § 5.)

If section 325 is to be treated as a Statute of Limitation, then the time which had run before the amendment thereof is deemed part of the time prescribed as such limitation. (Code Civ. Proc. § 9; *Benjamin v. Eldridge*, 50 Cal. 612.)

SHARPSTEIN, J.—The record shows that the defendant had been in the adverse possession of the demanded premises more than three years before the legislature amended section 325 of the Code of Civil Procedure by adding thereto the following proviso: "*Provided, however, that in no case shall adverse possession be considered established under any section or sections of this Code unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, State, county, or municipal, which have been levied and assessed upon said land,*" and such adverse possession continued until the commencement of this action, which was more than two years after the enactment of said proviso. Since the passage of said proviso the defendant is conceded to "have paid all the taxes, State, county, or municipal, which have been levied and assessed upon said land." But it is contended by the appellant that in order to establish an adverse possession it was incumbent on the defendant to show that he had paid said taxes during the entire period of his occupancy of the land. In other words, that he must not only show that since the passage of said proviso he has fully complied with all of its requirements, but that in anticipation of its passage he did all which he would have been required to, if said proviso had been enacted three years before it was. That this would be giving to said proviso a retroactive effect is quite clear, and that it cannot have because no part of the Code of Civil Procedure "is retroactive unless expressly so declared." (Code Civ. Proc. § 3.)

It is contended by appellant that by giving to this proviso a retroactive effect, i. e., by holding that the first three years of

the respondent's possession were not adverse, by reason of his not having paid the taxes levied and assessed on the land during those three years, would not be to destroy a vested right, because he could acquire no right as against the owner of the legal title by less than five years' possession. The question in this case is not whether, if construed as the appellant insists it should be, the law would destroy a vested right, but whether if so construed the law would have a retroactive effect, which it cannot have because the legislature has not "expressly so declared."

And if it cannot have a retroactive operation it can in no way benefit the appellant in this case.

There is another provision of the same Code on which respondent's counsel relies. It reads as follows:—

"When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this Code goes into effect, and the same or any limitation is prescribed in this Code, the time which has already run shall be deemed part of the time prescribed as such limitation by this Code." (Code Civ. Proc. § 9.)

But the counsel for appellant contends that these sections only apply to cases which arose before the adoption of the Code in its original form. And that an amendment to the Code may, without any express declaration, have a retroactive operation. In other words, that the amended section should be considered as though it had been originally enacted in its present form. Our own views upon this point are very clearly expressed in *Ely v. Holton*, 15 N. Y. 598, from which we quote the following:—

"The form in which amendments, both of the Code and of the Revised Statutes have generally been made by declaring that particular sections shall be amended so as to read in a given way, was adopted for the purpose of adjusting them to the original enactments, so that when the system should, after repeated amendments, become complete, the different parts might be put together without further revision, and thus form a perfect Code. The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along;

and the new parts, or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act."

The Code, so far as it relates to the payment of taxes by persons holding lands adversely to the owners of the legal titles to such lands, did not go into effect until sixty days after April 1, 1878, and it did not in our opinion change the character of the defendant's possession prior to that date, because it was not retroactive, and if not retroactive it could not; and because under section nine of said Code the time which had already run when the amendment of April 1, 1878, went into effect must be deemed a part of the time prescribed by the Code as amended.

Judgment affirmed.

THORNTON, J., MCKINSTRY, J., and MYRIOK, J., concurred.

MCKEE, J.—I dissent. The right of entry upon the demanded premises, asserted by the plaintiff, was founded upon a United States patent, which was issued and delivered to the plaintiff on the 17th of March, 1875, and purported to convey the premises in question with other lands. The action upon this patent was commenced on the 28th of October, 1881.

On the 18th of March, 1875, defendant entered upon the land; and at the commencement of the action he was in possession of it, and had been in the actual and exclusive possession of the same continuously for six years before he was sued. During that time he claimed the land adversely to the title of the plaintiff, and for three years of the time, namely, from the year 1878 until the year 1881, he paid all the taxes which had been levied upon the land. Upon these facts the court below decided that the plaintiff's action was barred by the Statute of Limitations, and ordered judgment accordingly. I think the decision and judgment are erroneous.

By the patent the plaintiff established the legal title to the property. From this fact two legal presumptions resulted: First, that the plaintiff, as holder of the legal title, had been possessed of the property within five years before the commencement of the suit; and secondly, that the occupation by the defendant was under and in subordination to the legal title.

Upon these presumptions the plaintiff was entitled to judgment, unless the defendant overcame them by proof that he had held and possessed the property adversely to the legal title for five years before the commencement of the suit. (§§ 318, 321, Code Civ. Proc.)

Negatively the proof shows that the defendant did not claim the land under color of title. His claim was that he had acquired title at the commencement of the suit by adverse possession under the Statute of Limitations. To establish the acquisition of such a title, it was necessary for him to prove that he had claimed and occupied the land for five years continuously before the commencement of the suit, by a substantial enclosure of the land, or by its usual cultivation or improvement, and the payment of all taxes which have been levied and assessed upon it. (§ 325, Code Civ. Proc.) These were the requisites and requirements of adverse possession as a source of title under the Code as it was when the defendant was sued. And the practical question arises, has the defendant proved an adverse possession with the requisites and requirements of the Code for the time prescribed?

The proof answers the question in the negative; for although it shows that the defendant occupied and claimed the land for the period of five years continuously, it also shows that he has not paid the taxes levied and assessed upon it during the period of five years. Therefore the Statute of Limitations has not run in his favor.

But it is urged that as the Code did not require the payment of taxes as essential to adverse possession before the amendment of April 1, 1878, it was not necessary for the defendant to prove payment of taxes for five years; and as he has, in fact, paid the taxes every year since 1878, for a period of three years, he has complied with the law.

The payment of taxes for five years was, however, one of the circumstances specified in the section of the Code invoked by the defendant as requisite to constitute the adverse possession necessary to confer title. As the Code stood when he invoked it, there was no such thing as a Statute of Limitations founded upon three years' adverse possession, and no such thing as a Statute of Limitations founded upon an adverse possession for

five years *without* payment of taxes. The fact, then, that the defendant had continuously occupied the land for six years adversely to the plaintiff, and had paid the taxes levied upon the land for three years of that time, was not proof of the adverse possession for five years, which the law required.

The right asserted by the defendant depended wholly upon section 325 of the Code of Civil Procedure as it was at the commencement of the suit. No absolute right to the land had been acquired by the three years' adverse possession before the amendment of the section on April 1, 1878. At that time the defendant was in law a trespasser upon the land, without right or claim of title; or if he had any right it was inchoate and imperfect, and subject to any legislation upon the section of the Code under which the right was claimed. It was not a vested right; being inchoate and imperfect, it fell with the repeal of the law upon which it depended. The amendment of 1878 operated as a repeal of the law as it had previously existed. (*Billings v. Harvey*, 6 Cal. 381; *Billings v. Hall*, 7 Cal. 1; *Clark v. Huber*, 25 Cal. 596; *Bensley v. Ellis*, 39 Cal. 313.)

A Statute of Limitations is purely an act of grace on the part of the legislature. Such an enactment is a measure of public policy only. It is entirely subject to the mere will of the legislative power, and may be changed or repealed altogether as that power may see fit to declare. Such legislation relates to the remedy only, and not to any property right or contract right. (*Billings v. Hall*, *supra*.) It may have a retrospective operation; but retroactive legislation is not unconstitutional where it only affects the remedy. (*Comm. v. Duffy*, 96 Pa. St. 506.) Hence it has become a settled rule of law that when a title to land has been acquired by adverse possession under a statute, the legislature does not possess the power to destroy the same, and a repeal of the statute does not divest the title (*Sharp v. Blankenship*, 59 Cal. 288); but at any time before the title has become vested the statute may be repealed or altered, either by shortening or lengthening the period required to make the title absolute. (Wood on Limitations, § 35.)

Petition for a rehearing denied.

[Department One.—March 26, 1883.]

SARAH E. ASTON, RESPONDENT, v. MARGARET
NOLAN, APPELLANT.

LAND — COTERMINOUS OWNERS — LATERAL SUPPORT.—A coterminous land owner, when making excavations for the purpose of building, is not required to sustain the adjacent land upon which there has been placed a building, unless the building has been erected for a period of five years. By giving notice of his intention to excavate, and conducting the work so that the soil without the weight of the building would not have fallen, his whole duty is performed.

ID.—TORT — DAMAGES — MASTER AND SERVANT — PRINCIPAL AND AGENT.—Where a coterminous land owner contracts with one to excavate a lot for the purpose of erecting a building, and the contract is silent as to the mode of doing the work, he is not liable for damages occasioned by the acts of such person or his servants.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Jarboe & Harrison, for Appellant.

The defendant is not responsible for any injury resulting from the negligence of Swannack, the contractor, or his servants or employees, while engaged in the excavation of her lot under an independent contract therefor with her. (*Boswell v. Laird*, 8 Cal. 469; *Du Pratt v. Lick*, 38 Cal. 691; *O'Hale v. Sacramento*, 48 Cal. 214; *Hilliard v. Richardson*, 3 Gray, 349; *Painter v. Pittsburgh*, 46 Pa. St. 213; *Harrison v. Collins*, 86 Pa. St. 153; *Barry v. St. Louis*, 17 Mo. 121; *Robinson v. Webb*, 11 Bush, 466; *Butler v. Hunter*, 7 Hurl. & N. 826; *Peachey v. Rowland*, 13 Com. B. 182.)

One person is not responsible for the act of another unless the relation of master and servant, or that of principal and agent, exists between them.

Unless the defendant had the right of selection and control of those by whose immediate act the injury resulted, she is not responsible for their acts or negligence. (Civ. Code, § 2009; *Kelly v. Mayor*, 11 N. Y. 436; *Potter v. Seymour*, 4 Bosw. 146.)

The complaint in this case is based upon the allegation that the injury resulted from the negligence of the defendant, "by her servants and employees" (fol. 10), and it is a general prin-

ciple that no person is liable for the act or negligence of another unless there be shown such relations between them as invokes the rule of *respondeat superior*. (*Pack v. Mayor*, 8 N. Y. 225.)

Such relation does not exist where one in the exercise of an independent calling is working for another under an independent contract, and when such contractor has the entire selection of the time, mode, and means of doing the various parts of the work contracted for. (*Linton v. Smith*, 8 Gray, 148; *Sh. & R. on Negligence*, §§ 76, 77, 81; *Forsyth v. Hooper*, 11 Allen, 421; *McCarthy v. Portland*, 71 Me. 318; *Murray v. Currie*, Law Rep. 6 C. P. 26; *Cuff v. N. & N. Y. R. R. Co.* 85 N. J. L. 17.)

J. C. Bates, for Respondent.

No one can escape the burden of an obligation imposed upon him by law by engaging its performance by another. (*Shearman and Redfield on Neg.* §§ 83, 84; *Civ. Code*, § 832; *Zeile v. Hood*, S. C. Cal. 1878, No. 5,341; *Farrand v. Marshall*, 21 Barb. 417. The last case has been approved in 80 N. Y. 583; 67 N. Y. 273; 57 N. Y. 77; see *Creed v. Hartman*, 29 N. Y. 594; *Gray v. Pullen*, 5 Best & Smith, 984; *Allison v. Western N. C. R. R. Co.* 64 N. C. 382; *Chicago v. Robbins*, 2 Black, 426; *Robbins v. City of Chicago*, 4 Wall. 678; *Lowell v. Boston & L. R. R. Co.* 23 Pick. 31; *City of St. Paul v. Seitz*, 3 Minn. 308; *City of Cincinnati v. Stone*, 5 Ohio St. 41; *Ellis v. Sheffield Gas Con. Co.* 2 El. & B. 767.)

The principle of law involved in this case we think definitely settled by *Zeile v. Hood*, *supra*.

By examining annotated edition of Civil Code, and cases cited under section 832, and then the present amendment, it will be seen that said section was materially changed.

We think that the legal duty of taking reasonable precautions to sustain the land whereon buildings rest, is clearly prescribed and expressed by said section of Civil Code, 832.

The statute places that duty on the *owners*, and we think that the responsibility cannot be avoided by a delegation of that power to others. (See *Hilliard v. Richardson*, 3 Gray, 353, cited by appellants.)

McKINSTRY, J.—Plaintiff alleges in her complaint that on

a certain day she was the owner and in possession of certain "tenements and buildings" upon a lot of land described, and owner of an unexpired lease-hold interest in the lot; that defendant was the owner in fee and in possession of an adjoining lot (describing it); that the plaintiff's land "and tenements" had the lateral and adjacent support from defendant's land, and plaintiff was entitled to have such support; that defendant commenced to excavate her lot adjacent to plaintiff's "land and buildings," for the purpose of construction, "and took away the earth therefrom without leaving proper or sufficient, or any support for plaintiff's *said buildings*, as required by section 832 of the Civil Code," and prosecuted "such grading and excavation" so carelessly and negligently adjacent to said plaintiff's *buildings*, some five feet in depth below the surface of plaintiff's land, and the official grade of the street in front thereof, "as to leave said plaintiff's land and buildings and tenements thereon" without proper or sufficient support, whereby the earth on plaintiff's premises gave way, and said "house and tenements of plaintiff," etc., were destroyed, to the damage, etc. The answer denied negligence, and set up an independent contract, etc.

The complaint seems to have been drawn, and the cause tried in the court below, upon the theory that it was the absolute duty of defendant in excavating her lot to protect the *building* of plaintiff. But, as there was no objection to the complaint in the court below, and we cannot say it entirely fails to set forth a cause of action, as the evidence offered by plaintiff was admitted without opposition; as no evidence was offered by defendant tending to prove that the soil of plaintiff's lot would not have fallen in except for the superincumbent building, and as the bill of exceptions contains no specifications of insufficiency of evidence to uphold the verdict, we cannot set the verdict aside unless error occurred at the trial.

It is urged by respondent that section 832 of the Civil Code has imposed upon an adjacent land owner obligations which were not his prior to the adoption of that section. We find, however, no new duty imposed upon one intending to excavate, unless it be the duty of giving reasonable notice of his intention. The section reads: "Each coterminous owner is entitled to the lateral and subadjacent support which *his land* receives from the

adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction on using ordinary care and skill, and taking reasonable precautions to sustain *the land* of the other, and giving reasonable notice to the other of his intention to make such excavation."

We inquire, what was the law when the section of the Code was adopted?

"Every one has so far the right to have his own soil sustained by that of his neighbor, that the latter may not dig so near to the land of the former as to cause the same to fall into the excavation by its own natural weight. He ought to guard against such a consequence by proper care, and the application of proper means of support. The right of lateral support in such case is an incident to the land itself. In the language of Rolle: 'It seems that a man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into the pit, and for this, if an action were brought it would lie.' (2 Rolle Abr. 565.) This doctrine is recognized and sustained by Campbell, C. J., in *Humphries v. Broyden*, by Parker, C. J., in *Thurston v. Hancock*, by Ch. Walworth, in *Lasala v. Holbrook*, and in *Farr and Marshall* which was fully and elaborately considered, and strongly sustains the above doctrine. But this right of a land owner to support his land against that of the adjacent owner does not, as before stated, extend to the support of any additional weight or structure that he may place thereon. If, therefore, a man erect a house on his own land so near the boundary thereof as to be injured by the adjacent owner excavating his land in a proper manner, and so as not to have caused the soil of the adjacent parcel to fall if it had not been loaded with an additional weight, it would be *damnum absque injuria*, a loss for which the person so excavating the land would not be responsible in damages." (2 Washburn on Real Property, 331.) Professor Washburn cites many cases in support of his views. It may be added, if the building has stood for a period of five years (in this State) before the excavation, the person who erected it has acquired a species of easement in his neighbor's land — a right to the support of his building as well as soil. No such question

as this last is presented in the case now before us. As to a house recently erected it has been sometimes said the adjacent owner will be responsible for excavating upon his own land, so as to injure or impair its foundations, if the injury results from the negligent, unskillful and improper manner in which it was done. But the question returns, what is a negligent or unskillful excavation? If the digging would not have caused any appreciable damage to the adjacent land in its natural state, it would not be the ground of an action. The owner who has dug down his land has done what he had a right to do in a lawful manner.

It would seem that by neglecting to give notice to the adjacent proprietor, as required by section 832 of the Civil Code, the person excavating his own lot would become liable for injuries caused by a caving which would not have occurred except for the superincumbent weight of his neighbor's building. This by reason of the section which requires him to give the notice. There is no averment in the complaint that defendant did not give, and there is evidence that defendant did give, the notice. It is apparent that by giving the notice a person excavating cannot relieve himself of any portion of the prudent care with which he must have conducted the work in the absence of the statutory provision requiring notice. His excavation must be such as would not have caused the soil of the adjacent lot to tumble in had it remained in its natural state — not built upon. But if he gives the notice, and so conducts the work as that the soil, without the weight of the edifice, would not have fallen, his whole duty is performed. By the giving of the notice the coterminous proprietors are relegated to their common-law rights and duties. Their duties are correlative. The object of the notice is that the owner of the building may have his attention called to the work, and if necessary shore up his wall or strengthen his foundation. If the person making the excavation must only see to it, that the digging be such as would not have displaced or disturbed his neighbor's soil, but must protect against the burden of his neighbor's building, however great, the result must often be practically to deprive the owner of land of the right of reasonable excavation, where his lot lies next that occupied by a massive structure. The expense of

preventing the fall of the building must ordinarily increase in proportion to its size and weight.

Since the enactment of the section of the Code the rights and duties of adjoining proprietors — with reference to the matter in hand — are substantially the same as they were before, provided notice is given by the party intending to excavate.

There was evidence that the work was done by an independent contractor, who agreed with defendant to excavate, to the depth of eight feet below the level of the street, the basement for the whole of a building to extend to the line of plaintiff's lot. The contractor swore the defendant had nothing to do with the selection of any of the men employed by him to do the work. Defendant testified: "I never spoke to any person who was grading the lot in question. I never had anything to do with the property after the work was commenced."

Defendant requested the court below to charge the jury:—

"If the jury shall find that the excavation of the lot was done by persons not employed by or under the control of the defendant, and that the defendant took no part in the said work or directed the same, they will find for the defendant.

"If the jury shall find that the defendant entered into a contract with another person to do all the work necessary to construct her building, including the excavation of the lot, and that the said work and excavation was done by him under said contract without any further control or direction by the defendant, they are instructed that the defendant is not liable for any negligence on the part of such contractor, or any one under his employment."

The court refused to charge as requested, to which defendant duly excepted.

The general rule is that one person is not liable for the act of another, unless the relation of master and servant, or principal and agent, exists. It is clear that the relation of master and servant did not exist between defendant and the independent contractor, nor between defendant and the employees of the contractor. To the general rule there are exceptions, but plaintiff has not brought this case within any of them.

The owner of real estate may not relieve himself of the duties resting upon him as such by a contract, the result of which,

while being executed or when completed, must necessarily create a nuisance. (*Chicago v. Robbins*, 2 Black, 426; *Clark v. Fry*, 8 Ohio St. 358.) If the contract is such as that the necessary effect of its execution, according to its terms, is to produce the result complained of, the owner of real estate may be liable. (Cooley on Torts, 547.) And so, perhaps, if the specifications for the work must render it inherently defective. (*Boswell v. Laird*, 8 Cal. 469.) It has been said: "If a contractor faithfully performs his contract, and a third person is injured by the contractor in the course of its due performance, or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury; but for the negligence of the contractor not done under the contract, but in violation of it, the employer is not in general liable." (Seymour, J., in *Lawrence v. Shipman*, 39 Conn. 589.) Of course the word "employer" is here used to designate the owner of the property or person contracting with the independent contractor by whom the injury is done.

In the case before us the contractor agreed to excavate defendant's lot, a thing of itself lawful. The mode and manner of doing the work was not expressly agreed upon; there was no inherent defect in a stipulated plan; the work would not necessarily create a nuisance. It is contended by respondent that it was the duty of defendant to insert in the contract an express term, to the effect the work should be so conducted and finished as not to disturb the soil of the adjacent lot, and that in default of such express provision the defendant is liable, because the work was done in accordance with the contract. But when a contract provides for doing a thing which may be, and generally is, done in a lawful manner, and is silent as to the mode of doing it, the contract is to be construed as requiring it to be done in a lawful manner. As the injury was caused by the contractor while doing work which, it must be assumed, could have been done without causing it, and the contractor had agreed so to do it, the injury was done in violation of his contract. The defendant was entitled to a charge to the jury that she was not liable if the damages were produced by the act of an independent contractor, or his servant.

Judgment and order reversed and cause remanded for a new trial.

Ross, J., concurred.

McKEE, J.—I concur. To the lateral and subjacent support which adjoining lands receive from each other the coterminous owners of such lands are entitled, subject, however, to the right of each to make excavations on his own land for construction. But the coterminous owner who exercises this right is bound by law to notify the owner of the adjacent land of his intention to excavate; he is also bound to take such precautions as will sustain the land of the other, and to use care and skill in excavating so as to prevent injury being done to the support of the adjacent land. More than that is not required of him; he is not bound to prop up a building on the adjacent land which the owner has built near the dividing line. A man who has built adjoining his neighbor's land ought to foresee the probable use by his neighbor of the adjoining land, and by convention with his neighbor, or by a different arrangement of his house, secure himself against future interruption. "This," says the Supreme Court of Massachusetts, in *Thurston v. Hancock*, 12 Mass. 220, "seems to be the result of the cases anciently settled in England upon the subject of nuisance, or interruption of privilege and easements, and it seems to be as much the dictate of common sense and sound reason as of legal authority." (See also *Panton v. Holland*, 17 Johns. 92; *Radcliff v. Mayor*, 4 Comst. 201; *McGuire v. Grant*, 1 Dutch. 362.)

This common-law doctrine has not been changed by section 832 of the Civil Code. By its terms the section limits the right of the coterminous owner to the lateral support which his *land* receives from the adjacent land. The section is, therefore, nothing more than a statutory form of expression of the rule that had been, previous to the adoption of the Code, judicially declared to be the law.

[Department Two.— March 27, 1883.]

J. M. PHILIP ET AL., RESPONDENTS, v. H. SIERING
ET AL., APPELLANTS.

PRACTICE — INSOLVENCY — JUDGMENT AGAINST ATTACHED PROPERTY — APPEAL —

After the commencement of the action the defendants were adjudged insolvent debtors, and all proceedings against them stayed. The answer set up no other defense than the adjudication in insolvency. The plaintiffs moved for a judgment on the pleadings, to be enforced only against certain attached property, on the ground that an attachment had been issued in the case, and property attached more than thirty days prior to the initiation of the insolvency proceedings. The court granted the motion and defendants appealed. The transcript on appeal did not show what papers were before the court upon the hearing of the motion. *Held*, that the judgment should be affirmed, it being incumbent on a party who alleges error to make it apparent by the record.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts sufficiently appear in the opinion of the court.

E. G. Knapp, and *Wm. H. Sharp*, for Appellants.

Under the circumstances it was error to render judgment.

The effect of the declaration in bankruptcy is of itself an injunction against further proceedings. In the absence of an order authorizing it, the plaintiff cannot proceed with his suit—if he attempts to do so “his proceedings are illegal and void.” (*Penny v. Taylor*, 10 Bank. Reg. 200–203.)

The adjudication must be pleaded in issuable form, and when so pleaded the cause is suspended. (*Gibson v. Green*, 45 Miss. 209; *Hecht v. Wassell*, 24 Ark. 412; *Frostman v. Hicks*, 15 Bank. Reg. 41.)

A bankrupt is *civiliter mortuus* from the day he files his petition. (*Johnson v. Geisritter*, 26 Ark. 44; *Barron v. Newberry*, 1 Biss. 149.) The assignee stands as administrator. (*Carr v. Gale*, 3 Wood. & M. 38; 2 Ware, 330.)

The language of the Act of 1880 providing for a stay follows that of the United States bankrupt law. The object is to protect the debtor from being harassed by suits, and to prevent a race of diligence between creditors. (*In re Rosenberg*, 2 Bank. Reg. 236; *In re Metcalf*, 1 Bank. Reg. 201.)

By the filing of his petition in insolvency, the control and

dominion of the insolvent's estate is transferred to the insolvent court.

Pending the proceedings, no order for the sale of the property to satisfy a lien can be made on petition for enforcement of the lien. (*Clifton v. Foster*, 103 Mass. 233; 3 Bank. Reg. 656; *In re Cook & Gleason*, 3 Biss. 116; *Douglass v. St. Louis Z. Co.* 56 Mo. 388.)

And an attaching creditor will not be allowed to proceed to trial and judgment, as there can be no party defendant. (*Ex parte John Foster*, 2 Story, 131.)

Disregard of the order staying proceedings is error, for which the judgment will be reversed. (*Bandy v. Ransome*, 13 Pac. O. L. J. 537.)

A judgment enforceable only against property is as erroneous as a general judgment.

Ray v. Wight, 119 Mass. 426, per Gray, O. J.: "Under U. S. Rev. Stat. § 5106, a plaintiff having a valid attachment lien upon the property of a defendant, who, pending the action, but not within four months after the attachment was made, has instituted proceedings in bankruptcy, is *not entitled to a special judgment to be enforced only against the attached property until the question of the debtor's discharge is determined, and there be no unreasonable delay in endeavoring to obtain a discharge.*"

The assignee was a necessary party. (*Gibson v. Green*, 45 Miss. 209; *Ex parte Foster*, 2 Story, 157-159; *Deas v. Thorn*, 3 Johns. 544.)

Naphtaly, Freidenrich & Ackerman, for Respondents.

The order appealed from should be affirmed because the transcript does not contain all the papers used on the hearing. (*Baker v. Snyder*, 58 Cal. 617.)

The case being before the court on the judgment roll alone, all presumptions are in favor of the judgment. (*Thompson v. O'Neil*, 41 Cal. 685; *Miles v. Thorne*, 38 Cal. 339.)

The fact that the attachment in question was made more than one month next preceding the commencement of the insolvency proceedings, cannot by this appeal be questioned, and it follows that plaintiffs in the action had a valid attachment upon certain

property of defendants, which attachment was not dissolved by those insolvency proceedings.

The plaintiffs were, therefore, entitled to a judgment to be enforced against the attached property. (*Bates v. Tappan*, 99 Mass. 376; *Bowman v. Harding*, 56 Me. 559; *Stoddard v. Locke*, 43 Vt. 574; *Daggett v. Cooke*, 37 Conn. 341; *Vaillant v. Childress*, 21 Wall. 643; 11 N. B. R. 318; *Peck v. Jenness*, 7 How. 612; *Batchelder v. Putnam*, 13 N. B. R. 404; *Mason v. Warthen*, 14 N. B. R. 347; *Sacramento Bank v. Hadley*, 2 Pac. C. L. J. 470.)

PER CURIAM.—The appeal as stated in the notice is from “the order overruling the demurrer, from the order directing a judgment and execution herein, and also from the judgment therein made and entered in the said Superior Court on the 20th day of April, 1881, in favor of the plaintiffs in said action, and against said defendants, and from the whole thereof.”

The demurrer to the complaint was properly overruled.

The answer alleges that after the commencement of this action the defendants were duly adjudged insolvent debtors, and all proceedings against them were stayed.

After the answer was filed the plaintiffs gave notice of motion for judgment upon the pleadings, on the ground that the attachment in the action was issued and property attached more than thirty days prior to the filing of the defendants' petition in insolvency; and it was stated in said notice that said motion would be based upon the pleadings, affidavit, and undertaking on attachment, the writ of attachment and return thereon of the sheriff, and upon all the papers on file in the action.

It does not appear from the transcript what papers were before or considered by the court upon the hearing of that motion. But it does appear that the court granted the motion and directed that the judgment should be enforced only against the property attached.

The judgment recites that it appeared to the court that property of the defendants had been seized and levied upon by the sheriff by virtue of a writ of attachment issued in this action more than one month before the insolvency proceedings were initiated by the defendants; that said property was then still in

the hands and custody of said sheriff, and that said attachment had not been dissolved and was then in full force.

It is incumbent on a party who alleges error to make it apparent. That the record now before us fails to do.

Judgment affirmed.

[Department One.— March 27, 1883.]

ANNIE B. GALLOWAY, ADMX., ETC., APPELLANT, v.
JOHN C. ROUSE ET AL., RESPONDENTS.

APPEAL — SERVING AND FILING NOTICE.— Under section 940 of the Code of Civil Procedure, the notice of appeal may be filed on a day subsequent to that upon which the service upon the adverse party is made.

APPEAL from a judgment of the Superior Court of the county of Contra Costa, and from an order refusing a new trial.

The respondents moved to dismiss the appeal. The facts are stated in the opinion of the court.

George Turner, and E. A. Lawrence, for Appellant.

Mills & Jones, for Respondents.

PER CURIAM.—“An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing.” (Code of Civil Procedure, § 940.)

This statute differs materially from the section of the former practice act regulating the mode of taking appeals, and as a consequence the decisions of this court based on the latter are no longer applicable.

As the statute now is, the notice of appeal may be filed with the clerk on a day subsequent to that upon which the service is

made. In the language of the statute "the order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal an undertaking be filed, or a deposit of money be made" with the clerk, etc.

In the case at bar it appears from the certificate of the clerk that notice of appeal was served on the 20th of November, 1882, and on the 23d of the same month was filed with the clerk, together with an undertaking on appeal. From what has been said it follows that these steps constituted an effectual appeal.

No transcript on appeal having been filed within the time prescribed by the rules, and no extension of time having been obtained for that purpose, the motion to dismiss must prevail.

Appeal dismissed.

Hearing in Bank denied.

[Department Two.—March 28, 1883.]

IN THE MATTER OF THE ESTATE OF H. S. DORLAND, DECEASED, ALICE DORLAND, ADMINISTRATRIX, APPELLANT, AND THE CREDITORS, RESPONDENTS.

ADMINISTRATION — ATTORNEY — VALUE OF SERVICES.— In determining the value of services rendered by an attorney in the settlement of an estate, the opinions of professional witnesses are not binding on the court.

ID.— DIVIDEND TO CREDITORS — ERROR IN AMOUNT.— A dividend ordered to be paid to creditors being in excess of the amount in the hands of the administratrix, the cause was remanded with instructions to correct the error.

APPEAL from a decree of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The administratrix filed her annual account, and written objections thereto were interposed by the creditors. Among the items objected to were certain credits for money purporting to have been paid to the attorney representing the administratrix for his services. The witnesses testified that the services were worth the amount paid, but the court thought otherwise, and reduced the credits from five thousand and seventy-

five dollars to one thousand dollars. The additional facts are sufficiently stated in the opinion of the court.

J. C. Bates, for Appellant.

M. Lynch, and *G. D. Shadburne*, for Respondents.

PER CURIAM.—The court below was not bound by the opinions of the professional witnesses as to the value of the services rendered by the attorney for the administratrix, and as to the proper amount to be allowed therefor. The court was authorized to compare its own judgment as to such value with the opinions of the witnesses, and make such allowance as should be just. (*Head v. Hargrave*, 105 U. S. 45; *Anthony v. Stinson*, 4 Kan. 211.)

The court charged the administratrix with a cash balance of \$7,611.57. We see no error in this. The court permitted her to retain \$2,930 for payment of expenses of administration. This left \$4,681.57 with which to pay a dividend on claims. The court ordered a dividend of twenty-five per cent to be paid on claims, and in giving the names of claimants and the amounts to be paid for each, the aggregate is a trifle over \$5,100. We apprehend that some confusion may have arisen in the clerical work of stating the amounts to be paid, and therefore the cause is remanded, with instructions to make such corrections as will make the aggregate of the sums to be paid as dividends not to exceed \$4,681.57, and in all other respects the order and decree are affirmed.

Hearing in Bank denied.

[Department Two.— March 28, 1883.]

E. HANSEN, RESPONDENT, v. LEWIS MARTIN ET AL.,
J. W. DAGER, APPELLANT.

PRACTICE — UNDERTAKING ON APPEAL — JUDGMENT AGAINST SURETIES UPON MOTION.— It is error to render judgment, under section 942 of the Code of Civil Procedure against one only of the sureties on an appeal bond — no reason appearing why the other was not joined, except that he could not be found and served with notice. The section provides for a judgment "against the sureties," and this being a statutory proceeding, the course pointed out by the statute must be strictly pursued.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The plaintiff, several years ago, recovered a judgment against Lewis Martin for one thousand two hundred and twenty-seven dollars and costs. Martin appealed and filed an undertaking to stay execution as provided by the statute, with J. W. Dager and John T. Hill as sureties.

The judgment was affirmed, and upon the coming down of the remittitur the plaintiff moved the court upon affidavits setting out the above facts, for an order that J. W. Dager and John T. Hill appear and show cause why judgment should not be entered against them as sureties for the amount of the judgment recovered against Martin. Dager moved to dismiss the proceedings on the ground that Hill had not appeared to answer the order, nor had he been served with notice. The court found that there had been an unsuccessful attempt to serve Hill, denied the motion, and after a trial upon an answer setting up several defenses rendered judgment against Dager.

John C. Burch, for Appellant.

The words used in the section 942 "that they are bound," and not that they "*jointly and severally are bound*," as also that "judgment may be entered . . . against *the sureties*," and not against the *sureties or either* of them "if taken either in "their ordinary and popular sense," or that they were used in the law as such, and must be taken in their *technical sense* is conclusive that section 942 provided for a "*joint*" bond only as construed by section 1644, Civil Code.

The sureties received no *benefit* from the *promise*, and are not brought within the exception specified in section 1431, Civil Code, and under section 1659, Civil Code, they are not "*severally*," but *jointly* liable. So that no other than a *joint* judgment can be entered.

The undertaking given in this action contains factors which are not provided for by section 942. At p. 40, folio 113, Trans., the sureties are made to say: "We, the undersigned," . . . "do hereby '*jointly and severally*' undertake and promise"—the words "*jointly and severally*" are interpolated upon

the section; and at p. 41, folio 116, the words "*and without notice to us or either of us,*" are also interpolated upon or in addition to the conditions provided in section 942. The use of these latter words might be construed to authorize judgment against them "or either of them," were it not for the fact that the words following immediately are "*against the undersigned sureties,*" plural, using the language of the section providing for a "joint" judgment.

Notwithstanding the undertaking executed uses the words "jointly and severally" as above stated, we understand this to be a *statutory bond*, and it is well settled by this Supreme Court that when such a bond is given pursuant to the requirements of a particular statute or section of law, the provisions of that statute or section are deemed in law to have been incorporated into the bond.

It was said by this Supreme Court in *Heynemann v. Eder*, 17 Cal. 483: "Though not strictly an undertaking such as is contemplated by the statute, we think it should be construed in the same manner" their "agreement must be read in the light of the statute." Under this rule the "interpolated" words must be eliminated, and the bond left such as the Code (section 942) makes it and intended it to be, a "joint bond" upon which a "joint judgment" alone, and not a several or joint and several judgment may be rendered.

Tully R. Wise, for Respondent.

It has been decided over and over again that section 942 does authorize a judgment against the sureties upon motion. (*Kelly v. Morgan*, 54 Cal. 604; *Ladd v. Parnell*, 57 Cal. 232; *Meredith v. Santa Clara Mng. Assn. of Balt.*, 56 Cal. 178; *Wood v. Orford*, 56 Cal. 157.)

This motion is the same as a *scire facias*. (*Beall v. New Mexico*, 16 Wall. 535; *Davidson v. Farrell*, 8 Minn. 262; *Wright v. Simmons*, 1 Smedes & M. 389; *White v. Prigmore*, 29 Ark. 211; *Chippee v. Thomas*, 5 Mich. 59; *Ladd v. Parnell*, 57 Cal. 232; *Wood v. Orford*, 6 Pac. C. L. J. 519; *Ward v. Chamberlain*, 2 Black, 430; *Bouvier's Law Dic. Verb. recognizance*.)

It is common practice in United States courts to enter judgment against stipulators at the same time as against principal.

No affidavit is necessary, but the case of *Kelly v. Morgan* is followed exactly by direction of the court. As the proceedings were based on papers in the case on the record, that is all that was necessary.

The parties can waive any legal or constitutional right, unless the law or Constitution expressly forbid it. (*Connelly v. State*, 31 Am. Rep. 34; *Brown v. Leitch*, 31 Am. Rep. 42; *State v. Kaufman*, 33 Am. Rep. 148; *State v. Worden*, 33 Am. Rep. 27.)

The court compelled us to proceed against Dager alone, because he had been served with notice, and Hill had not. This was proper. (Code Civ. Proc. § 579.)

PER CURIAM.—Martin, in appealing to this court from the judgment rendered against him, filed an undertaking with Dager and Hill as sureties. The judgment was affirmed, and on the going down of the remittitur the plaintiff moved, under section 942, Code of Civil Procedure, for judgment against the sureties. Notice of the motion was served on Dager only. The court entered judgment against him alone.

We think that it was error to render judgment under that section against one of the sureties only, no reason appearing why the other was not joined, except that he could not be bound and served with notice. The section provides for a judgment "against the sureties"; and this being a statutory proceeding, the course pointed out by the statute must be strictly pursued. The terms of the bond did not, if it could have done so, authorize a variation from the provision of the statute; it authorized the entry of judgment "against the undersigned sureties."

Judgment reversed and cause remanded for further proceedings.

Hearing in Bank denied.

[Department Two. — March 28, 1883.]

MARGARET M. HUTCHINSON, APPELLANT, v. A. G.
AINS WORTH ET AL., RESPONDENTS.

TRANSFER -- DEFECTIVE ACKNOWLEDGMENT BY MARRIED WOMAN -- EVIDENCE.—

The certificate of acknowledgment of an instrument by a married woman is defective when it does not state that the notary made her acquainted with the contents of the instrument upon an examination without the hearing of her husband; and it is not error to prohibit its introduction in evidence.

ID.— PRACTICE — PLEADING.— When an acknowledgment is properly made but defectively certified, a party interested may have an action to correct the certificate; and where, in foreclosure proceedings, objection is made to the introduction of the mortgage on the ground that the certificate is defective, the plaintiff should be permitted to amend the complaint and prove that the acknowledgment was made in compliance with the statute, and have judgment reforming the certificate.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order refusing a new trial.

The action was brought to foreclose a mortgage made by defendant Anna Ainsworth, wife of defendant A. G. Ainsworth, upon her separate property, given to secure the payment of their joint note.

The certificate of acknowledgment attached to the mortgage was as follows:—

"STATE OF CALIFORNIA, }
County of Alameda. } ss.

"On this third day of September, A. D. one thousand eight hundred and seventy-eight, personally appeared before me, Will. H. Burrall, a notary public in and for said county, Anna Ainsworth, described as a married woman and the wife of A. G. Ainsworth, whose name is subscribed to the annexed instrument as a party thereto, and who is personally known to me to be the person whose name is subscribed to the said annexed instrument as a party thereto; and she, having been by me first made acquainted with the contents of said instrument acknowledged to me on examination, apart from and without the hearing of her said husband, that she executed the same, and that she does not wish to retract the execution of the same.

"In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

"[NOTARIAL SEAL.]

WILL. H. BURRALL,
"Notary Public."

The defendants objected to the introduction of the mortgage on the ground of insufficiency of the acknowledgment, and the court sustained the objection. The plaintiff then moved to amend the complaint, and be allowed to prove that the acknowledgment was taken in exact conformity to the requirements of the Code, and for a judgment reforming the certificate. This motion the court denied, and gave judgment for plaintiff for the amount of the note, but denied the prayer for a foreclosure of the mortgage.

William Reade, and W. C. Belcher, for Appellant.

Cited *Wedel v. Herman*, 59 Cal. 507; *Murphy v. Rooney*, 45 Cal. 78; *Lestrade v. Barth*, 19 Cal. 660.

Geo. W. & W. B. Tyler, for Respondents.

The authorities are almost unanimous that a deed by a married woman improperly acknowledged is void. (1 Bish. Married Women, § 589; *Knowles v. McCamly*, 10 Paige, 342; *Steele v. Thompson*, 14 Binn. 84; *Baxter v. Bodkin*, 25 Ind. 172; *Barry v. Donley*, 25 Tex. 737; *Willes v. Gattman*, 53 Miss. 721; *Marriner v. Saunders*, 5 Gilm. 125; *Barrett v. Tewksbury*, 9 Cal. 13; *Ewald v. Corbett*, 32 Cal. 493; *McLeran v. Benton*, 43 Cal. 467; *Morrison v. Wilson*, 13 Cal. 498; *Leonis v. Lazzarovich*, 55 Cal. 52, and cases there cited.)

If the deed is void, it certainly cannot be reformed as *against* Anna Ainsworth and her grantees, either at law or in equity.

Besides the cases cited *supra*, the following are in point: *Leftwitch v. Neal*, 7 W. Va. 569; *Hamar v. Medsker*, 60 Ind. 413; *Martin v. Davelly*, 6 Wend. 1; *Wentworth v. Clark*, 33 Ark. 432; *Callahan v. Callahan*, 4 Tex. 61; *Butler v. Buckingham*, 5 Day, 492; *Lane v. McKeen*, 15 Me. 304; *Russell v. Ramsey*, 35 Ill. 362; *Dickinson v. Glenney*, 27 Conn. 104; *Selover v. A. R. Co.* 7 Cal. 266; *Barrett v. Tewksbury*, 9 Cal. 13; *Leonis v. Lazzarovich*, 55 Cal. 52.

As regards the admission of parol evidence, the following authorities are directly in point; all holding that a defective acknowledgment of a married woman's deed cannot be helped by parol evidence. (*Russell v. Ramsey*, 35 Ill. 362; *Trimmer v.*

Heagy, 16 Pa. St. 484; *Hayden v. Wescott*, 11 Conn. 129; *Elliott v. Peirsol*, 1 Peters, 328; *Elwood v. Klock*, 13 Barb. 50; *O'Ferrall v. Simplot*, 4 Iowa, 381; *Wilkinson v. Getty*, 13 Iowa, 157; *Looney v. Adamson*, 48 Tex. 619; *Jourdan v. Jourdan*, 9 Serg. & R. 268; 1 Bish. Married Women, § 591; *Landers v. Bolton*, 26 Cal. 408.)

In all dealings with married women the maxim *caveat emptor* must be applied, and the doctrine of estoppel *in pais* does not apply. (*Morrison v. Wilson*, 13 Cal. 495.)

PER CURIAM.—The certificate of acknowledgment was defective, in that it did not state that the notary, upon an examination without the hearing of her husband, made the married woman acquainted with the contents of the instrument. Section 1186 of the Civil Code requires that such separate examination must embrace as well the making her acquainted with the contents of the instrument as the acknowledgment by her; and section 1191 gives the form of the certificate in very plain language. The court, therefore, did not err in sustaining defendants' objection to the admission of the mortgage in evidence.

When the acknowledgment is properly made, but defectively certified, a party interested may have an action to correct the certificate. (§ 1202, Civ. Code.) We see no objection to the joining this action with the action for foreclosure. The court should have permitted plaintiff to amend her complaint and prove, if she could, that the acknowledgment was actually taken in compliance with the statute, and have judgment correcting the certificate.

Judgment and order reversed and cause remanded for proceedings in accordance with this opinion.

[In Bank.—March 28, 1883.]

THE PEOPLE, RESPONDENT, v. JOSEPH HURTADO,
APPELLANT.

HOMICIDE — EVIDENCE — CONFESSION BY WIFE OF ADULTERY — INSANITY.—Defendant was found guilty of murder in the first degree. The wife of defendant testified, on his behalf, that she confessed to him, prior to the killing, she

had been guilty of adultery with the deceased, and that the confession was followed by great anger, weeping, and mental depression on the part of defendant. Defendant, having introduced evidence that a certain house in Sacramento was a house of ill-fame, offered to prove by a witness the independent fact that deceased had been seen entering the house in company with the defendant's wife. The wife's testimony had not been impeached. *Held*, that the court rightly excluded the testimony. It was her statement which could be claimed to be the cause, or one of the causes, which deprived him of his reason, not the truth of her statement, with respect to which he had no personal knowledge.

ID.—MANSLAUGHTER—PASSION—PROVOCATION.—If a defendant charged with murder is so far in possession of his mental faculties as to be capable of knowing that the act of killing was wrong, any partial defect of understanding which might cause him more readily to give way to passion than a man ordinarily reasonable, cannot be considered for any purpose. To reduce the offense to manslaughter, the provocation must at least be such as would stir the resentment of a reasonable man.

ID.—CHARGE.—The charge of the trial court must be taken together, and if, without straining any portion of the language, it harmonizes as a whole, and fairly and correctly presents the law bearing on the issues tried, the appellate court will not disturb the judgment because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text.

ID.—THREATS.—The defendant asked the court to charge, "If the defendant had been told of threats made by deceased against him, . . . then defendant had a right to arm himself," etc. The court refused to so instruct. *Held*, not error; it was for the jury to determine from the evidence whether the defendant was justified in arming himself and in using arms.

ID.—DEPOSITION—CONSTITUTION.—Section 18, article 1, of the present Constitution is no prohibition upon the power of the legislature to authorize the taking of depositions by the defendant in every class of criminal cases.

ID.—EVIDENCE—STATEMENTS.—A witness, Morrison, testified that he told defendant of a conversation he had with his (defendant's) wife, in which she promised she would be good and do what was right. Defendant then asked the witness to state any conversation he had with her in which she made any admission of her adultery with Estuardo, the deceased. The court sustained an objection by the prosecution. *Held*, not error; it is manifest that any statement the wife may have made to the witness Morrison not made known to the defendant could not have had any tendency to overthrow his reason.

ID.—INSTRUCTION—ASSUMING FACTS NOT PROVED—SEDUCTION.—The court refused the following instruction: "It is proper for the jury to take into consideration the statements made to him of the seduction of his wife by deceased, as proper for you to consider in arriving at a conclusion as to whether he understood and was legally responsible for the killing; also, to aid you in arriving at the conclusion as to whether the act was premeditated or done with malice." *Held*, not error; the instruction assumes that statements were made to defendant "of the seduction of his wife by deceased." Seduction implies more than illicit intercourse.

ID.—DEGREES OF MURDER—PUNISHMENT.—The court refused the following instruction: "If you believe the defendant, in truth and in fact, when he killed deceased believed deceased had seduced his wife, while it is in itself no excuse or sufficient provocation to excuse murder, if you believe he wholly understood and could control his act at the time of the homicide, yet it is proper for you to take into consideration in arriving at the degree of murder, if any, of which he may be guilty; also it is proper for you to take such testimony into consideration in fixing the punishment if you should find him

guilty of murder in the first degree." *Held*, not error; the belief by defendant that deceased had seduced his wife could not of itself tend to reduce the crime to murder of the second degree.

APPEAL from a judgment of the Superior Court of Sacramento County.

The facts are stated in the opinion of the court.

C. I. Jones, A. L. Hart, and T. B. McFarland, for Appellant.

Attorney-General, and *Johnson*, for Respondent.

MCKINSTY, J.—Defendant was found guilty of murder in the first degree.

Two defenses were relied on at the trial. First, that defendant was laboring under insanity when the fatal shot was fired: second, that the killing was manslaughter only.

The wife of defendant testified, on his behalf, that she confessed to him prior to the killing, she had been guilty of adultery with deceased, and that the confession was followed by great anger, weeping, and mental depression on the part of defendant. Defendant, having introduced evidence that a certain house in Sacramento was a house of ill-fame, offered to prove by a witness, one Clenfuegas, the independent fact that deceased had been seen entering the house in company with defendant's wife. The testimony would have tended to prove the adultery. The court below sustained the prosecution's objection to the testimony.

It is urged by appellant — the defendant — the evidence was admissible as corroborating the testimony of defendant's wife that she had confessed to her husband. No direct evidence was introduced by the people to contradict her statement that she had made the confession to her husband. We know of no principle which would permit defendant to strengthen or bolster up the statement of the witness that she had declared to defendant she had committed adultery, by proving that, in fact, she had committed adultery. Evidence that she had committed adultery would not tend to prove that she confessed to her husband she had committed adultery. It was her statement which could be claimed to be the cause, or one of the causes, which deprived defendant of his reason — not the truth of her state-

ment, with respect to which he had no personal knowledge. It may be the presumption, to which she, in common with all other witnesses was entitled, that she was telling the truth, and the further presumption that she would not swear falsely she had been guilty of adultery unless she was in fact guilty, were balanced or overcome in the minds of the jurymen by the probability she would swear falsely to save her husband from conviction. But we cannot assume that the jury arbitrarily, because she was the wife of defendant, rejected her testimony, or that they rejected it at all, since, if they accepted her statement as absolutely true, the verdict may be just. The credibility of each witness—not directly impeached—must be determined by the jury, and we must presume was in this case determined by the jury, upon consideration of the manner of the witness, the inherent probability of the testimony, and the other evidence in the cause, admitted because of its relevancy to the issues tried. To admit evidence in itself totally irrelevant, because it might in some degree render more probable testimony which is relevant, would be to open up the way to the trial of side issues not made by the pleadings. If it were competent for the defense to give evidence tending to prove that defendant's wife had committed adultery, it would be competent for the prosecution, in rebuttal, to prove that she had not committed adultery; in the case before us, to introduce witnesses who should swear that the house referred to was a house of good repute, or that defendant's wife never entered it. Moreover, it would have been competent for the prosecution, in the absence of evidence on the part of defendant tending to prove her adultery, to cast discredit upon her testimony that she had confessed her guilt to her husband, by proving that she was entirely innocent. We are convinced the objection was properly sustained.

The court below refused the request of defendant to give the instruction following:—

“If the jury believe from the evidence that the defendant was not so insane, at the time of the homicide, as to be irresponsible for his acts, but at the time he was laboring under such a mental unsoundness as to cause him to be easily aroused to a sudden heat of passion, and that he committed the homicide without malice aforethought, but on a sudden heat of passion,

aroused and caused by an act of injustice towards him, committed by the deceased, it will be their duty to find him guilty of manslaughter only."

The instruction was properly refused. If defendant was so far in possession of his mental faculties as to be capable of knowing that the act of killing was wrong, any partial defect of understanding which might cause him more readily to give way to passion than a man ordinarily reasonable, cannot be considered for any purpose. To reduce the offense to manslaughter the provocation must at least be such as would stir the resentment of a reasonable man.

It cannot be urged that the homicide is manslaughter because it was committed in an unreasonable fit of passion. In an abstract sense anger is never reasonable, but the law, in consideration of human weakness, makes the offense manslaughter when it is committed under the influence of passion caused by an insult or provocation sufficient to excite an irresistible passion in a reasonable person; one of ordinary self-control.

There was some evidence that defendant "lay in wait" for deceased. We cannot say, therefore, that the instruction in that regard was totally inapplicable and misleading.

Defendant excepts to the portion of the charge to the jury which reads: "If the defendant voluntarily killed the deceased, and you are satisfied from the evidence, beyond all reasonable doubt, of such voluntary killing, then it is your duty to convict him unless you find from the evidence that the case comes within some one of the specifications of excusable or justifiable homicide." This language follows and is a *resume* of the instructions of the court with reference to unlawful homicide. The question of insanity is elsewhere treated of, and considering the whole charge, it cannot be presumed that the language of the court was understood by the jury to mean that the volition of an insane man rendered him liable to punishment. "We must take the charge together, and if, without straining any portion of the language, it harmonizes as a whole, and fairly and correctly presents the law bearing on the issues tried, we will not disturb the judgment because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text." (*People v. Doyell*, 48 Cal. 93.)

Defendant asked the court to charge: "If the defendant had been told of threats made by deceased towards him . . . then defendant *had a right* to arm himself when he went to the Police Court," etc. The court properly refused the offered instruction. It was for the jury to determine from the evidence whether defendant was justified in arming himself and in using his arms.

On the application of defendant the deposition of one Lenora Beauteris—a witness too ill to appear in court—was taken on behalf of defendant. Defendant was not present when the deposition was taken. The witness was sworn by the clerk and her testimony taken by questions, propounded by the respective counsel, and answers thereto. The deposition was introduced in evidence by defendant. Defendant now contends in this court that the judge below, of his own motion, should have excluded the deposition, and that his failure to do so was error, for which a new trial should be granted.

Defendant's proposition is that a deposition cannot be used in a case of homicide, because of section 13 of article 1 of the Constitution of the State. The section reads:—

"In criminal prosecutions in any court whatever the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law. The legislature shall have power to provide for the taking in the presence of the party accused and his counsel of depositions of witnesses in criminal cases other than cases of homicide, where there is reason to believe that the witness, from inability or other cause, will not attend at the trial."

The section, with the exception of the last clause, relates to the privileges of persons accused of crime. "In criminal prosecutions the party accused *shall have the right*," etc. He shall not be twice put in jeopardy for the same offense; he shall not be compelled to be a witness against himself, nor be deprived of life, liberty, or property "without due process of law." There

can be little doubt that the right to due process of law would include the common-law right to be confronted by his witnesses. To prevent misunderstanding, however, the framers of the Constitution added: "The legislature shall have power to provide for the taking *in the presence of the party accused* and his counsel, of depositions of witnesses in criminal cases other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial." It may be that by reason of the exception depositions cannot now be used *against* the defendant in cases of homicide, even although they are taken in the presence of the party charged with that crime, and with full opportunity for cross-examination. But in other cases the legislature may authorize depositions to be taken on the part of the prosecution. Inasmuch, however, as the tenor of the provision of the Constitution clearly shows, with the exception noted, that it was intended for the protection of defendants, there is no prohibition upon the power of the legislature to authorize the taking of depositions by the *defendant* in every class of criminal cases. In this view of the question it is not necessary to inquire how far the constitutional privileges accorded to defendants charged with crime may be waived by them.

A witness, Morrison, after testifying he had a conversation with the wife of defendant, said: "I told Joe (defendant) about the conversation I had with his wife, *in which she promised she would be good and do what was right.*" He was asked by the defendant: "State now the conversation you had with her." To this question the prosecution objected, on the ground that the question called for incompetent and hearsay testimony. The court sustained the objection. Counsel for defendant then asked: "Now state any conversation you had with her before she went away, in which she made any admission to you of her adultery with Estuardo." A like objection was sustained to the last question.

If the record showed that the witness had testified he had communicated to defendant a conversation with his wife in which "she made any admission of her adultery" with deceased, we would be inclined to hold the court below erred in sustaining the objections to the questions. But the witness had only

stated that he told defendant about a conversation in which "she promised she would be good and do what was right." It is manifest that any statement she may have made to the witness not made known to defendant, could not have had any tendency to overthrow his reason.

Defendant asked the court to charge the jury:—

"It is proper for the jury to take into consideration the statements made to him of the seduction of his wife by the deceased as proper for you to consider in arriving at a conclusion as to whether he understood and was legally responsible for the killing; also to aid you in arriving at a conclusion as to whether the act was premeditated or done with malice." Also,—

"If you believe defendant in truth and in fact when he killed deceased believed deceased had seduced his wife, while it is in itself no excuse or sufficient provocation to excuse murder if you believe he wholly understood and could control his act at the time of the homicide, yet it is proper for you to take into consideration in arriving at the degree of murder, if any, of which he may be guilty; also it is proper for you to take such testimony into consideration in fixing the punishment if you should find him guilty of murder in the first degree."

The court in its general charge said: "Evidence of information given defendant that improper conduct or relations had occurred between defendant's wife and deceased is to be considered only as affecting the defendant's mental condition."

The court also charged very fully with respect to the subject of insanity, in language as favorable to defendant as he was entitled to have used. (Charges asked by defendant. Nos. 7, 12, 17, 22, 23, 24, 25, 26, 27, 28, 29, 35, 36.)

We cannot say the action of the court in refusing the instructions above quoted demands a reversal of the judgment or a new trial. The first of the two instructions assumes that statements were made to defendant "of the seduction of his wife by deceased." While we would not always and necessarily hold a charge erroneous which should assume a fact to be proven, if from the immediate context, or elsewhere in the instructions, it appeared that the existence or non-existence of the fact was left to be determined by the jury, we will not say that the rejection of such a charge is erroneous. Moreover, the word

"seduction" implies more than illicit intercourse between deceased and defendant's wife. A jury might well believe a husband would more probably be rendered insane by the act of one who should deliberately entice the wife from the path of duty — who should by arts and solicitation persuade her to sacrifice her chastity — than by her voluntary and unsolicited surrender of her person. It was for the jury to decide whether any statements were made to defendant with respect to an adultery committed with deceased, and to decide whether such statements showed that she had been seduced.

Nor did the court err in refusing the last of the two instructions above quoted. If defendant "believed deceased had seduced his wife" (and retained the possession of his reason so as to be responsible for his act), the circumstance might furnish a motive for the crime, but it could not of itself tend to reduce the crime to murder of the second degree; or, in other words, it could not tend to neutralize the effect of the circumstances which tended to establish that the killing was done with the express malice or predetermination to take life, which constitutes murder of the first degree. While any fact in evidence may be considered by the jury in fixing the punishment where a defendant is found guilty of murder of the first degree, yet the court below was called on to give or refuse the offered instruction as a whole, and did not err in rejecting the whole when, as we have seen, part was objectionable.

Judgment and order affirmed.

ROSS, J., MCKEE, J., MYRICK, J., SHARPSTEIN, J., and THORNTON, J., concurred.

[In Bank.—March 20, 1883.]

THE PEOPLE, ETC., APPELLANTS, v. M. RIGNEY ET AL.,
RESPONDENTS.

SACRAMENTO — CHARTER OF — POWER OF TAXATION UNDER.— The several acts of the legislature subsequent to the original charter of the city of Sacramento gives authority for the levy and collection of taxes in addition to those specified in such charter, and constitutes an enlargement of the taxing power conferred by the charter.

APPEAL from a judgment of the Superior Court of the county of Sacramento.

The action was brought to recover delinquent taxes levied by the board of trustees of the city of Sacramento for the fiscal year 1882-83. The levy was for a general tax of one dollar on one hundred, a fire department tax of twenty-four cents, a school tax of thirty cents, a levee tax of eighteen cents, a police tax of sixteen cents, a redemption tax of seven cents, and a library tax of five cents; making a total of two dollars. The charter of the city passed April 25, 1863, authorized a levy of one per cent. The Statute of 1872 authorized a fire department tax, the Act of January 18, 1870, a school tax, the Act of March 30, 1878, a levee tax, the Act of March 6, 1872, a police tax, the Act of March 31, 1876 a redemption tax, and the Act of April 26, 1880, a library tax.

It was contended by defendants that these several acts were not an enlargement of the taxing power, but were intended merely to direct the application of the general tax of one per cent authorized by the charter—that the levy in excess of one per cent was void.

The complaint was demurred to and the demurrer sustained.

H. L. Buckley, W. A. Anderson, Catlin & Hamburger, and Freeman & Bates, for Appellants.

It is claimed that the city levy must be limited to one per cent. We propose to show an express authority for every cent levied.

The levy of a general tax of one per cent is sanctioned by sections 2 and 25 of the Charter, passed April 25, 1863. (Devlin's Comp. pp. 4 and 19.)

This is specifically appropriated by section 26 of the Charter, as follows:—

55 per cent thereof to a sinking fund.

8 per cent thereof to a school fund.

7 per cent thereof to a fire department.

30 per cent thereof to a general fund.

The fact that the proceeds of this tax are thus appropriated confutes the theory that levies subsequently authorized were to be paid out of the general tax.

The fire department levy is authorized by Statute of 1872, sections 9 and 10. ((Devlin's Comp. pp. 80, 81.)

The school tax. (See Devlin, p. 56, § 2.)

The levee tax. (See Devlin, p. 68, § 1, and p. 72, § 3.)

The police tax. (See Devlin, p. 93.)

The Fowle bond tax. (See Devlin, p. 113.)

The library tax. (§ 15,068 Hittell's Codes.)

R. T. Devlin, J. W. Armstrong, and J. H. McKune, for Respondent.

The respondent claims that the limitation of the taxing power in the board of trustees to one per cent per annum is still in force, and that so far as subsequent statutes have authorized the levy of taxes (special or general) they only direct what shall be done with the taxes raised by the levy of one per cent or less.

He also claims that the several acts under which the authorities of the city assume the right to enlarge the levy of taxes beyond one per cent are inoperative and void.

Assuming (for the argument) that the said acts passed subsequent to the charter are operative, do they enlarge the power in the board of trustees to tax? The rule is well settled that in the construction of statutes effect must be given to each provision if possible.

The limitation in the power to tax contained in the charter of Sacramento is perfectly consistent with the subsequent acts cited. The several taxes may be levied and yet not exceed the one per cent limit, and so all provisions stand and have full force and effect. (9 Cowen, 546.)

This principle is illustrated in the *Mayor etc. v. Magruder*, 34 Md. 381.

The several acts conferring the additional powers of taxation are unconstitutional. (Art. 4, §§ 25, 31, and 37, Const.; *Billings v. Harvey*, 6 Cal. 383; *State v. Ingersoll*, 17 Wis. 631; *State v. Andrews*, 20 Tex. 230; *Blakemore v. Dolan*, 50 Ind. 194; *Cooley Cons. Lim.* 185.)

PER CURIAM.—We are of opinion that under the charter of the city of Sacramento and the several subsequent acts of the legislature for the levy of the respective taxes therein named;

the trustees of the city had authority to make the tax levy in controversy. The several acts subsequent to the original charter gave authority for the levy and collection of taxes in addition to those specified in such original charter, and constituted an enlargement of the taxing power conferred by the charter.

Judgment reversed, and cause remanded with instructions to overrule the demurrer.

McKEE, J., dissented.

Rehearing denied.

[In Bank.—March 30, 1883.]

EX PARTE E. HARRISON, ON HABEAS CORPUS.

CRIMINAL LAW — GAMBLING — SENTENCE UNDER SECTION 330.—Sections 1205 and 1446 of the Penal Code are inapplicable to sentences imposed under section 330, and a prisoner held in custody for failure to pay a judgment rendered under the provisions of that section is only entitled to be discharged upon the payment of the fine and costs in money, at any time within the term of imprisonment, or by serving out the term of his imprisonment. He has no right to pay either fine or costs by imprisonment at the rate of one dollar a day.

THE facts are stated in the opinion of the court.

F. A. Berlin, for Petitioner.

Attorney-General, for Respondent.

McKEE, J.—The punishment prescribed for the offense of gaming, as defined by section 330 of the Penal Code, is a fine of not less than two hundred dollars, nor more than one thousand dollars, and imprisonment in the county jail until payment of the fine *and costs*, not exceeding one year. Satisfaction of a judgment for fine and costs, rendered under the provisions of the section, can only be made in one of two ways; namely, by payment in money, or by imprisonment for the time fixed by the judgment, which must be within the maximum time prescribed by the section.

A prisoner held in custody for failure to pay such a judgment is only entitled to be discharged upon payment of the fine and

costs in money, at any time within the term of his imprisonment, or by serving out the term of his imprisonment. Section 330 gives him no right to pay either fine or costs by imprisonment at the rate of one dollar per day.

Sections 1205 and 1446 of the Penal Code are inapplicable to sentences imposed under section 330. Section 1205 relates to the satisfaction of judgments in the Superior Courts imposing a fine only, and section 1446 relates to the satisfaction of such fines imposed by judgments in Justices' or Police Courts. Both provide for the payment of such fines by imprisonment at the rate of one dollar for each day's imprisonment. Any judgment for a fine only substantially conforming to the provisions of those sections would be valid and sufficient (*Ex parte Ellis*, 54 Cal. 204), and one held in custody under it would be entitled to a credit of a dollar for each day he may have remained in prison, and, at any time, would be entitled to his discharge upon paying the sum remaining due. (*Ex parte Kelly*, 28 Cal. 414.)

It would be otherwise, however, as to a party held in custody by a commitment upon a judgment for *fine and costs* imposed under the provisions of section 330. He would have no right to his discharge at any time within the term of his imprisonment without first paying in money the judgment against him. Both fine and costs must first be paid, or the prisoner serve his term of imprisonment. Until one or the other of these things be done the sheriff is bound to detain him in custody. (§ 1215, Pen. Code.) But to authorize his detention the judgment must, under the provisions of section 330, specify the amount of the fine and costs, and the punishment to be inflicted. That section fixes the minimum and maximum of the fine, and the maximum of the imprisonment for the offense; and it is the duty of the court in which conviction has been had to render judgment within the boundaries established, and to specify in the judgment the amount of the fine, and the term of the imprisonment, and in that regard the judgment should be certain and definite, and complete in itself, so that what it requires to be done may be known without resort to anything outside of it. A judgment rendered upon a conviction under section 330 must specify the term of imprisonment, otherwise it is not such a judgment as is

authorized by the section. And as no term of imprisonment for the offense of which the petitioner was convicted under section 330 is fixed by the judgment under which he is held in custody, he is illegally held, and must be discharged.

It is so ordered.

THORNTON, J., and SHARPSTEIN, J., concurred.

McKINSTRY, J., specially concurring.—Section 1205 of the Penal Code cannot be dove-tailed into section 330 so that the two together may be read as defining the punishment applicable to the crime named in 330. Section 330 provides that one found guilty of dealing, etc., any of the games mentioned is punishable by fine, “and shall be imprisoned until such fine and costs of prosecution are paid, such imprisonment not to exceed one year.” The costs of prosecution are a different thing from the fine, and in section 330 the two things are spoken of as different. There can be no doubt that a person imprisoned under a judgment rendered according to section 1205 is entitled to his discharge when he has been imprisoned for a number of days equal to the number of dollars’ fine, although he has paid no portion of the fine or costs. He cannot be detained to “work out” the amount of costs at a dollar a day. But section 330 expressly provides that the person found guilty of the offense therein defined shall be imprisoned for a year, unless, in the mean time, he shall pay the fine “and costs of prosecution.” In such case he is not entitled to his discharge on payment of the whole of the fine (without the costs), nor is he entitled to his discharge at the expiration of a number of days equal to the number of dollars’ fine, or equal to the number of dollars of any portion of the fine remaining unpaid. He must remain in jail for the period of a year, unless he shall pay the costs as well as the whole of the fine. As under section 330 the costs of prosecution can be satisfied only by a payment, or by a year’s imprisonment, and as the fine and costs cannot be satisfied separately, in such manner as to relieve the party of any portion of the year’s imprisonment, section 1205 can have no application to judgments rendered upon conviction under section 330.

MYRICK, J., dissented.

[Department Two.—April 2, 1883.]

E. B. YOUNG, RESPONDENT, v. THOMAS S. MILLER
ET AL., THOMAS S. MILLER, APPELLANT.

PROMISSORY NOTE — INDORSER — PLEADING — DEMURRER.— In an action against the maker and indorser of a promissory note, the complaint alleged in substance among other things that the note was presented at maturity to the maker for payment, but was not paid, whereof the indorser had due notice. The indorser demurred on the ground of the insufficiency of this allegation, and the demurrer was overruled. *Held*, that the allegation was sufficient, and that the demurrer was properly overruled.

ID.— ANSWER — DENIAL.— The answer of the indorser denied that he had due or legal notice of the presentment of the note for payment, or the non-payment thereof. *Held*, that no issue of fact was raised by this denial.

ID.— ACCOMMODATION INDORSER — TENDER.— An alleged tender by the indorser *held* to be bad because the amount tendered was less than the sum due by the terms of the note, although he was an accommodation indorser, and the plaintiff had purchased the note of the maker at a discount.

ATTACHMENT — FEES OF SHERIFF.— Where an attachment is levied on separate pieces of real estate, the sheriff is entitled to fees for each levy.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing to retax costs.

The only defense was by the indorser, and judgment was rendered against him on the pleadings. The additional facts sufficiently appear in the head notes and opinion of the court.

P. B. Ladd, and Wilson & Otis, for Appellant.

John H. B. Wilkins, for Respondent.

PER CURIAM.— The demurrer to the complaint was properly overruled. The allegation of presentation of the note to the maker, the non-payment, and notice thereof to the indorser are sufficiently alleged. The denial of the defendant that he had due or legal notice of the presentation of the note to the maker for payment, and the non-payment thereof raised no issue of fact; and the allegations that defendant was an accommodation indorser, that the plaintiff purchased the note of the maker at a discount, and that the defendant tendered to the plaintiff the sum which he paid for the note with interest and cost of protest, constituted no defense to the action, because the amount tendered was less than the sum due by the terms of the note; and it was

not error to render judgment for the plaintiff upon the pleadings. The levy of the attachment upon each separate piece of real estate constituted an independent levy on the property. In this case there were three distinct levies, for each of which the sheriff was entitled to the fees allowed "for levying an attachment on property."

Judgment and order affirmed.

Hearing in Bank denied.

[Department Two.—April 6, 1883.]

**WILLIAM BROWN, APPELLANT, v. ELIZA DELAVAU,
RESPONDENT.**

PRACTICE — COSTS IN INJUNCTION SUITS WHERE JUDGMENT IS LESS THAN THREE HUNDRED DOLLARS.—In an action to enjoin the continuation of a wrongful act, and for damages already sustained thereby, a judgment for fifty dollars damages, but for no part of the equitable relief demanded, will not carry costs.

ID.— EXCEPTION TO ORDERS MADE AFTER JUDGMENT.—The appellate court will not review an order made after judgment unless it is excepted to.

APPEAL from an order of the Superior Court of the city and county of San Francisco striking out a cost bill.

The facts are stated in the opinion of the court.

J. B. Hart, for Appellant.

C. H. Parker, for Respondent.

PER CURIAM.—The plaintiff in his complaint demanded that the defendant be enjoined from throwing earth upon her land in such a manner that it would fall upon the plaintiff's land, and a judgment for five hundred dollars against the defendant for damages already sustained by the plaintiff by reason of the throwing of earth upon his land by the defendant. He recovered judgment for fifty dollars damages, but for no part of the equitable relief demanded in the complaint. He filed a bill of costs, which the court on motion of defendant ordered stricken from the files. From that order this appeal is taken.

The case as presented by the record is not distinguishable in

principle from *Himes v. Johnson*, 61 Cal. 259, in which we said: "The plaintiff recovered a judgment for fifty dollars damages and the costs of the action. We think that the court erred in giving the plaintiff a judgment for costs. It is true that the plaintiff prayed an injunction, but this was denied, and the action thereafter should be treated as one for damages only. It is quite clear that a judgment for fifty dollars damages in such an action would not carry costs."

Besides, it does not appear that the order was excepted to, and we cannot review an order made after judgment unless it is. (Code Civ. Proc. §§ 646, 647, 651.)

Order affirmed.

[Department Two.—April 6, 1883.]

R. B. BUCKNER, PETITIONER, v. W. P. VEUVE,
RESPONDENT.

PROHIBITION — QUO WARRANTO — OFFICE.— Prohibition will not lie to prevent the usurpation of an office. Quo warranto is the proper remedy.

APPLICATION for a writ of prohibition. The petitioner was elected justice of the peace of San Jose Township at the election held January 8, 1883. The respondent was elected justice of the peace for the city of San Jose under the provisions of section 103 of the Code of Civil Procedure. By virtue of the Act of March 17, 1874, the petitioner, as justice of the peace of the township, is *ex-officio* police justice or judge of the police court of the city of San Jose.

Petitioner alleged that on March 22, 1883, the respondent ousted him of the office of police judge for the city of San Jose, and wrongfully assumed to discharge the duties of that office, and prayed for a writ of prohibition, commanding the respondent to desist and refrain from discharging the duties of the office.

Wm. B. Hardy, for Petitioner.

PER CURIAM.— *Quo warranto* lies to prevent the usurpation of an office. Prohibition is not available as a remedy for that purpose.

Application for a writ of prohibition denied.

[Department Two.—April 11, 1888.]

A. M. EASTON ET AL., RESPONDENTS, v. M. O'REILLY ET AL., E. W. BURR, E. F. NORTHAM, AND HENRY JONES, APPELLANTS.

EJECTMENT — PRACTICE — AMENDING COMPLAINT — PARTIES — LANDLORD AND TENANT.—The action was ejectment. The complaint was filed in 1874, against defendants Burr and O'Reilly, who answered. In 1875, the complaint was amended naming as defendants O'Reilly, Northam, Burr, Silva, and John Doe Jones. In 1876, a second amended complaint was filed naming as defendants O'Reilly, one Haubricht, Burr, Northam, Silva, Henry Jones, John Doe, Richard Roe, and Peter Roe. The evidence showed that O'Reilly was not in possession when the suit was brought, and that he had sold the property just before the commencement of the action to Burr and Northam. From the time of the sale to Burr and Northam, and for several months after the complaint was filed Jones was in possession as tenant of Burr and Northam. Haubricht succeeded Jones and was in possession under a lease at the time of filing the second amended complaint. The court granted a nonsuit as to O'Reilly, Haubricht, and Silva, but refused it as to Jones. Defendants then moved for a nonsuit as to Burr and Northam on the ground that it was not proven that either of them was in possession personally or was the landlord of any defendant who was in possession at the time the action was commenced against such defendant; which motion was denied. *Held*, that no error was committed.

ID.—SWAMP LANDS — EVIDENCE — ACTS OF 1858 AND 1868.—The Act of the Legislature of 1858 did not forbid the sale of swamp and overflowed lands within the limits of five miles beyond the city and county of San Francisco, and where a certificate of purchase had issued under that act for lands within those limits, the Act of 1868 and amendments thereto containing a prohibition against the sale of such lands, do not defeat the rights of the purchaser, or those claiming under him, to a patent.

ID.—STATUTE OF LIMITATIONS.—The plaintiffs claimed title to the land under a patent from the State therefor as swamp and overflowed, issued in 1871, and following a certificate of purchase issued in 1859. The defendants pleaded the Statute of Limitations, and offered to prove an actual, exclusive, and continuous occupation and possession by them and their grantors under claim of title against all the world, for more than ten years before the issuing of the patent, and more than fifteen years before the commencement of the action, and that neither the State nor any one claiming under the State had received the rents, issues, or profits of the premises within that period. The action was commenced on the 20th of January, 1874, one of the defendants against whom the judgment was rendered being named in the original complaint, and the others in the first amended complaint filed on the 8th of March, 1875. Nothing was said in the offer as to the time at which the land had been certified to the State by the commissioner of the general land office as swamp and overflowed land. *Held*, that the offer was properly rejected.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts sufficiently appear in the head notes and opinion of the court.

A. N. Drown, and E. W. McGraw, for Appellants.

The nonsuit as to Henry Jones should have been granted. He was first made a defendant March 8, 1875. The only testimony as to his possession of the premises is that of defendant E. W. Burr, who says: "Haubricht went in under lease from Burr and Northam, about the middle of 1874. From December 10, 1873, until Haubricht went in, defendant Jones was in possession as tenant of Burr and Northam."

This evidence discloses the fact that Jones was the party as against whom the action should originally have been commenced, but he was not made a party to the original action, and when he first became a party in 1875, he was no longer in possession, but had yielded possession to Haubricht. (*Lawrence v. Ballou*, 50 Cal. 258.)

The motions for nonsuit in the cases of Burr and Northam rest on a different principle.

Burr was an original party defendant, Northam came in as defendant for the first time in 1875. The evidence fails to disclose that either one had a *possessio pedis* of the land in controversy at the time the action was commenced, or at any time thereafter.

The action was barred by sections 315 and 316 of the Code of Civil Procedure, defendant having been in the exclusive, actual, and continued possession and occupation of the premises for more than ten years.

Taylor & Haight, for Respondents.

MYRICK, J.—This is an action of ejectment. The plaintiffs had judgment as to defendants Burr, Northam, and H. Jones, who have appealed.

The suit was commenced January 20, 1874, against Burr and one O'Reilly, who were served and answered. March 8, 1875, the plaintiffs filed an amended complaint, naming as defendants O'Reilly, Northam, Burr, Silva, and John Doe Jones. A second amended complaint (on which, and answers thereto, the action was tried) was filed August 29, 1878, naming as defendants O'Reilly, one Haubricht, Burr, Northam, Silva, Henry Jones, John Doe, Peter Roe, and Richard Roe, the last three

being stated to be fictitious names. The defendants answered, alleging that the cause of action was barred by sections 315, 316, 318, 319, and 320 of the Code of Civil Procedure.

On the trial plaintiffs gave in evidence a patent of the State of California (swamp and overflowed lands), dated November 29, 1871, to themselves; also a certificate of purchase, dated September 9, 1859, to F. P. Tracy, together with evidence to show that they had acquired the right of F. P. Tracy under the certificate.

First. The evidence as to possession showed that O'Reilly was not in possession when the suit was commenced, January 20, 1874. He had been in possession, and on the 10th of December, 1873, executed a deed to Burr and Northam, who have ever since claimed to own the land. From December 10, 1873 (when Burr and Northam took the deed from O'Reilly), until about the middle of 1874, defendant Jones was in possession as tenant of Burr and Northam, at which latter time Haubricht went in under lease from them; Haubricht was in possession at the time of filing the second amended complaint, by which he was made a party. It will thus be seen that when the suit was commenced, January 20, 1874, Burr and O'Reilly were not proper parties defendant. O'Reilly was made a party, but was not in possession; Jones was in possession, but was not made a party; and Burr being out of actual possession, was not joined with his tenant Jones.

By the first amended complaint, O'Reilly was again erroneously made a party; and Silva, Jones, Northam, and Burr were joined with him. In the second amended complaint the error as to O'Reilly was repeated; Haubricht (then in possession) was joined, as were his landlords Burr and Northam.

On motion of defendants' counsel the court granted nonsuit as to defendants O'Reilly, Haubricht, and Silva, and denied their motion for nonsuit as to Jones. The defendants then moved for nonsuit as to defendants Burr and Northam, and each of them, on the ground that it was not proven that either of them was in possession personally, or was the landlord of any defendant who was in possession at the time the action was commenced as against such defendant. As to these motions and rulings we have to say, the motion was properly granted as to

O'Reilly and Silva, it was properly denied as to Jones — he was not in possession at either of the times when he was named as defendant, to wit, March 8, 1875, and August 20, 1878, but he was in possession when the suit was commenced, January 20, 1874; and when the complaint was amended March 8, 1875, and again August 20, 1878, the amended complaints respectively took the place of the preceding complaint. "The amended complaint supersedes the original, but there is no dismissal of the action. It simply takes the place of the other. No new or different action is commenced, and no new cause of action is introduced. There is no change in the identity of the cause of action. That is the same as before, and the commencement of the action dates from the filing of the original complaint and issuing of summons thereon." (*Barber v. Reynolds*, 33 Cal. 501; *Jones v. Frost*, 28 Cal. 246.) The motion was properly denied as to Burr and Northam — their tenant Jones was in when the suit was commenced; he was a proper party, being in possession (*Klink v. Cohen*, 18 Cal. 623), and they were properly joined with him (§ 379, Code Civ. Proc.); the granting of the motion as to Haubricht would not entitle the landlords to a nonsuit, Jones being in possession as their tenant when the suit was commenced; the plaintiffs were entitled to pursue their action.

Second. The defendants assert that the land in controversy is located within five miles of the city and county of San Francisco, and claim that the patent is therefore void under section 70, Statutes 1869–70, p. 877. Conceding that the land is within the limits mentioned, it is sufficient answer to say that it appears from the certificate of purchase that the State received, September 9, 1859, payment in full for the land, and issued its certificate of purchase under the Act of 1858. (Statutes 1858, p. 198.)

The Act of 1858 did not forbid the sale of lands within the limits of five miles beyond the city and county of San Francisco. The purchaser had acquired vested rights under that act; by the terms of that act (§ 7) the purchaser or his assignee or legal representatives would be entitled to a patent after the lands should have been confirmed to the State. The Act of March 28, 1868 (Statutes 1867–68, p. 528, § 70), and the Act of April

4, 1870 (Statutes 1869-70), amendatory thereof, containing the prohibition against the sale of swamp and overflowed, salt marsh, and tide lands, within five miles of the city and county of San Francisco, did not pretend to, nor would they, defeat the right of the purchaser under the Act of 1858, or those claiming under him, to a patent.

Third. The defendants offered to prove that they and those under whom they claim had been in the exclusive, actual, and continued occupation and possession of the premises, claiming to own the same as against all the world, for more than ten years prior to the issuance of the patent to plaintiffs, and for more than fifteen years prior to the commencement of this action; also that the State, or any one claiming under the State, had not received the rents, issues, or profits of the premises within that period. The giving of the testimony was objected to, and the objection was sustained.

This court held in *Manly v. Howlett*, 55 Cal. 94, regarding swamp and overflowed lands, that the certificate of purchase did not pass the title *as title*; that in a suit for the recovery of the land commenced after the issuance of the patent, the Statute of Limitations cannot be held to have commenced running prior to the date of the patent. The counsel for defendants, in commenting upon the application of the decision in that case to the case now before us, urge that sections 315 and 316 were not involved in that case, and therefore that decision has no application here. In a recent case in this court (*Wright v. Rosebery*, 63 Cal. 252), we had occasion to comment upon the effect of the acts of Congress regarding swamp and overflowed lands, especially the Acts of September 28, 1850, and July 23, 1866, requiring the commissioner of the general land office to certify swamp and overflowed lands to the State. Although the Act of 1850 was a general grant to the State of all swamp and overflowed lands within the State, yet the character of swamp and overflowed would not be definitely fixed upon a specific tract until the action of the proper federal officers; and the offer of the defendants did not embrace the proof that such action was had more than ten years before the suit was commenced. It is true the plaintiffs did not prove such action; but their patent raised the presumption that all neces-

sary steps had been taken. Even conceding (which we do not) that if the land had been certified to the State more than ten years before the commencement of the action, it would have been barred by sections 315 and 316, Code of Civil Procedure, we are of opinion that the offer of defendants did not embrace sufficient to present a defense to the plaintiffs' right of recovery.

We see no error in the record prejudicial to the appellants. The judgment is affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

[Department Two.— April 12, 1883.]

SAVINGS AND LOAN SOCIETY, RESPONDENT, v.
ALONZO E. HORTON ET AL., APPELLANTS.

APPEAL — DISMISSAL — ENTRY AND CORRECTION OF DECREE.— Where a decree of foreclosure is entered and subsequently, by order of the court, corrected as to a clerical error in the amounts, an appeal taken more than one year after the entry of the decree, but less than one year after the order correcting it, will be dismissed.

APPEAL from a decree of foreclosure of the Superior Court of the city and county of San Francisco, and from an order amending the decree, and from a judgment of deficiency.

The facts are stated in the opinion of the court.

George N. Williams, for Appellant.

A. N. Drown, for Respondent.

The appeal is too late. (Code Civ. Proc. § 939, sub. 1; *Thomas v. Anderson*, 55 Cal. 45; *McLaughlin v. Dougherty*, 54 Cal. 519.)

The court always has power to correct errors in computation and clerical errors made by itself or officers, and to cause its decrees to be amended accordingly *nunc pro tunc* as of the date of original entry. (Freeman on Judgments, 67-71; *Rousset v.*

Boyle, 45 Cal. 69; *Estate of Schroeder*, 46 Cal. 316; *Smith v. Kennedy*, 63 Ala. 334.)

MYRICK, J.—The notice of appeal in this case states that the appeal is taken from the decree of foreclosure and sale entered August 4, 1880, from the amended decree entered October 8, 1880, and from the judgment of deficiency docketed December 2, 1880.

The decree of foreclosure was made in open court August 2, 1880, and was recorded August 4, 1880. The transcript before us shows no subsequent action of the court, except that in the decree of August 2, 1880, in stating the amount due on the mortgage at "forty-seven thousand seven hundred and eighty-three 42-100 dollars," the "seven," "seven," and "eighty-three 42-100" are erased with ink lines, and the words "four," "five," and "thirty-six" interlined, also in ink, in two separate places, making the decree read that the amount due was "forty-four thousand five hundred and thirty-six dollars"; and on the margin is written "decree amended by order of court entered October 8, 1880; attest William A. Stuart, clerk." No docketing of any judgment for deficiency appears in the transcript. The notice of appeal was given September 15, 1881.

The notice of appeal was given too late. It should have been given within one year after August 4, 1880, the day when the decree was entered. The fact that the court on the 8th of October following corrected its decree as to the figures did not change the day of the entry of the decree; it was already entered. Doubtless by clerical error wrong figures were stated in the decree, and the court, perhaps of its own motion, as it had the legal right to do, corrected the error so as to make the record speak the truth.

The case before us is not such a case as would have been presented, if the decree of August 4th had been set aside, and another decree entered October 8th; it is merely a correction of amounts, not the entry of a new decree.

Appeal dismissed.

SHARPSTEIN, J., and THORNTON, J., concurred.

[Department One.— April 14, 1883.]

JAMES D. WALKER ET AL., RESPONDENTS, v. LAURA L. BUFFANDEAU ET AL., JOHN H. WISE, AND THOMAS DENIGAN, APPELLANTS.

PLEADINGS — DEFECTIVE ALLEGATIONS AND DENIALS — OBJECTIONS ON APPEAL.— Certain defective allegations and denials, not objected to in the court below, sustained on appeal, and the objections to them overruled.

MORTGAGE FORECLOSURE — TWO MORTGAGES ON THE SAME DAY — RECORDING — EVIDENCE — PRESUMPTION.— Where two mortgages are executed and delivered on the same day, but recorded on different days, no presumption arises from the mere fact of recording as to their priority, nor does this fact tend to prove that the one first recorded was executed and delivered before the other.

ID.— FINDINGS — CONCLUSION OF LAW.— A finding as to the priority of the mortgages, stated as a conclusion of law, and based upon facts previously found, but not justified thereby, held, to be merely a conclusion of law, and not a finding of fact.

APPEAL from a judgment of the late District Court of the Fourth Judicial District, in and for the city and county of San Francisco.

The facts are stated in the opinion of the court.

Tully R. Wise, and E. P. Cole, for Appellants.

The mortgages being dated on the same day, are, in point of law, simultaneous, and must be decreed to be paid equally.

The court based its idea solely upon recording.

The recording acts do not give priority, they only protect the mortgage from being postponed to a subsequent *bona fide* encumbrancer. Under no circumstance does recording make priority of execution.

Section 1213 of the Civil Code makes every conveyance recorded, notice. Section 1214 makes it void as against a purchaser or mortgagee in good faith, and for a valuable consideration, whose conveyance is first recorded. This was the error of the lower court.

Between a purchaser in good faith, and a *bona fide* purchaser under the recording acts, there is no distinction. (*Grimstone v. Carter*, 24 Am. Dec. 230; *Withers v. Little*, 56 Cal. 370; *James v. Morey*, 14 Am. Dec. 475; *Union Canal Co. v. Young*, 30 Ill. 212.)

Sidney V. Smith & Son, for Respondents.

The facts found by the court are sufficient to sustain the ultimate conclusion, that the plaintiffs' mortgage was the superior one.

The plaintiffs' mortgage having been first recorded, the presumption is that it was in fact prior; and, there being no fact to destroy that presumption, the law will draw its conclusion in accordance with it. This is a case, therefore, of the probative facts being all found, and comes within the rule of *People v. Hagar*, 52 Cal. 171.

The finding that "the plaintiffs' said mortgage is a lien upon the premises described in the complaint prior and superior to the lien of the mortgage of the defendants Wise and Denigan," is a finding of fact. (*Frazier v. Crowell*, 52 Cal. 401.)

And it will be taken to support the judgment, although placed among the conclusions of law. (*Jones v. Clark*, 42 Cal. 192.)

PER CURIAM.—The action is to foreclose a mortgage executed by Buffandeau, deceased. With respect to the appellants (defendants Wise and Denigan), the allegation of the complaint is: "The defendants claim some right, title, interest, or estate in or to the said premises, *subsequent, however, to said mortgage and subject thereto.*" To this appellants answered: "Defendants admit that they have an interest in said premises by way of mortgage from E. B. Buffandeau, dated the 18th day of April, 1877, to secure a promissory note," etc. "And they further allege they have no information or belief sufficient to enable them to answer the allegation of the complaint, that *the claims* of the defendants are subsequent, however, to said mortgage to plaintiffs and subject thereto, and so deny that their mortgage is subsequent or subject to the mortgage of said plaintiffs."

It is said by respondents that the portion of the answer above quoted raises no issue. It is urged, in the first place, the defendants could not base a denial that their interest, in the mortgaged premises, was subsequent and subject to the lien of plaintiffs' mortgage, upon an alleged *ignorance* of the facts. It has been held, very often, that where the fact alleged is such as that its existence or non-existence must, from its nature, be

known to the opposing party, such party cannot be permitted to plead ignorance, or deny "upon information and belief." In such cases the party alleging a matter as a fact is entitled to an explicit denial, or to an admission. (*Humphreys v. McCall*, 9 Cal. 62; *Brown v. Scott*, 25 Cal. 189; *Richardson v. Wilton*, 4 Sandf. 708; *Sherman v. N. Y. Central Mills*, 1 Abb. Pr. 188; *Chapman v. Palmer*, 12 How. Pr. 37; *Fales v. Hicks*, 12 How. Pr. 154; *Hance v. Rumming*, 2 Smith, E. D. 48; *Ketcham v. Zerega*, 1 Smith, E. D. 553.)

It is said by respondents, in the second place, that the answer is evasive; it is not an express denial of the fact alleged. It is insisted that the answer does not even deny knowledge of the verity or falsehood of the averment actually made, but sets up a supposititious averment, and then alleges defendants' ignorance with respect to *such* averment; that, while the complaint alleges any right, or title, or interest, or estate, which defendants may have in the premises, to be subject or subordinate to plaintiffs' lien, the answer only declares defendants to be ignorant of the truth of a pretended averment "that the *claims* of the defendants are subsequent," etc.

Appellants, on the other hand, contend that the allegation of the *complaint* is insufficient to constitute a cause of action against them; that the allegation is, defendants "claim" some right, title, interest, or estate subsequent, etc.; that is to say, that defendants *claim* that such interest as they have is subsequent and subject to plaintiffs' mortgage.

If the plaintiffs had objected to the form of the denial in the court below the defendants might have been compelled to admit or deny expressly the allegation that their interest (as mortgages) was subsequent and subject to plaintiffs' lien. The plaintiffs' further objection to the *answer*, and the objection of appellants to the *complaint*, cannot be considered here. The answer is as broad as the complaint, and the complaint does not entirely fail to state a cause of action. Admitting that a complaint in foreclosure should allege that an asserted right of a third party in the mortgaged premises "is subsequent and subject to" plaintiffs' lien, there is here an attempt to state the fact, which, if inartificial or imperfect, should have been specially objected to by demurrer or otherwise. The court below *tried the*

issue of priority, as to which both parties introduced evidence, found certain facts bearing upon such issue, and concluded, as matter of law, that the mortgage of defendants was subsequent and subject to the mortgage of plaintiffs. There is no bill of exceptions, and, so far as appears, there was no motion by either party for judgment upon the pleadings, nor was the attention of the court called, by any *special* objection or application, to defects in the complaint or answer. Under these circumstances the interests of justice cannot be subserved by giving effect to points first made in this court.

Treating the pleadings as presenting the issue — “Is the defendant’s mortgage subsequent and subject to plaintiffs’ lien?” — it remains to inquire whether the court found upon that issue.

The District Court, amongst other facts, found that the mortgage to plaintiffs was executed and delivered April 18, 1877, and *recorded* the same day; that the mortgage to appellants was made and delivered April 18, 1877, and recorded April 26, 1877. In other words, that the mortgages were made and delivered on the same day, but plaintiffs’ mortgage was first recorded.

As “a conclusion of law” from these facts the court found plaintiffs’ mortgage as a lien upon the premises described in the complaint prior and superior to the lien of the mortgage of the defendants Wise and Denigan aforesaid.

It is urged by respondents, the fact that plaintiffs’ mortgage was first recorded creates the *presumption* that it was prior.

Even if the prior record of the plaintiffs’ mortgage created a presumption that their mortgage was first executed and delivered, such would not be a conclusive legal presumption, but a presumption which could be rebutted by satisfactory evidence. Hence the finding of the fact of previous record would not necessarily establish the plaintiffs’ priority. Since *Coveny v. Hale*, 49 Cal. 552, it has not been doubted that “findings” must be either of the ultimate facts, or of such probative facts as will enable the court to declare that the ultimate facts “necessarily result therefrom.” The ultimate fact of priority of execution does not necessarily result from the finding of the prior registry of plaintiffs’ mortgage. The plaintiffs’ mortgage may have been first recorded and yet the appellants’ mortgage been first executed and delivered.

Nevertheless, *it would seem*, that if the prior record of the mortgage created a presumption that it was executed and delivered before appellants' mortgage, or if the prior record even tended to prove plaintiffs' priority, the "conclusion of law" of the court below, "that plaintiffs' lien was prior and superior to the lien of defendants' mortgage," might be treated as a finding of the ultimate *fact* of plaintiffs' priority. Where, on the question of the ratification of a note, the findings embraced several facts tending to establish it, and then a conclusion from them that there had been a full ratification and confirmation, it was *held*, that such conclusion was the ultimate fact to be ascertained; that it was none the less a finding of fact because it was stated as a conclusion. (*Jones v. Clark*, 42 Cal. 180.) But unless the previous findings, in some degree, tend to prove the ultimate fact, it is manifest that the conclusion (as in this case) "from the foregoing facts," must be treated as what it purports to be — a conclusion of law from the facts previously recited.

Why should the fact that one of two instruments made on the same day was first recorded be considered to create any presumption that the instrument was executed and delivered at an earlier hour of the day than the other? There is nothing in the nature of the mere fact of record which tends to prove the independent fact of prior execution and delivery. Nor is there any language in the statute which can be construed to make a prior record evidence of a prior execution. Sections 1213 and 1214 of the Civil Code read:—

"Sec. 1213. Every conveyance of real property, acknowledged or proved, and certified and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees.

"Section 1214. Every conveyance of real property other than a lease for a term not exceeding one year is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded."

Section 1213 declares that the filing for record of a conveyance, with the recorder, shall be constructive notice of *its contents* to "subsequent purchasers and mortgagees." And 1214, that a

conveyance, not recorded, shall be void "as against any subsequent purchaser, or mortgagee, . . . in good faith and for a valuable consideration, whose conveyance is first duly recorded."

So far as the date of the execution of an instrument is concerned, the record of it, or a certified copy of its record, creates no other presumption than the production of the original would create, the presumption that it was made when it purports to have been made.

In the case before us, both mortgages were recorded on different days, both purport to have been made on the same day, and the court below found both were in fact executed and delivered on the same day. In the absence of a finding with respect to priority of delivery, we might presume, perhaps, the delivery of the two to have been contemporaneous. We certainly cannot presume the plaintiffs' mortgage was first executed and delivered because it was first recorded, nor does the fact it was first recorded tend to prove its prior execution and delivery.

The decree cannot be allowed to stand. Except that the court (the District Court) in which the cause was tried has gone out of existence we might remand the cause with directions that the court below, upon the evidence already taken and such further relevant evidence as might be introduced, find the facts necessary to a proper determination. But this course is now apparently impracticable. A new trial seems necessary.

Judgment reversed and cause remanded for a new trial.

[Department Two.— April 18, 1883.]

JOHN O'KANE, RESPONDENT, v. JAMES DALY ET AL.,
HIBERNIA SAVINGS AND LOAN SOCIETY, APPELLANT.

APPEAL — SERVICE OF NOTICE — DISMISSAL.—The plaintiff brought this suit to be discharged from a trust under an assignment for the benefit of creditors. The Hibernia Savings and Loan Society, several other creditors, and the assignors were made defendants. The Hibernia Savings and Loan Society and some others denied certain allegations of the complaint, and asked that the assignment be declared void. The assignors and several of the defendants consented to a judgment discharging the plaintiff. The Hibernia Savings and Loan Society appealed, and served the notice on the plaintiff alone, who moved to dismiss the appeal. *Held*, that the motion should be granted for want of service of the notice of appeal on each of the parties interested in the judgment.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

Respondent moved to dismiss the appeal on the ground that no proper service of the notice of appeal had been made. The facts are stated in the opinion of the court.

Edward P. Cole, for the motion.

The notice of appeal not being addressed to any of the other defendants, and not being served on them of course does not give this court jurisdiction to determine any question in the judgment in which they are interested, or by which they may be affected. Daly and Hawkins have an interest in the validity of this assignment; this makes them adverse parties. (§§ 938, 940, Code Civ. Proc.)

All the defendants are interested in who shall be assignee. They are interested in the costs. Every party whose interest in the subject-matter of the appeal is adverse to, or will be affected by the reversal or modification of the judgment, is an adverse party, whether he is plaintiff or defendant. (*Senter v. Bernal*, 38 Cal. 640; *Cotes v. Carroll*, 28 How. Pr. 446; *Hiscock v. Phelps*, 2 Lans. 118; *Thompson v. Ellsworth*, 1 Barb. Ch. 627.)

Tobin & Tobin, contra.

THORNTON, J.—This action is brought by O'Kane to be discharged from a trust under an assignment made to him as assignee by Daly and Hawkins for the benefit of creditors, under the provisions of the Civil Code. Several of the creditors were made parties defendant, among others the Hibernia Savings and Loan Society. Daly and Hawkins were also made defendants.

The society above named answered, denied several allegations of the complaint, and among other matters alleged that the assignment to O'Kane was void, and asked that it be so adjudged. Mary and Jane O'Meara also in their answer asked that the assignment be adjudged null.

Daly and Hawkins and several other defendants consented that a judgment should be entered discharging the assignee

from the trusts of the assignment, and in accordance with the prayer of complaint. The society and the O'Mearas did not join in this consent. Judgment was rendered and entered in favor of plaintiff, discharging him from the trusts above mentioned. The judgment embraced other matters not necessary to be here mentioned. The Hibernia Savings and Loan Society alone prosecutes this appeal.

A motion is made by counsel for respondent O'Kane to dismiss this appeal, on the ground that no proper service of notice of appeal has been made. The notice of appeal was served on plaintiff alone.

We are of opinion that the co-defendants of the appellant were all interested in the judgment, and would be affected by its reversal, and by consequence the notice of appeal should have been served on each of them. (*Senter v. Bernal*, 38 Cal. 640; *Hiscock v. Phelps*, 2 Lans. 118; *Cotes v. Carroll*, 28 How. Pr. 446; *Thompson v. Ellsworth*, 1 Barb. Ch. 627.)

The only appeal attempted to be taken in the case is from the judgment, and as such appeal was not properly taken, we cannot consider any one of the various orders to which our attention has been called, no one of them being appealable.

The motion to dismiss the appeal must be granted. So ordered.

MYRICK, J., and SHARPSTEIN, J., concurred.

[Department Two.— April 19, 1883.]

MICHAEL C. KIRSCH ET AL., RESPONDENTS, v. L. L. BRIGARD, APPELLANT.

EJECTMENT BY LESSEE — EXPIRATION OF LEASE PENDING ACTION.— Lessees in the actual possession of land from which they are ousted by an intruder, without title or color of right, may recover the possession in an action commenced during the continuance of the lease, though not tried until after its expiration.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was ejectment. The facts sufficiently appear in the opinion of the court.

J. B. Crockett, and Mastick, Belcher & Mastick, for Appellant.

George A. Nourse, for Respondents.

SHARPSTEIN, J.—The counsel for defendant insists that although the plaintiffs were in the actual possession and occupation of the demanded premises at the time of the entry and ouster by the defendant, their possession was not of that kind which would enable them to maintain an action of ejectment against any one who might enter upon the premises by force and violence. And this insistence is based upon certain allegations in the complaint to the effect that one Naphtaly was at the time of the commencement of the action, and for more than five years prior thereto had been, the owner, and, by himself and his tenants, in the possession of said premises, and that in the month of September, 1873, said Naphtaly leased to the plaintiffs said premises, and that they entered upon the possession thereof and remained in such possession until evicted therefrom by the defendant in the month of January, 1879. "That at the expiration of the term described in said lease, to wit, in the month of September, 1878, said lease was renewed by mutual agreement of said plaintiffs and said Naphtaly for one year"; and that at the date of the commencement of the action (June 28, 1879) said lease was in full force. From which the learned counsel for appellant argues that "if any one could then, at the expiration of the written lease, have maintained ejectment against the defendant, it was Naphtaly, the landlord, but instead of resorting to this remedy, he made an oral lease to the plaintiffs for a term of one year, which expired September 18, 1879, and the action was commenced June 28, 1879. The only possible ground on which they could *then* maintain ejectment against the defendant was that, as tenants of Naphtaly, the owner, under the lease for one year (which was then in force), they were entitled to be let into the possession of the demised premises by virtue of that lease. If it be conceded that they then had a good cause of action on that ground, the trouble is that the oral lease expired by its terms within less than three

months after the commencement of the action, and about one year before the trial. The law is well settled that the plaintiff in ejectment must be entitled to the possession both at the commencement of the action and *at the time of the trial* to entitle him to a judgment of restitution."

Briefly stated the argument is this, that as the entry and ouster occurred before the expiration of the first written lease, the plaintiffs' right of action terminated at the termination of that lease, and was not renewed by the renewal of it; and conceding that under the new lease they were entitled to be let into possession and might maintain an action to recover it, they could not recover it after the expiration of said last mentioned lease, although they commenced their action before the expiration of it. It is alleged in the complaint that the entry and ouster by the defendant were in the month of January, 1879; and that the plaintiffs were then holding under the lease of September, 1878, which at the alleged date of said entry and ouster had several months to run. So that the complaint does not show that the alleged cause of action arose before the expiration of the first or written lease, but that it arose while the plaintiffs were holding under the second or oral lease. And it appears by the last brief filed by counsel for appellant that he so understands it. He says: "The complaint avers that the defendant entered in January, 1879, during the pendency of the one year lease, and the action was commenced in June, 1879, and the trial commenced on September 20, 1880, more than one year after the expiration of the oral lease."

At the date of the commencement of the action the lease had several months to run, but it had expired before the trial commenced. Therefore the appellant claims that it appears by the complaint that the plaintiffs *at the time of the trial* were not entitled to the possession of the demanded premises, and consequently not entitled to a judgment for restitution. The plaintiffs, however, do show that at the time the action was commenced they had a right to recover, and unless it *appears* that such right terminated during the pendency of the action, the verdict and judgment in their favor ought not to be disturbed on that ground. And this leads to the inquiry, does it *appear* in this case that the plaintiffs' right to recover terminated

during the pendency of the action? Appellant's counsel insists that it does, and that it appears on the face of the complaint. And he relies upon the allegation that in the month of September, 1878, the plaintiffs took from Naphtaly a lease of the premises for one year, and as that term would expire before the action was tried, it is claimed that the plaintiffs' right terminated during the pendency of the action.

In none of the cases cited by counsel on this point did it appear that the plaintiffs' right to recover terminated during the pendency of the action, but that he had no right when he commenced his action, and sought to recover upon a right acquired during the pendency of the action. And the court simply said that, "to a recovery in ejectment the plaintiff must not only have a right of entry at the trial, but must have had it when the suit was brought." (*Kile v. Tubbs*, 32 Cal. 332.)

A complaint in ejectment need show no more than that at the time of the commencement of the action the plaintiff is entitled to the possession of the demanded premises, and that the same is unlawfully withheld from him by the defendant. It need not show that the plaintiff will be entitled to such possession at any future period of time. As was said in *Pico v. Pico*, 56 Cal. 453, there is nothing in our Code which provides for anticipatory pleading.

In this case it did not appear by the complaint that the right to recover would terminate before the action was tried, because no attempt was made to predict when it would be tried. There was at least a possibility that it might be tried before the expiration of the lease under which the plaintiffs held when they commenced their action. If no mention had been made of any lease in the complaint, and all the facts alleged in regard to leases had been first brought out in the evidence, we might hold, on the authority of *Foscalina v. Doyle*, 47 Cal. 437, that "if the defendant intended to rely upon the fact that the plaintiff's right to the possession had expired during the pendency of the action, the fact should have been pleaded in a supplemental answer."

The complaint stated facts sufficient to constitute a cause of action, and the defendant did not move for judgment before the trial on the ground that it appeared on the face of the complaint

the plaintiffs' right to recover had terminated during the pendency of the action, which he might have done if his present position be tenable. We therefore conclude that the only way in which advantage could be taken of the fact which it is here sought to take advantage of, would be by pursuing the course pointed out in *Foscalina v. Doyle, supra*.

But the allegations in regard to leases are mere surplusage. Strike them all out and sufficient remains to constitute a good complaint in ejectment, and the evidence would be sufficient to justify the verdict. There was evidence tending to prove that the plaintiffs had been in the actual possession of the land in controversy for many years, during which they had cultivated and improved it, and that it was enclosed by a substantial fence. That while they were so in the possession of it the defendant forcibly entered and took possession of it. He attempts to justify such entry on the sole ground of its being made for the purpose of pre-empting the land. But it is now well settled that land occupied, fenced, and cultivated as this is shown by some of the witnesses to have been at the time of such entry, is not open to settlement and entry under the pre-emption laws of the United States. Therefore, as was said in *Foscalina v. Doyle, supra*, the defendant "being a mere intruder, without title or color of right, the plaintiff was entitled, in virtue of his prior possession, to a judgment of restitution." In such a case it would be immaterial by what right the plaintiff claimed to be in possession. The simple fact that he was in the *actual* possession at the time of the forcible intrusion would entitle him to recover as against the naked intruder, who had forcibly entered without title or color of right. And it is admitted by appellant's counsel "that if the land be public land of the United States (as this land was) the law, as against a mere trespasser, will presume a grant from the United States to the person who first obtains actual possession." And that presumption as between the person who first obtains actual possession and a mere trespasser is a conclusive presumption. Otherwise it could so easily be overcome as to afford no substantial protection to persons in the actual prior possession of such lands.

Assuming, as we must in this case, that at the time of the defendant's entry the plaintiffs were in the actual possession of

the demanded premises, and that at the time of the commencement of their action they were entitled to recover the same, we are of the opinion that that right did not terminate by reason of the expiration during the pendency of the action of the term of the lease between them and a stranger to the action, although it appeared that as between them and their lessor their right to the possession of the premises had terminated during the pendency of the action.

If we are correct in this it follows that there was no substantial error in any of the instructions given to the jury, and the court was justified in modifying the instruction asked by the defendant before giving it.

Judgment and order affirmed.

THORNTON, J., and MYRICK, J., concurred.

[Department One.— April 20, 1883.]

**THE NEVADA BANK OF CALIFORNIA, RESPOND-
ENT, v. WILLIAM DRESBACH ET AL., APPELLANTS.**

JUDGMENT — JURISDICTION — APPEAL.— Where an appeal from a judgment is heard on the judgment roll, and it appears that the court had jurisdiction of the subject-matter, and of the parties to the action, and the judgment roll fails to disclose any error, the judgment must be affirmed.

ID.— MOTION TO VACATE — AFFIDAVIT OF MERITS.— An affidavit of merits is indispensable as the basis of a motion to vacate a judgment.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing to vacate the judgment.

The grounds of the motion to vacate the judgment were that pending the action the defendants instituted proceedings in insolvency, and were discharged from their debts, including the debt to the plaintiff on which the action was brought. The motion was supported by affidavits, but there was no affidavit of merits apart from the statements made in relation to proceedings and discharge in insolvency, nor were these proceedings brought to the attention of the court until after the judgment was rendered. The additional facts sufficiently appear in the opinion.

D. L. Smoot, for Appellants.

The court had no jurisdiction to render judgment. The insolvency court had stayed all proceedings, and had discharged the defendants from all their debts. (*Home Life Ins. Co. v. Dunn*, 19 Wall. 223; *Gordon v. Longest*, 16 Peters, 97; *Kern v. Huidekoper*, 103 U. S. 485; *Rix v. McHenry*, 7 Cal. 89.) Conceding that the court had jurisdiction, still the judgment should have been set aside. (*Bennett v. His Creditors*, 22 Cal. 42; *Imlay v. Carpentier*, 14 Cal. 173; *Engels v. Lubeck*, 4 Cal. 33.) The affidavits filed with the motion, and the papers on file show merits, because they disclose a discharge from the personal obligation to pay the debt. (*Freeman v. Campbell*, 56 Cal. 639; *Hawley v. Campbell*, 62 Cal. 442.)

McAllister & Bergin, for Respondent.

There was no affidavit of merits. (*Parrott v. Den*, 34 Cal. 80.)

PER CURIAM.—This is an appeal from a final judgment and an order denying a motion to vacate and set it aside.

Defendants were regularly served with process. One of them appeared, demurred, and answered, the other did not. The demurrer was overruled. The case was tried; but at the trial defendants were not present by themselves or counsel, and the court, after hearing the evidence of the plaintiff, gave judgment against both defendants.

The court had jurisdiction of the subject-matter and of the persons of the defendants, and there is no error apparent on the face of the judgment roll.

On the motion to vacate the judgment there was no affidavit of merits. Such an affidavit was indispensable as the basis of the motion. (*Parrott v. Den*, 34 Cal. 79; *Francis v. Cox*, 33 Cal. 323; *Bailey v. Taafe*, 29 Cal. 422; *People v. Rains*, 23 Cal. 129.)

Judgment and order affirmed.

Hearing in Bank denied.

[Department One.—April 20, 1883.]

JOHN GARDNER, RESPONDENT, v. OMNIBUS
RAILROAD COMPANY, APPELLANT.

PAYMENT — EVIDENCE.— The action was brought to recover a balance alleged to be due the plaintiff for services rendered by him for the defendant as its superintendent. During the employment, one O'Neil was defendant's secretary and charged with the duty of paying all employees. Every month plaintiff signed and delivered to O'Neil, a receipt for his salary, but left the money with O'Neil, to be drawn from time to time as he desired. *Held*, that the evidence shows that the plaintiff confided in O'Neil and left the money with him in his individual capacity, and that the defendant is not liable for the loss occasioned by reason of leaving the money in his hands.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Lloyd & Wood, for Appellant.

Geo. W. and W. B. Tyler, for Respondent.

Ross, J.—Plaintiff sued to recover of defendant corporation the sum of eight hundred and two dollars and twenty-one cents, with interest from the 1st day of September, 1876, being a balance alleged to be due the plaintiff, at the date mentioned, for services theretofore rendered by him for defendant as superintendent of its street railroad. Plaintiff was engaged as such superintendent, at a salary of two hundred dollars per month, for many years immediately preceding September 1, 1876. On that day his services terminated. During most of that time he was also one of the directors of the defendant. During the same time one O'Neil was its secretary. When these relations were first assumed the safe that was moved to the defendant's office, to be used as its safe, contained certain papers, jewelry, trinkets and money belonging to the plaintiff, which the latter permitted to remain there, in charge of O'Neil for safe keeping. The secretary was charged with the duty of paying the employees of the defendant, and was furnished with the necessary funds for that purpose, and every month during the plaintiff's term of service, he signed and delivered to the secretary, in writing, a

receipt acknowledging the payment by defendant of the full amount of his salary for such month. Such receipts are at least *prima facie* evidence of the payment of the money.

But the plaintiff seeks to avoid the effect of the receipts by saying that as a matter of fact, when he gave the receipts he did not get the money, but left it with the secretary, to be drawn by him from time to time as he desired. That the plaintiff did leave the money in the hands of *O'Neil* is quite clear from the record, but that the defendant is not responsible for any loss occasioned thereby we think equally clear. Plaintiff evidently had confidence in *O'Neil*. According to his own testimony, he left his private papers, jewelry, trinkets, and money made in speculations with him for safe keeping. In the same way, we think, the evidence shows he left his salary. In his testimony, the plaintiff says: "I was a director when Mr. *O'Neil* was made secretary. He was the secretary and I was the superintendent. We lived in one office for sixteen years and never had a dispute. I signed the receipt for salary because the money was safe. I was superintendent of the company, and whenever I wanted to draw it I knew it was good. I had all that I had as valuables in the safe, and private papers. I had two bags of money, one of foreign and domestic coins that amounted to several hundred dollars, and lots of other things. I never drew my salary money out except that I drew it out on order. Mr. *O'Neil* kept it there in the safe, and everything else while I was with the Omnibus Railroad Company." And again: "At the time I first commenced doing business in this way with Mr. *O'Neil*, I told him, this is my old safe, you are carrying the key of it, and my things are all in there, and I am going to make this my bank and going to leave my money with him (*O'Neil*). I being superintendent and director, I thought it as good as a bank. I will leave it here in the safe all the time. I speculated and made money on the outside, and I carried it there for safe keeping, and Mr. *O'Neil* always had the keys of that safe. I think Mr. Jordan had the key if he was absent."

Whatever loss occurred to the plaintiff by reason of leaving his salary in *O'Neil's* hands, the plaintiff must stand. Both he and *O'Neil* were officers of the defendant. The company furnished the latter with funds with which to pay the wages of its

employees, and each month the plaintiff executed his receipt for his salary. So far as the company could see, it was paid in fact, and we think it was paid in contemplation of law as well as of the parties, the plaintiff, for reasons of his own, electing to leave the money in the hands of the individual O'Neil.

Judgment and order reversed and cause remanded.

McKEE, J., and McKINSTRY, J., concurred.

Hearing in Bank denied.

[Department One.—April 20, 1883.]

JOHN HINKEL, RESPONDENT, v. HIS CREDITORS,
V. D. MOODY, A CREDITOR, APPELLANT.

INSOLVENCY — ASSIGNEE — CREDITOR — FRAUD — OPPOSITION.—Under the insolvent law of 1852, it was competent for the regularly elected assignee, being a schedule creditor, to file a written opposition to the insolvent's discharge on the ground of fraud in wilfully and knowingly omitting property from the schedule and executing sham deeds with intent to defraud creditors. Such an opposition having been stricken out by the court, *held*, error.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

Wilson & Otis, for Appellant.

The striking out of the opposition to insolvent's discharge was error. (See §§ 8 and 10 of the Act of March 4, 1852; Stats. 1852, p. 69.)

The suggestion has been advanced by respondent that Moody had accepted the office of assignee, he is thereby precluded from impeaching the validity of his appointment, which respondent says he is attempting to do by filing this opposition. Judge Sanderson, however, in the case of *Wilson v. His Creditors*, 32 Cal. 406, 411, in construing section 20 of the act referred to, says:—

“So the creditors may oppose the discharge upon two grounds; first, any supposed illegality in the appointment of the assignee

which would raise an issue of law as to the validity and regularity of all the previous proceedings; and second, any supposed fraud on the part of the insolvent, within the meaning of sections twenty-seven to thirty-two, both inclusive, which would raise an issue of fact to be tried by a jury, on a plea of not guilty by the insolvent." The opposition in the case at bar, it will be seen, rests solely on the ground of alleged frauds of the insolvent, and does not in any way pretend to be an attack upon the regularity of the assignee's appointment. That an opposition of this character has been always recognized as proper, and coming within the contemplation of section 20 of the act, we submit is not only conclusively shown by the case last cited, but by numerous other cases of which we content ourselves with citing the following. (*Grow v. His Creditors*, 31 Cal. 380; *Sanborn v. His Creditors*, 37 Cal. 609; *Lambert v. Slade*, 4 Cal. 337.)

Thos. V. O'Brien, for Respondent.

I respectfully submit that, having elected himself and qualified as assignee, appellant waived the right as a creditor to object to his own appointment as assignee.

That having undertaken the trust for all the creditors, he waived the right to object as a creditor to the surrender of the assets of the insolvent to himself, for the benefit of all the creditors.

So long as he continued to act as trustee, he could not seek to destroy their trust.

He would not be permitted to commit *felo de se*. He would not be permitted to perpetrate a fraud on his beneficiaries by playing, in his capacity of trustee, into his own hands as attaching creditor. (*Sanborn v. His Creditors*, 37 Cal. 609; *Cohen v. Barrett*, 5 Cal. 195; *Hastings v. Cunningham*, 39 Cal. 144; *Story Eq. Jur.* § 322; *Civil Code*, §§ 2228-2234, 2283, 2306; *Fox etc. v. Minor*, 32 Cal. 112; *Page v. Naglee*, 6 Cal. 241; *Hawley v. Mancius*, 7 Johns. Ch. 275; 2 Paige, 603; *Bishop on Insolvent Debtors*, p. 273, § 293, and p. 127, § 148; *Bump on Bankruptcy*, 458; *Strong v. Willie*, 3 Fla. 124; *Perry on Trusts*, 3d ed. vol. 1, p. 540.)

McKEE, J. — This was a proceeding by Hinkel, the respondent, to be adjudged an insolvent debtor, and discharged from his debts. The proceeding was commenced under the provisions of the Statute of Insolvency passed March 4, 1852. In the schedule filed by the petitioner, Moody, the appellant herein, was named as a creditor to whom the insolvent owed a balance of four thousand dollars upon a promissory note. At a meeting of the creditors of the insolvent on the day fixed by the court for the appointment of an assignee, pursuant to notice given for that purpose, Moody was elected assignee. As such he qualified and entered upon the duties of his office. But as a creditor of the estate he also demurred to the petition of the insolvent, and at the same time filed a written opposition to his discharge upon the grounds that he had committed fraud in wilfully and knowingly omitting from the schedule of his property several parcels of real estate, of which he was really the owner, but for which, before filing his petition in insolvency, he had executed and delivered to his father sham deeds with intent to defraud his creditors.

The court overruled the demurrer, and on motion of the attorney for the insolvent struck from the files the written opposition accusing the insolvent of fraud.

The statute under which the proceeding was had provided for the filing of such an opposition by a schedule creditor of the insolvent, and prescribed the duty of the court with reference to it.

Section 20 provided as follows: "That in case after the appointment of said assignees, any one or more of the creditors of the insolvent debtor should deem it necessary to oppose it, on the ground of some fraud having been committed by the said insolvent debtor, or of the appointment not having been legally made, he shall within ten days next following the appointment of said assignees, lay before the court which has already taken cognizance of the case, his written opposition, stating specially the several facts of nullity of the said appointment, or of fraud by him alleged against the insolvent debtor, whereupon, in case of accusation of fraud, after having received the said insolvent debtor's answer, the court shall order a jury to be summoned of not less than six men, to be summoned in the same manner as

juries are summoned in the District Court for the purpose of deciding on the same accusation."

Filed, as the opposition was, within the time prescribed by that section, and by the appellant as a creditor, who had proved and filed his claim according to law, the opposition was a part of the proceeding authorized by the insolvent law; and upon being filed it raised an issue which involved a question of fraud which it was the duty of the insolvent to meet, and the court to hear and determine. This issue the insolvent had the right to meet, either by demurrer or answer to the opposition containing the allegations of fraud. (*Wilson v. His Creditors*, 32 Cal. 407.) On failure or refusal to demur or answer, the court, as in ordinary cases, could order a dismissal of the proceeding for failure to prosecute. (*Sanborn v. His Creditors*, 37 Cal. 609.) On filing an answer the duty was imposed on the court to try and determine the issue as prescribed by sections 20, 21, and 22 of the insolvent law; but until the issue was disposed of on demurrer or answer, it was erroneous to discharge the insolvent.

The fact that the opposition was filed by a creditor who had been elected assignee did not prejudice his right to make it — did not affect its validity nor oust the jurisdiction of the court to hear and decide the issue raised by it. As assignee, he was entitled to all the property of the insolvent from and after the surrender, even if it was not mentioned in the schedule (*Poehlmann v. Kennedy*, 48 Cal. 201), and when obtained he would hold it in trust for the benefit of all the creditors and of the insolvent himself, subject to the proceeding in which he was acting as assignee. By that relation to the estate he did not waive nor lose any of his rights as a creditor. In his capacity as creditor, he had the right to attack the proceeding in insolvency as a fraud upon the creditors. The Insolvent Statute of 1852 was not intended for the benefit of fraudulent insolvent debtors. (Stat. 1852, §§ 27, 28, 29.) Striking the opposition from the files was therefore erroneous. (*Davenport v. His Creditors*, 62 Cal. 29.)

Judgment and order reversed, and cause remanded for further proceedings.

ROSS, J., and MCKINSTRY, J., concurred.

[Department One.— April 20, 1883.]

M. C. DUFFICY, RESPONDENT, v. A. M. SHIELDS ET AL.,
C. M. HITCHCOCK, APPELLANT.

CHATTEL MORTGAGE UPON UPHOLSTERY AND FURNITURE IN HOTEL TO SECURE PURCHASE MONEY.—The action was brought to foreclose a chattel mortgage upon the furniture, carpets, beds, and bedding, and all belongings of whatever nature in and to the Brooklyn Hotel in the city and county of San Francisco, and upon the unexpired term of the lease of the hotel premises, good will, and everything appertaining to the hotel, given to secure the payment of the purchase money of all the property included in the mortgage. *Held*, that the mortgage being made to secure the purchase money of other property than the furniture and upholstery used in the hotel it is void.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

J. E. McElrath, and Clement, Osment & Clement, for Appellant.

It does not appear how much was the purchase price of the furniture, and how much that of the other items of the property. As ninety-three hundred dollars was paid, it may be, for aught that appears, that the furniture debt was extinguished. But that is unimportant. The *material* fact is that the *furniture* was mortgaged to secure the purchase money of *other* property *in addition* to that of the furniture. This is the incurable infirmity in the mortgage which vitiates it.

The provisions of the law, says our Supreme Court, "are plain, simple, and most imperative in their terms. The privilege of holding a lien upon certain kinds of personal property, in the possession of the mortgagor, is accorded to the mortgagee, in certain cases, upon the performance of certain conditions. These conditions are few, and easily performed, and there need be no difficulty, with ordinary care, in fully complying with them. But they are made *essential* to the validity of the mortgage." (*Gassner v. Patterson*, 23 Cal. 300, 301; Civil Code, § 2955.)

Mastick, Belcher & Mastick, for Respondent.

PER CURIAM. — If the mortgage in question was made to

secure the purchase money of anything besides one half of the upholstery and furniture used in the Brooklyn Hotel, it is void. (Civil Code, § 2955; *Gassner v. Patterson*, 23 Cal. 299.)

By the mortgage, "the mortgagor mortgages to the mortgagee his interest, being an undivided one half of all the effects and all belongings, of whatever nature or kind, of, in, and to the hotel in the city and county of San Francisco, State of California, known as the Brooklyn Hotel, Nos. 210 and 212 Bush Street, together with all the furniture, carpets, beds and bedding, etc., etc.; also, the unexpired term of the lease of said premises, good will, and all and everything connected with or appertaining to said hotel, as security for the payment to him of the sum of thirteen thousand dollars (\$13,000) gold coin, on the 24th day of June, A. D. 1877, being the balance due on the purchase money of said and foregoing interest in the effects and things above mentioned, in and to the Brooklyn Hotel."

It is as clear as anything can be, from the loose manner in which the instrument is drafted, that the purchase money intended to be secured by it was the balance due of the purchase money of all the property included in the mortgage, which embraced other property than the upholstery and furniture used in the hotel.

Judgment and order reversed and cause remanded.

[In Bank.—April 21, 1883.]

THE PEOPLE, ETC., EX REL. WILLIAM H. KNIGHT
v. WILLIAM BLANDING, RESPONDENT.

CONSTITUTIONAL LAW — EXTRA SESSION — CONFIRMATIONS BY SENATE.—The constitutional limitation on the power of the legislature when convened in extra session applies only to acts of legislation—the joint action of the Senate and Assembly. Whenever the legislature is lawfully convened, the Senate may confirm appointments made by the governor.

10.—EXPIRATION OF TERM OF OFFICE — APPOINTMENT OF SUCCESSOR.—The respondent, Blanding, was a harbor commissioner under a commission dated March 8, 1878, for a full term of four years. Anticipating the expiration of the term, the governor nominated the relator, Knight, his successor, on the 12th day of April, 1881. The appointment was confirmed by the Senate at the extra session of 1881, and on the 8th day of March, 1882, a commission issued. *Held*, that the appointment was not invalid because the commission issued on the day on which respondent's term expired.

Id.—CONSTRUCTION OF WORD "AT."—The word "at" as used in section 2520 of the Political Code, to wit: "The governor shall, in like manner, at the expiration of their respective terms, appoint and commission their successors," is indefinite in its meaning, and may mean the exact moment of time, or near it.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The respondent Blanding was on the 4th day of March, 1878, by the governor nominated as a member of the State board of harbor commissioners, on the 6th day of March was confirmed by the Senate, and on the 8th day of March was commissioned to hold for the term of four years. A special session of the legislature, commencing April 4th, was held in the year 1881, pursuant to a proclamation of the governor. In the proclamation, among the purposes specified for convening the legislature, was the following: "To send appointments to the Senate for their confirmation."

On the 12th day of April, 1881, the governor nominated the relator as State harbor commissioner *vice* the respondent, term expiring March 8, 1882; on the 13th of April, 1881, the Senate confirmed the appointment, and on the 8th of March, 1882, the governor issued his commission, and the relator qualified, duly presented his commission to the board, and demanded of respondent the surrender of the office. Upon a refusal, this action to try the right to the office was brought by the attorney-general in the name of the people. On behalf of the respondent it was contended that the appointment of the relator was invalid because: first, the consent of the Senate to his appointment was given during the extra session of the legislature of 1881; and second, because the appointment was made by the governor on the day on which the term of the respondent expired

Thomas J. Clunie, W. H. L. Barnes, and George A. Knight.
for Appellant.

The prohibition contained in the Constitution is that the legislature, when so convened, has no power to *legislate* on any subjects other than those specified in the proclamation. We do not pretend that consenting to an appointment is a legislative act, and if it is not it does not come within the prohibition. The mat-

ter of appointments was mentioned in the proclamation, and was *incidental* to the extra session of the legislature, and was expressly provided for in the foregoing section of the Constitution; but if it were not, as we have shown by the briefs on file, the Senate, when lawfully convened in extra session, may do anything that it could do at a regular session, unless there be a clause in the Constitution that prohibits them.

The legislature when lawfully convened, whether in virtue of the provisions of the Constitution or the governor's proclamation, can, when not restricted by constitutional provision, do anything at an extra session that it might at a regular session. (*Morford v. Unger*, 8 Iowa, 82; *McAffee v. Russell*, 29 Miss. 84.)

In this case, there is no such clause anywhere in the Constitution. The claim of counsel, that "articles of impeachment could not be preferred at an extra session," and therefore consent of the Senate to appointments could not be given at that time, is equally fallacious. The Constitution, article iv., § 17, adds: "The Assembly shall have the sole power of impeachment, and all impeachments shall be tried by the Senate," etc. Why, then, cannot articles of impeachment be preferred by the Assembly at an extra session? Is there any constitutional objection to it?

The maxim, *expressio unius est exclusio alterius*, has no application to a State Constitution. The rule of construction invoked by the respondent does not apply to State Constitutions; in fact, it is right the reverse. The legislature can do all acts not prohibited by the Constitution, the State Constitution and the Federal Constitution being entirely different in this respect.

The appointment was not premature. (See *Brady ex rel. —, v. Howe*, 50 Miss. 607; *State ex rel. Geo. B. Whitney v. Hiram Van Buskirk*, 40 N. J. 463; *Marshall v. Harwood*, 5 Md. 423; *People v. Reid*, 6 Cal. 289; *People v. Mizner*, 7 Cal. 519; *People v. Tilton*, 37 Cal. 614; *People v. Howe*, 25 Ohio St. 588; 18 Am. Rep. 324.)

Knight was not appointed harbor commissioner until the issuance of his commission. (See *People v. Taylor*, 7 Pac. C. L. J. 480; Pol. Code, § 996, subd. 9; *Marbury v. Madison*, 1 Cranch, 137; *U. S. v. Le Baron*, 19 How. 74; *People v. Whitman*, 10 Cal. 38; *State v. Allen*, 21 Ind. 516, 521; Opinions of

Atty.-Gen., vol. 4, p. 217; Story on Constitution, p. 398; 2d Story on Constitution, § 1546; *People v. Murray*, 70 N. Y. 526.)

Wallace, Greathouse & Blanding, for Respondent.

The governor had no power to convene the legislature in extra session, as upon an extraordinary occasion, for the purpose of enabling it to receive or consent to appointments; nor did the Senate have any power in extra session to consent to such appointments. (Constitution of 1879, art. v., § 9; see *Jones v. Theall*, 3 Nev. 233; also *Morford v. Unger*, 8 Iowa, 86, 87.)

The Constitution of 1879 is mandatory and prohibitory, not directory. (Art. i., § 22.)

No other State Constitution contains this provision.

The governor must state the purposes for which he has convened the legislature, and each purpose must be capable of being qualified by the term "extraordinary occasion."

Each purpose must be distinct, must be an "extraordinary occasion," and must stand by itself. It cannot derive support from any other purpose stated in the proclamation. It would not be permissible to insert one good subject, and thus bolster up and fortify other and invalid subjects.

The legislature may legislate on the subjects specified in the proclamation, but on *none other*.

The two expressed exceptions exclude all not expressed. With scrupulous care, the Constitution has specified the *two sole* permissible exceptions, to wit: that the legislature may in extra session provide for the expenses of the session, and that it may provide, also, for all other matters that are incidental to the session.

"Extraordinary occasion" must qualify everything upon which the legislature can act in extra session; but "extraordinary occasion" can never qualify the action of anything less than the *whole legislature*. It cannot qualify or be an attribute of the action of the Senate as such, nor of the House as such. It cannot qualify or be an attribute of the action of the Senate alone in consenting to appointments, and hence that consent can never be given in *extra session*.

The power is to convene the legislature as a whole and for subjects upon which it can act as a whole; and, when so convened, the legislature can only act as a whole. There is no power given to convene either the Senate or House alone, as in the Constitution of the United States.

There is no reason *in fact* why an "extraordinary occasion" could ever arise as to appointments to office. The whole machinery of appointments is completely provided for and regulated by law. If there is an incumbent, he holds, and *must* hold, "although his term has expired, until his successor has qualified." (Section 879, Pol. Code; *People v. Whitman*, 10 Cal. 38; *People v. Bissell*, 49 Cal. 407; *People v. Tilton*, 37 Cal. 619.)

Relator's appointment was and is void in that it was premature.

The appointment by the governor, on April 12, 1881, the consent of the Senate in extra session, on the following day, and the commission issued on March 8, 1882, were all *ultra vires*, in that they were made before the power to make them did or could exist. The mode and time of appointment to office are purely statutory, and to the statute we must look. The relator could not be appointed or commissioned *prior* to the expiration of the term of the defendant. (Pol. Code, § 2520.)

This section provides, as to harbor commissioners, that "the governor shall, in like manner [i. e., by and with the consent of the Senate], *at the expiration of their respective terms*, appoint and commission their successors." Defendant's term of office included all of the 8th day of March, 1882. He held office for four years from the date of his commission, and his commission was dated March 8, 1878.

When a public officer holds *from* a certain day, the first day is always excluded and the last included. (*Best v. Polk*, 18 Wall. 112, 119; Pol. Code, § 12; *Watson v. Pears*, 2 Camp. 294; *Bank of Oswego v. Ives*, 2 Hill, 355; *Portland Bank v. Maine Bank*, 11 Mass. 204; Smith's Commentaries, §§ 616, 617, 618.)

There are many cases which hold that prospective appointment is bad even where there are no statutory words limiting the time when it should be made. To this effect are *Ivy v. Lusk*, 11 La. An. 486, 488; *Commonwealth v. Fowler*, 10 Mass. 300,

301; *Noe v. Bradley*, 3 Blackf. 158-161; *Biddle v. Willard*, 10 Ind. 62.

THORNTON, J.—It is urged that the appointment of the relator Knight is invalid, for the reason that the consent of the Senate to his appointment was given during the extra session of the legislature of 1881, when it was convened by proclamation of the governor, for the purpose of legislating upon certain subjects specified in the proclamation.

We concur in the view in regard to this point taken in the former opinion of the court, filed November 28, 1882, and adopt its language, which is as follows:—

“In our view of the matter, it is not necessary to consider whether the governor could constitutionally convene the legislature in extra session for the sole purpose of having the Senate consent to his appointments. Nor is it necessary to inquire whether that was one of the subjects specified in the proclamation by which he convened the legislature at that time. The fact that the legislature was lawfully convened on that occasion, and that while so convened the Senate consented to the appointment of the relator, is not disputed. The legislature had no power to act on that subject whether it was specified in the proclamation or not, and the constitutional prohibition is limited to subjects upon which the legislature would have power to legislate in the absence of any prescribed limitation. The prohibition applies only to acts of legislation, and it was wholly unnecessary to prohibit legislation by the Senate, because the Senate alone could not legislate. It might pass any number of bills, but until concurred in by the other House, and approved by the governor, they would have no validity. Therefore, the constitutional limitation on the power of the legislature to legislate, when convened in extra session, does not apply to this case, and the Senate had the same power to consent to the appointment of the relator that it would have had if the Constitution had authorized the governor to call an extra session of the legislature whenever he should deem it advisable to do so, without imposing any other limitations upon its power to legislate when so convened than are imposed on its power to legislate when convened in regular session.”

It is further argued that the appointment is invalid because it was made by the governor on the day on which the term of the respondent expired, and that the governor was not authorized to make such appointment until the respondent's term had expired. To sustain this argument we are referred to section 2520 of the Political Code, which, so far as bears on this question, is in these words:—

“As soon as may be after the passage of this act, the governor, by and with the consent of the Senate, shall appoint three harbor commissioners, who shall hold office, one for two years, one for three years, and one for four years, from the date of their respective commissions. The governor shall, in like manner, at the expiration of their respective terms, appoint and commission their successors for a full term of four years.”

Let it be conceded that respondent's term included the whole of the 8th of March, 1882, and that relator was appointed on the same day. We do not think with this concession that the argument is sound. The preposition “at” is indefinite in its meaning; such is the view of it taken by Dr. Webster. (See the word in Webster's Dictionary.) He says: “It is less definite than ‘in’ or ‘on’; ‘at the house’ may be *in* or *near* the house.” With reference to time, it may mean *the exact moment* or *near* it. In common speech the word is so used. When the legislature used the words in the section above quoted “*at the expiration of,*” it would be a very strained construction to hold that it was intended to designate the exact moment rather than a few moments before. It seems by the argument to be admitted that it may designate any time *after* the expiration, even a few moments *after*. If a few moments *after*, why not a few moments *before*? We see no reason why one construction is not as correct as the other.

It is consistent with the finding that the appointment was made on the last moment of the 8th of March. To hold under such circumstances that the governor could not lawfully exercise the power of appointment, would be adhering to the exact letter of the statute with a strictness not at all commendable. To lay down such a ruling as law, would seem to men of good common sense and fair judgment, as savoring of the absurd. To hold to the letter of the act as contended for by respondent, would tend

strongly to establish the position that the power of appointment must be exercised at the very *punctum temporis* when respondent's term ended, or it would not be lawfully exercised. The interpretation urged by counsel for respondent may be an ingenious refinement, but it would not be a tenable construction of the section referred to.

The judgment is reversed and cause remanded, with directions to enter judgment for the plaintiff in accordance with the prayer of the complaint.

MYRIOK, J., SHARPSTEIN, J., and MCKEE, J., concurred.

ROSS, J., and MCKINSTY, J., dissented.

[In Bank.—April 21, 1893.]

RICHARD SAVAGE, RESPONDENT, v. DANIEL
SWEENEY, APPELLANT.

NEW TRIAL — APPEAL — PRESUMPTION.—The action was brought to recover a balance alleged to be due for work done and materials furnished in the construction of certain buildings. The case was tried by the court without a jury, and a decision rendered in favor of the plaintiff for a portion of the amount claimed. The plaintiff moved for a new trial on several grounds, and among others that the evidence was insufficient to justify the decision. The motion was granted, but it did not appear on what ground. The defendant appealed from the order. *Held*, that every intendment must be indulged to sustain the judgment, and that the court is authorized to presume that the motion was granted on the ground of insufficiency in the evidence.

ID.—DISCRETION OF THE COURT.—A motion for a new trial is addressed to the sound discretion of the court, and no abuse of discretion appearing, an order granting the motion will not be disturbed.

APPEAL from an order of the late District Court of the Nineteenth Judicial District, granting a new trial.

The facts necessary to be stated appear in the head notes and opinion of the court.

Jarboe & Harrison, for Appellant.

R. R. Provines, for Respondent.

PER CURIAM.—This action was tried by the court, and the

decision was in favor of plaintiff. The plaintiff, nevertheless, moved for a new trial on the ground *inter alia*, that the evidence was insufficient to justify the decision. The court granted the motion, and from this order the defendant appealed.

It does not appear upon what grounds the new trial was granted, and, therefore, as every intendment must be indulged to sustain the judgment of the court below, this court is authorized to presume that it was granted on the insufficiency of the evidence to sustain the decision.

In relation to this, it is the well-settled rule of this court that such motion for a new trial is addressed to the sound discretion of the court, and an order granting it will not be disturbed unless it appears that the court below has abused its discretion in so ruling. (*Pierce v. Schaden*, 55 Cal. 406; *Bronner v. Wetzlar*, 55 Cal. 419, and cases cited.)

No such abuse appears in this cause, and the order is affirmed.

[Department One.— April 24, 1883.]

SIMON BLUM, APPELLANT, v. LORENZO SUNOL ET
AL., RESPONDENTS.

NEW TRIAL — PRESUMPTION — APPEAL.— Every intendment prevails in favor of the correctness of an order granting a new trial although made by another judge than the one who tried the cause, and such intendments must be overcome by affirmatively showing error.

ID.— FINDING — DOCUMENTARY EVIDENCE — DEPOSITIONS.— Where a finding has been made upon a conflict of evidence, or contrary to evidence, or without evidence, the appellate court will not interfere with the action of the trial court in granting a new trial, although the evidence upon which it acted consists of depositions and documentary and oral evidence.

APPEAL from an order of the Superior Court of the city and county of San Francisco granting a new trial.

The facts are stated in the opinion of the court.

Wm. T. Wallace, John Currey, and B. S. Brooks, for Appellants.

And this court has decided that "where the testimony in the court below is in the form of depositions, the Supreme Court on appeal will re-examine it, and is not bound by the rule which

forbids disturbing a judgment where there is a conflict of evidence." (*Lander v. Beers*, 48 Cal. 546; *Wilson v. Cross*, 33 Cal. 61.)

The Superior Court had no jurisdiction to set aside the findings and judgment, unless the evidence was *insufficient to justify the findings*. A mere difference of opinion as to the weight of testimony would not justify it. The statute does not authorize the court to set aside the verdict of a jury, because the court comes to a different conclusion on the facts. The successful party has a property in his verdict; and he can only be deprived of it for the causes stated in the statute. Judge Dwinelle sat in the place of the jury, and his findings stand as a verdict, but Judge Hunt did not occupy that position. (*Canning v. C. P. R. Co.*, 50 Cal. 166; *Glenn v. Arnold*, 56 Cal. 631; *Witherby v. Thomas*, 55 Cal. 11; *Helbing v. Svea Ins. Co.* 54 Cal. 159; *Griffith v. Moss*, 47 Cal. 589; *Merle v. Mathews*, 26 Cal. 455.)

S. M. Wilson, and *E. J. Pringle*, for Respondents, cited *Canning v. C. P. R. Co.* 50 Cal. 166; *Altschul v. Doyle*, 48 Cal. 535; *Macy v. Davila*, 48 Cal. 646; *Irving v. Cunningham*, 58 Cal. 306; *Pierce v. Schaden*, 55 Cal. 406; *Du Brutz v. Jessup*, 54 Cal. 118; *Coleman v. Rankin*, 37 Cal. 247; *Parrott v. Floyd*, 54 Cal. 534; *De Godey v. Godey*, 39 Cal. 167; *Watson v. R. R. Co.* 41 Cal. 17; *Lick v. Madden*, 36 Cal. 213.

McKee, J.—The action in this case was tried and decided by the late District Court of Contra Costa County. After decision and judgment a motion was made for a new trial upon a bill of exceptions. Before the motion was heard the attorney for the plaintiff, having been elected judge of the Superior Court of the county, became disqualified from acting in the case, and the action was removed and transferred to the Superior Court of the city and county of San Francisco. There the motion was argued and submitted, and after a review of the evidence contained in the certified bill of exceptions, the court sustained the motion and ordered a new trial, and from the order this appeal has been taken.

Although the order was made by the successor of the trial court, or rather by another judge than the one who tried the

cause, yet as every intendment prevails in favor of its correctness, the appellant is bound to overcome such intendments by affirmatively showing prejudicial error. No such error has been made to appear.

The issues tried involved the genuineness of certain instruments in writing, through which defendants claimed title to the real property in controversy in the case. Upon those issues much documentary and oral evidence was given by both parties; and, from an examination of the evidence contained in the record, we are of opinion there was no abuse of discretion by the court below in granting a new trial.

Where a finding has been made upon a conflict of evidence, or contrary to evidence, or without evidence, this court does not interfere with the action of the lower court in granting a new trial, although the evidence upon which it has acted may consist, as it does in this case, of depositions and documentary and oral evidence. (*Canning v. C. P. R. R. Co.* 50 Cal. 166; *Parrott v. Floyd*, 54 Cal. 534; *Macy v. Davila*, 48 Cal. 646; *Altschul v. Doyle*, 48 Cal. 535.)

Order affirmed.

McKINSTY, J., and ROSS, J., concurred.

Hearing in Bank denied.

[Department One.— April 24, 1883.]

LUCY M. BRIGGS, RESPONDENT, v. JAMES T.
HAYCOCK ET AL., APPELLANTS.

CONVERSION — WAREHOUSEMAN.— The plaintiff intrusted certain property to the Ten Cent Parcel Company, a corporation, to be stored. The company stored the property with warehousemen — to whose rights and duties the defendants succeeded — taking a receipt therefor. The defendants had notice that the plaintiff was the owner of the property. She tendered them the amount of the storage charges, seventy-eight dollars, and demanded the property, but did not present the warehouse receipt. Defendants refused to deliver it on the sole ground that it had been sold for the storage charges, but offered to deliver it for two hundred dollars. The court found that the property had not been sold, but was at the time of the tender and refusal in the possession of defendants. *Held*, that the refusal amounted to a conversion, and that the failure to produce the receipt constituted no defense, as the refusal was placed on the mere ground that the property had been sold.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

Sawyer, and *Ball*, for Appellant.

The demand and refusal did not constitute *conversion*. (*Balch v. Jones*, 61 Cal. 234; *Hilliard on Torts*, 48.)

The receipt should have been produced. (*Patten v. Baggs*, 43 Ga. 167; *Second Nat. Bk. v. Walbridge*, 19 Ohio St. 419; *Horr v. Barker*, 8 Cal. 613; *Davis v. Russell*, 52 Cal. 615; *Cochran v. Ripy*, 13 Bush, 495.)

McAllister & Bergin, and *G. F. Gordon*, for Respondents.

The court is asked to reverse the judgment upon two grounds, namely:—

1. Non-production of the receipt.
2. There has been no conversion of the property.

It is too late to make these points.

The absolute and unqualified refusal to deliver the goods to respondent upon payment of all charges due thereon, without calling for any receipts, excused its production—and *non constat* that the point was ever made on the trial where it could readily have been obviated. (*Rogers v. Weir*, 34 N. Y. 463; *Ball v. Liney*, 48 N. Y. 12; *Smith v. Shaw*, 16 Cal. 90; *Miller v. Myers*, 46 Cal. 538; *Gould v. Banks*, 8 Wend. 567.)

Ross, J.—Action for conversion of certain articles of personal property. The plaintiff's ownership of the articles is an undisputed fact in the case. As owner, she intrusted the property to the Ten Cent Parcel Delivery Company, a corporation, to be stored. Defendants' predecessors in interest were warehousemen, and with them the company stored the property, taking a warehouse receipt therefor. Subsequently the defendants succeeded to the rights and duties of the original warehousemen in respect to it. On the 18th of July, 1877, they had notice that the plaintiff was the owner of the property, and on that day delivered to her a portion of it on an order from the Parcel Delivery Company. Afterward, and on the 2d of July,

1879, the plaintiff tendered defendants the amount due thereon for storage, seventy-eight dollars, and demanded possession of the remainder of the property. Defendants refused to deliver the remainder on the sole ground that the same had been sold to pay storage charges; but at the same time offered to deliver it if plaintiff would pay them *two hundred* dollars. In truth, according to the findings, the property had not been sold, but was at the time of the tender and demand in defendants' possession.

On these facts the court below rightly gave judgment for the plaintiff. The circumstances attending the refusal of the defendants to surrender the property to the owner on tender of the charges due amounted to a conversion of it.

The objection that the warehouse receipt was not produced is not well taken. Defendants did not put their refusal to deliver on any such ground, but based it solely on the ground which, according to the findings, had no support in fact, that the property had been sold to pay storage charges. If they had asked for the receipt, perhaps it would have been produced.

Judgment affirmed.

McKEE, J., and McKINSTRY, J., concurred.

Hearing in Bank denied.

[In Bank.—April 27, 1883.]

THE PEOPLE, APPELLANTS, v. F. A. GIESEA,
RESPONDENT.

CRIMINAL PRACTICE — DISMISSAL OF PROSECUTION — SECTION 1382 OF THE PENAL CODE CONSTRUED.—The indictment in this case was demurred to and the demurrer sustained. This ruling was reversed on appeal. The trial court then fixed a day for the trial, against defendant's objections, more than sixty days after the remittitur was filed. The defendant demanded his discharge under section 1382 of the Penal Code, and the court so ordered and dismissed the action. *Held*, that this section has no application to such a case, and that the court erred in its ruling.

APPEAL from an order of the Superior Court of Kern County, discharging defendant and dismissing the action against him.

The facts are stated in the opinion of the court.

Attorney-General, for Appellants.

J. W. Freeman, and R. E. Arick, for Respondent.

PER CURIAM.— This is an appeal from an order dismissing the cause and discharging the defendant.

The indictment in this cause was demurred to and the demurrer was sustained. On appeal by the people to this court, this ruling was reversed with directions to overrule the demurrer. On the return of the remittitur, the court fixed a day for the trial of the defendant, and against his objection, more than sixty days after the remittitur was filed. Thereupon the defendant, under section 1382 of the Penal Code, claimed his discharge, and that the case should be dismissed. The court below so ruled and made an order discharging the defendant and dismissing the cause. Thereupon, this appeal was prosecuted by the people.

We are of opinion that the case of the defendant does not come within the provisions of the section above referred to. That section has no application where the prisoner has demurred to the indictment, the demurrer sustained, the effect of which ruling had to be gotten rid of by an appeal.

The court in our judgment erred in its ruling, and the order is reversed and cause remanded, that proceedings may be had in the court below according to law.

MORRISON, C. J., and SHARPSTEIN, J., did not participate.

[Department Two.— May 4, 1883.]

IN THE MATTER OF THE ESTATE OF A. E. ROSE,
DECEASED, CERTAIN MINOR HEIRS AND THEIR
GUARDIAN, APPELLANTS, AND H. HIRSHFELD,
ADMINISTRATOR, RESPONDENT.

ORDER — APPEAL — COMPUTATION OF TIME.— Where the last day of the period allowed to appeal from an order is a non-judicial day, an appeal taken on the next day is in time.

PROBATE PROCEEDINGS — SALE OF REAL ESTATE.— A decree in probate directing the sale of real estate held to be invalid by reason of defects in the

petition and proceedings with reference to various matters required by the Code, and particularly as to the necessity for the sale, such necessity not appearing from any facts set forth in the petition or stated in the decree.

APPEAL from an order of the Superior Court of the county of Kern confirming a sale of real estate.

The decree directing the sale was not appealed from, but treated as void. The additional facts sufficiently appear in the opinion of the court.

George V. Smith, and Stetson & Houghton, for Appellants.

R. E. Arick, for Respondent.

MYRIOK, J.— This is an appeal from an order confirming the sale of property sold as real estate, and directing a conveyance to be made.

The appeal was in time. The sixtieth day fell on Monday, January 2, 1882. The 1st day of January, 1882, being Sunday, the ensuing Monday was a non-judicial day (§ 11, Code Civ. Proc.), and the notice given on Tuesday, January 3d, was in time. (§ 12.) The motion to dismiss is therefore denied.

The petition for the sale of the property is fatally defective. Section 1537 of the Code of Civil Procedure requires that the petition set forth the amount of personal estate that has come to the hands of the administrator, and how much, if any, remains undisposed of; the debts outstanding so far as can be ascertained or estimated; the amount due on the family allowance, or that will be due for one year; the debts, expenses, and charges of administration already accrued, and an estimate of what will accrue; a general description of the real property of the deceased or in which he had any interest, and the condition and value thereof, with other matters stated in the section. In endeavoring to be conformed to the above requirements, the petition described the personal property which had come to the hands of the administrator, and stated that it had been appraised at four thousand five hundred and eleven dollars. The petition then stated "that a portion of said property has been sold by a former order of this court, and your petitioner has realized therefrom the sum of three thousand dollars, and the balance

remains to be disposed of." What property remains to be disposed of?

In regard to the debts, the petition stated: "That the debts outstanding against the said deceased, as far as can be ascertained or estimated, amount to this day to the sum of five thousand dollars, and are fully set forth in the schedule marked A, heretofore annexed and made a part of this petition." No schedule A is annexed to the petition, nor any schedule of debts outstanding. The petition stated: "That the amount due on the family allowance is the sum of \$——; that the amount that will be due on said family allowance, after the same shall have been in force one year, is the sum of \$——."

The petition also stated that the debts, expenses, and charges of the administration already accrued amount to two hundred and fifty dollars, "and are fully set forth in the schedule marked B, hereunto annexed and made a part of this petition"; and that the debts, expenses, and charges of administration that will accrue are estimated at five hundred dollars, "and are set forth in the schedule marked C hereunto annexed and made part of this petition." There is no schedule B or schedule C annexed to or accompanying the petition, nor any statement, except as above, of the debts, expenses, or charges of administration, accrued, or to accrue. There is no attempt at a statement of the condition of the property of the estate; nor of the value of the property asked to be sold, except the statement that it is of uncertain value on account of litigation with reference thereto.

The section of the Code above referred to provides if any of the matters therein enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the decree. The petition did not state that such matters required by the section as were omitted could not be ascertained, nor does it appear, directly or indirectly, that the defects were supplied by proofs at the hearing, nor does the decree authorizing the sale state any general or other facts showing a necessity for a sale. It is true, the order of sale states that it having appeared to the court *by the petition* that it was necessary to sell

real estate, thereupon an order to show cause was made; but the order does not state that *on the hearing* a sale appeared to be necessary. The only statement in that regard is, it "appearing to the court that it would be for the benefit of the estate to sell the said real estate at private sale." These words express a choice as between a public and a private sale; but do not express a necessity for a sale. An attempted sale, based upon such a petition and order, would convey no title.

Order reversed.

THORNTON, J., and SHARPSTEIN, J., concurred.

[Department Two.— May 4, 1883.]

IN THE MATTER OF THE ESTATE OF A. E. ROSE,
DECEASED, CERTAIN MINOR HEIRS AND THEIR
GUARDIAN, APPELLANTS, AND H. HIRSHFELD,
ADMINISTRATOR, RESPONDENT.

ADMINISTRATOR — FINAL ACCOUNT — VOUCHERS — PROOF.— An order settling the final account of an administrator reversed for want of proper vouchers, and because the proof as to the correctness of the account was too general and indefinite.

APPEAL from an order of the Superior Court of the county of Kern.

The facts appear in the opinion of the court.

Stetson & Houghton, for Appellants.

R. E. Arick, for Respondent.

MYRIOK, J.— This is an appeal from an order settling the account of the administrator.

Section 1631 of the Code of Civil Procedure provides that, in rendering his account, the administrator must produce and file vouchers for all charges, debts, claims, and expenses which he has paid, and he may be examined on oath touching such payments; if a voucher is lost, or for other good reason cannot be

produced on the settlement, the payment may be proved by any competent witness.

According to section 1632, he may be allowed any item of expenditure not exceeding twenty dollars for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where, and to whom it was made; but the aggregate of such allowances must not exceed five hundred dollars.

The vouchers produced by the administrator in this case, and used on the settlement of his account, numbered one to twenty-two, respectively, the receipts for sums paid the appraisers, clerk, attorney, and possibly some few others, were proper vouchers, and the items represented by them were properly allowed by the court; but the bulk of the so-called vouchers appearing in the transcript, from folio 57 to folio 88, are in no sense vouchers. We select one as a sample:—

“ \$27.87.

BAKERSFIELD, September 24, 1878.

“ Pay to the order of Fred Hanes twenty-seven 87-100 dollars, United States gold coin, value received, and charge to account of Rose estate.

“ M. PURCELL.

“ To H. HIRSHFELD, Admstr. Rose estate.”

This is not a voucher. H. Hirshfeld is the administrator of the estate. This paper may have been very well as a statement from M. Purcell to Mr. Hirshfeld that he should pay the amount to the person named; but it gives no information as to why the amount should be paid out of the funds of, or charged to, the estate; nor does it tend to prove that the amount was paid; it is no voucher from the payee. There is no statement of any fact in the account or in the report tending to show that the items represented by these so-called vouchers were incurred or paid in or about the business of the administration of the estate. The same may be said of the accounts and receipts contained in the transcript, from folio 91 to and including folio 96, except that these appear to have been receipted by the persons in whose favor the accounts were presented. The amount of \$678.75 appears on the credit side of the account as cash paid L. Hirshfeld, supplies; but why the item was paid, or what relation the administration of the estate bore to these sup-

plies, or to the payment, in no way appears. On referring to the voucher or account of L. Hirshfeld & Co., on which the payment was made, we find the supplies to consist of potatoes, cream tartar, coffee, sulphur, flour, cardles, tobacco, cigars, onions, leather, cash, tea, beans, bacon, rubber coat, pants, vest, axle-grease, sheeting, toweling, etc., etc.; but we are not informed in any manner what these articles had to do with the administration of the estate. It appears in the bill of exceptions that as to the items in the account of Hirshfeld & Co., the administrator was not particularly examined, but was asked generally as to whether they were necessary expenses in the care and management of the sheep and other property of the estate, and for the care and custody of the mixer children, and he stated they were. The order settling the account contains no statement that proof of the correctness of the account was had, nor any finding as to its correctness. The evidence should have shown why the expenses were incurred, leaving the court to determine as to their necessity or propriety. When we observe that the items on the credit side of the account as allowed by the court aggregate \$9,159.17, nearly one half of which is made up of items subject to one or the other of the above criticisms, we are free to say that the account was presented and attempted to be proven in a way far from that contemplated by the statute. It is a very easy matter for an administrator to present in writing a general synopsis of his administration, for doing so he is amply paid; we notice in this account an item of fees of administrator, \$545.85, and for attorney's fees, \$250; we think the requirements of the Code as to the method of conducting the business and settling the accounts should be complied with.

The order is reversed and the cause is remanded for further proceedings.

THORNTON, J., and SHARPSTEIN, J., concurred.

[Department One.— May 8, 1883.]

ANDREW CASSIDY, RESPONDENT, v. MARY CASSIDY,
APPELLANT.

DIVORCE — FINDINGS — PRACTICE.— In an action by the husband for a divorce on the grounds of habitual intemperance and extreme cruelty, the wife denied the allegations of the complaint, and set up as a separate defense extreme cruelty on the part of the husband. The court found in substance that the material allegations of the complaint were true, and rendered a judgment in favor of the husband. There was no finding upon the issue tendered by the wife as to the cruelty of the husband. *Held*, 1. That the finding was not sufficient to support the judgment. 2. That it was competent for the wife to plead the cruelty of the husband in defense of the action, and that the judgment could not be sustained in the absence of a finding on the subject.

PLEADINGS — COMPLAINT — DEMURRER.— Where a complaint contains two counts, one of which is good, a general demurrer to the whole complaint must be overruled.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are sufficiently stated in the head notes and opinion of the court.

G. W. & W. B. Tyler, for Appellant, cited *Ladd v. Tully*, 51 Cal. 277; §§ 462 and 467, Code Civ. Proc.; *Phipps v. Harlan*, 53 Cal. 87; *Billings v. Everett*, 52 Cal. 661; *Sift v. Canavan*, 52 Cal. 417.

John Wade, and *James McCabe*, for Respondent.

McKINSTRY, J.— The defendant (appellant) demurred generally to the whole complaint. Appellant now claims there are two counts in the complaint, and that one is insufficient. There is but one count; but if there had been two, one being good, the general demurrer would have been properly overruled.

One of the findings of the court below was "all the material allegations of facts set forth in plaintiff's complaint are sustained and proven by the evidence." Such a finding does not uphold a judgment. We have no means of determining what the court below may deem "material" facts or averments. (*Ladd v. Tully*, 51 Cal. 277.) The finding with respect to "extreme cruelty" on the part of defendant is somewhat uncer-

tain. If it be admitted, however, that such finding is sufficient, the record contains no pretense of a finding with reference to the counter-charges of the answer. It is well settled in this State that the findings must respond to all the material issues made by the pleadings. (*Swift v. Canavan*, 52 Cal. 417; *Billings v. Everett*, 52 Cal. 661; *Phipps v. Harlan*, 53 Cal. 87.) Defendant in an action for divorce may allege and prove facts constituting a cause of divorce against the plaintiff in bar of the plaintiff's cause of divorce. (Civil Code, § 122.) The averment of the facts constituting such recriminatory defense, and the denial thereof by plaintiff (which the law implies), creates a material issue, upon which the court should find.

Judgment and order reversed and cause remanded for a new trial.

McKEE, J., and SHARPSTEIN, J., concurred.

[Department One.— May 8, 1883.]

J. S. DYER, RESPONDENT, v. S. MARTINOVICH ET AL.,
APPELLANTS.

STREET ASSESSMENT.—An assessment was made for the grading of Leavenworth Street from Green to Union Street in the city and county of San Francisco. Between Green and Union Streets there was a small street thirty-five feet in width, terminating at one end in Leavenworth Street, and known as Lincoln Street. The cost of the work in front of Lincoln Street was assessed against the lots fronting on that street. In the assessment, Lincoln Street is designated by its name, but it is also numbered and referred to as a lot having a frontage of thirty-five feet on Leavenworth Street, and chargeable with a certain amount as its proportion of the cost of the work. On the diagram attached to the assessment there is a space marked Lincoln Street with a number upon it corresponding to the number in the assessment. *Held*, that the assessment was properly made, that Lincoln Street is not to be regarded as one of the lots assessed, and that the reference to it was merely for the purpose of a distribution of the cost of the work as between the lots liable therefor.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

J. C. Bates, for Appellant.

The assessment is too large and therefore void. (*Prescott v. Prescott*, 62 Me. 431; *Glidden v. Chase*, 35 Me. 90; *Boyden v.*

Moore, 5 Mass. 371; *Dyer v. Chase*, 52 Cal. 440; *Donnelly v. Howard*, 60 Cal. 291.

O. H. Parker, for Respondent.

PER CURIAM. — The appeal is from a judgment entered against defendants in an action on a street assessment.

No objection is made to the assessment and diagram other than that hereinafter stated. "The diagram and assessment show that Lincoln Street is a small street thirty-five feet wide, terminating in a main (Leavenworth) street. Lot 7, in suit, is assessed for Lincoln Street, but the assessment shows on its face that Lincoln Street is named and designated as lot 6, and assessed for \$544.32, the same as other lots, except that other lots are assessed to 'unknown.' "

The assessment consists in two distributions of the amounts to be paid. In the first, the lots of private proprietors fronting on Leavenworth Street are numbered 1, 2, 3, 4, 5, and 7, and "Lincoln Street" is numbered as lot 6. This is followed by an "assessment against Lincoln Street for its proportion of the above-named expense; thirty-five feet grading," etc. This last consists of a distribution of the expense imposed by the statute upon the property fronting on Lincoln Street to the lots of property fronting on that street.

The assessment is to be read as a whole, and from this it appears that the land used as Lincoln Street is *not* assessed against "Mr. Lincoln," or against "Lincoln Street" as a person. The insertion in the first part of the assessment of Lincoln Street as "lot 6" may be treated as surplusage, or as merely indicating that the width of Lincoln Street on Leavenworth is not held in private ownership. Read together, the two parts of the assessment show that the property fronting on Leavenworth, and also fronting on Lincoln, was properly assessed.

Judgment affirmed.

[Department One.—May 8, 1883.]

BANK OF SONOMA COUNTY, RESPONDENT, v. A. J. GOVE, APPELLANT.

PROMISSORY NOTE — TRANSFER — EQUITIES.—If a promissory note is transferred after maturity by an indorser who took it before maturity, and was not himself affected by any equities between the original parties, the holder acquires it relieved of such equities, and they are not available against him. (McKINSTRY, J., and ROSS, J.)

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of MR. JUSTICE McKINSTRY.

C. V. Grey, for Appellant, cited Civil Code, § 3123; Code Civ. Proc. § 368; *Vinton v. Crowe*, 4 Cal. 309; *Hayward v. Stearns*, 39 Cal. 58; *Hart v. Cooper*, 47 Cal. 77; *Brown v. Witts*, 57 Cal. 304; *Fuller v. Hutchings*, 10 Cal. 523; *Baxter v. Little*, 6 Met. 7.

A. W. Thompson, for Respondent, cited Code Civ. Proc. § 383; 1 Daniels on Negotiable Instruments, §§ 724, 726, 786, 803, and authorities there referred to.

McKINSTRY, J.—The appellant Gove made his promissory note for eight hundred dollars to defendant Stuart, who indorsed it before maturity to the National Gold Bank and Trust Company. The bank discounted the note in the regular course of its business. After maturity, the bank for a valuable consideration transferred the note to E. W. Steele. Subsequently Gove, the maker, paid to Steele one half the sum then due upon the note, claiming that as between himself and Stuart the instrument was an accommodation, and each was liable to the other for one half only. Steele refused to recognize the alleged claim, but consented to receive the sum paid as a partial payment, and such sum was indorsed as a payment in the usual manner. Afterwards Steele transferred the same for value to the plaintiff. As between themselves there was an agreement between Gove and Stuart that each should pay one half the note, but of this

neither the National Bank, Steele, nor the plaintiff had notice when they respectively bought the note.

This action was commenced August 30, 1877. Defendant Stuart was discharged from his debts under the insolvent laws June 27, 1879, and judgment went for him in the court below. That court gave judgment in favor of the plaintiff for the balance due against the appellant Gove.

Upon this state of facts it is contended by appellant the judgment should be reversed, because plaintiff was chargeable with notice that the note was an accommodation note, and that the maker had paid all he was liable to pay to Steele. Appellant relies upon the proposition laid down in *Vinton v. Crowe*, 4 Cal. 309, and approved in *Hayward v. Stearns*, 39 Cal. 58. In the first of these cases the proposition is thus stated: "A negotiable note, taken by the holder after its maturity, is taken subject to all subsisting equities between the maker and payee, but not such as subsisted between the maker and any intermediate holder."

The facts in *Vinton v. Crowe* are not reported, but in *Hayward v. Stearns* the defense relied upon the fact that while the note remained in the hands of Turner, who took after it was overdue, the latter became indebted to the maker in a sum greater than the amount of the note. There can be no doubt the law was properly applied in that case, and it must be supposed that the facts in *Vinton v. Crowe* were analogous. At all events, the general language employed by the court is not to be interpreted as establishing that every indorsee who takes a negotiable instrument after maturity is bound by the equities subsisting between the payor and payee; if, indeed, the fact that, as in the case before us, the note was made for the mutual accommodation of the original parties can be considered as an equity within the meaning of the rule.

"It is a settled principle that if the party who transferred the instrument to the holder acquired the note before maturity, and was himself unaffected by any infirmity in it, the holder acquires as good a title as he held, although it were overdue and dishonored at the time of the transfer." (Daniel on Negotiable Instruments, § 726, citing many American cases; Chitty on Bills, 13th Am. Ed. 250; 9 Ex. 690.)

Here the note was discounted by the National Bank before it became due, without notice of the agreement between the original parties.

In England it is well established that the general rule, that the purchaser of overdue paper can stand in no better position than his transferrer, does not apply so far as to invalidate bills and notes drawn, indorsed, or accepted for accommodation, overdue at the time they are negotiated or transferred, it being considered that parties to accommodation paper hold themselves out to the public by their signatures, to be bound to every person who shall take the same for value, the same as if it were paid to themselves. And the fact that the purchaser knew that the paper was so drawn, indorsed, or accepted for accommodation, does not weaken his position. (9 Ex. 690.) But inasmuch as the decisions in the United States do not uniformly follow the English rule, and as the facts of the case at bar do not demand a decision of the question, we express no opinion with respect to this last point.

Judgment and order affirmed.

Ross, J., concurred. McKee, J., concurred in the judgment.

[Department One.— May 8, 1883.]

H. B. CONGDON, APPELLANT, v. WM. S. CHAPMAN,
RESPONDENT.

SALE — AGREEMENT — PERFORMANCE.— The plaintiff sold to the defendant certain shares of the capital stock of a corporation, to be paid for out of the first moneys which could be realized from the sale of any stock of the corporation owned or controlled by the defendant, who agreed to make all reasonable efforts to realize on the same without unnecessary delay for the purpose of paying the plaintiff. The suit was brought to recover the price of the shares sold. The answer alleged in substance that the defendant had complied with the agreement as to the efforts to be made by him to realize on the stock, but had not been able to sell any portion of it. The court below found in his favor upon the matters so alleged. *Held*, that these matters constituted a defense to the action, and that the plaintiff could not recover.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The case came up on the judgment roll. No motion was made for a new trial, and the evidence was not before the court. The following is a copy of the agreement on which the questions in the case arose:—

SAN FRANCISCO, CAL., November 20, 1876.

MEMORANDUM OF AGREEMENT.

H. B. Congdon sells to W. S. Chapman thirty thousand shares of the capital stock of the Erie Consolidated Mining Company, at the price of ten cents per share. Said Chapman agrees to said purchase, and to pay for said stock in gold coin, from the first moneys which can be realized from the sale of any stock of said company owned or controlled by him. Said Chapman agrees to purchase from said Congdon such further quantities of said stock as he may supply within thirty days, at the same price and on the same terms. Said Chapman acknowledges the receipt of said thirty thousand shares of said stock this day delivered to him by said Congdon, and said Chapman agrees to use all reasonable efforts to realize on the stock of said company owned or controlled by him without unnecessary delay, to the end that said payment may be made to said Congdon.

WM. S. CHAPMAN,
H. B. CONGDON.

Witness, FORD H. ROGERS.

More than three years elapsed between the date of the agreement and the commencement of the action.

Cary & Troutt, for Appellant, argued that the agreement should be construed as requiring payment within a reasonable time, and that the defense set up in the answer could not be maintained, citing *Hicks v. Shouse*, 17 Mon. B. 483; *Ubsdell v. Cunningham*, 22 Mo. 125; *Sears v. Wright*, 24 Me. 278; *Nunez v. Dautel*, 19 Wall. 560; *Williston v. Perkins*, 51 Cal. 554.

Pillsbury & Titus, for Respondent, argued that the effect of the agreement was to provide for payment out of a special fund to be raised by selling of stock, and that the construction contended for by the counsel for the appellant would be substantially to make a new contract between the parties; that the

respondent had done all the agreement required him to do, and is not liable.

PER CURIAM.—The plaintiff sold to the defendant certain shares of the capital stock of the Erie Consolidated Mining Company, upon defendant's agreement to pay for the stock, at a stated rate per share, "from the first moneys which can be realized from the sale of any stock of said company owned or controlled by him (Chapman); . . . and said Chapman agrees to use all reasonable efforts to realize on the stock of said company owned or controlled by him without unnecessary delay, to the end that said payment may be made to said Congdon."

By this agreement the parties clearly expressed their intention that the stock should be paid for out of the first moneys that could be realized from the sale of any stock of the company owned or controlled by Chapman, the latter further agreeing to use all reasonable efforts to realize on the stock without unnecessary delay, "to the end that said payment may be made to said Congdon."

At the trial the court below found that the defendant used reasonable diligence and made all reasonable efforts to sell the stock, but had been unable to sell any of it. Under such circumstances, to hold the defendant liable in this form of action would be to make and enforce between the parties a contract essentially different from the contract that they themselves made, and from that declared on herein.

Judgment affirmed.

[Department Two.— May 8, 1883.]

THE ANGLO-CALIFORNIAN BANK, LIMITED, APPELLANT, v. GRANGERS' BANK OF CALIFORNIA, RESPONDENT.

CORPORATION — TRANSFER OF STOCK — EQUITIES.—A transfer of shares of the capital stock of a corporation by the owner thereof to a *bona fide* purchaser for value, vests the title in such purchaser free of equities between the seller and the corporation of which the purchaser was ignorant at the time of the transfer, though provided for by a by-law of the corporation. The existence of such a by-law is not enough to charge the purchaser with notice, nor is it

enough that the purchaser, being also a corporation, has a similar by-law which is printed on each of its certificates of stock. The power of corporations to make by-laws for the transfer of their stock does not include the power to create liens thereon, affecting purchasers for value without notice.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The stock in question was transferred to the plaintiff by one Fowler as security for the payment of a debt previously contracted, the time of payment being extended in consideration of the transfer. The stock was represented by a certificate issued to Fowler as the owner thereof, and the transfer to the plaintiff was regularly made by assignment and delivery of the certificate. At the time of the transfer, Fowler was indebted to the defendant in a large amount, and the defendant claimed a lien on the stock under one of its by-laws, for the payment of this indebtedness. The plaintiff had no knowledge of the indebtedness or the existence of the by-law. A demand by the plaintiff for a transfer of the stock on the books of the defendant was refused, and the action was brought to recover damages for such refusal. The defendant was incorporated under the provisions of the Civil Code. The additional facts sufficiently appear in the opinion of the court.

Chickering & Thomas, for Appellant.

1. Our general proposition is that a *bona fide* purchaser of corporate stock, for value and without notice, takes it free of all equities between his vendor and the corporation.

Plaintiff was a purchaser for value. Our forbearance to sue, and our renewal of Fowler's obligation on the faith of the security, are *valuable* considerations. (*Frey v. Clifford*, 44 Cal. 335; *Cary v. White*, 52 N. Y. 138; 2 Pomeroy Equity, § 749.)

2. The plaintiff had no actual or constructive notice of the by-laws of the defendant. Nothing can be statutory notice which is not expressly declared by the statute to be notice.

3. Plaintiff had no actual notice of circumstances sufficient to put a prudent man upon inquiry as to the by-laws of defendant. The facts do not bring the case within either of the two classes

spoken of by Wigram, V. C., in *Jones v. Smith*, 1 Hare, 43, 55, 56, which is cited in 2 Pomeroy's Equity, § 605, and spoken of therein as "the most comprehensive and accurate generalization" of the law of constructive notice "ever attempted by any judge or text-writer."

4. Stocks are *quasi negotiable* instruments, and those who purchase them in good faith, for value and without notice, take them free of all equities. (*Winter v. Belmont Mining Company*, 53 Cal. 428.)

5. The defendant held out Fowler to the world as the legal owner of the stock, and is bound by his disposition of it to a purchaser for value without notice. (*Winter v. Belmont Mining Company*, *supra*; *Brewster v. Sime*, 42 Cal. 147; *Thompson v. Toland*, 48 Cal. 113; *Stone v. Marye*, 14 Nev. 362; *Holbrook v. New Jersey Zinc Company*, 57 N. Y. 616.)

6. The by-laws of a corporation are not binding on third parties. They need only look within the four corners of the certificate. (*Mechanics' Bank v. Smith*, 19 Johns. 115; *Lowry v. Commercial Bank*, Taney, 310; *Bank v. Lanier*, 11 Wall. 369; *Angell & Ames on Corp.* § 359; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Bank v. Pinson*, 58 Miss. 421, and citations.)

Pillsbury & Titus, for Respondent.

1. Corporations have power to make by-laws regulating the transfer of stock. (Civ. Code, § 354, sub. 6; *St. Louis etc. Ins. Co. v. Goodfellow*, 9 Mo. 149; *Cunningham v. Alabama Trust Co.* 4 Ala. 652; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; *Field on Corporations*, § 304; *Pendergast v. Bank of Stockton*, 2 Sawy. 108.)

2. When the holder of stock is indebted to the corporation, and the corporation has a lien on the stock for the debt, a transferee of the certificate is not entitled to a transfer of the stock on the company's books, except he first pay the debt. (*McCready v. Rumsey*, 6 Duer, 574; *Reese v. Bank of Commerce*, 14 Md. 271; *Mechanics' Bank v. N. Y. & N. H. R. R. Co.* 18 N. Y. 599; *Union Bank of Georgetown v. Laird*, 2 Wheat. 390; *Stebbins v. Phoenix F. I. Co.* 3 Paige, 350.)

3. Certificates of stock are not negotiable securities in the sense that an indorsement and delivery thereof to a *bona fide* purchaser, for value and without actual notice, cuts off equities between the corporation and the holder and transferor of the stock. (*Mechanics' Bank v. N. Y. & N. H. R. R. Co.* 13 N. Y. 623, 624; *Bank of Georgetown v. Laird*, 2 Wheat. 390; *Stebbins v. Phoenix Fire Ins. Co.* 3 Paige, 350; Angell & Ames on Corporations, §§ 352, 353, 3d ed.; *Dunn v. Commercial Bank of Buffalo*, 11 Barb. 580; *Weaver v. Barden*, 3 Lans. 338; 49 N. Y. 286; *Hall v. Rose Hill etc. Road Co.* 70 Ill. 673; *Shaw v. Spencer*, 100 Mass. 382; 1 Am. R. 115; *Atkins v. Gamble*, 42 Cal. 99; *Sherwood v. Meadow Valley M. Co.* 50 Cal. 412; Note to 6th ed. Parsons on Contract, vol. 1, p. 290.)

SHARPSTEIN, J.—The court found that prior to and at the time of the transfer of thirty shares of the capital stock of the corporation defendant, by one Fowler to the corporation plaintiff, said Fowler was indebted to the defendant in a sum greatly in excess of the value of said stock, and that said indebtedness had never been paid, and that by virtue of a by-law of said corporation defendant, it was justified in refusing to enter said transfer upon its books until said indebtedness should be paid. Said by-law reads as follows:

“All transfers of stock shall be subject to all debts and equities in favor of the corporation, against the person or corporation making such transfer, and existing or arising prior to the regular transfer thereof upon the books of the corporation, and no transfer of shares shall be made upon the books of the corporation until all dues and demands thereon due to the corporation from the party or parties representing such shares shall have been paid.”

The court also found that the plaintiff had no actual knowledge of that by-law, and that it never tried by inquiry or otherwise to obtain any such knowledge. It is not found that prior to said transfer the appellant was informed or knew of the indebtedness of said Fowler to the respondent.

It is found that many of the banking corporations of this city, including the corporation plaintiff, had by-laws similar to the one above quoted, and that the latter corporation had such a

by-law printed upon his certificates of stock, from which the court drew the conclusion "that the corporation plaintiff, its managers and other officers, had actual notice of circumstances sufficient to put a prudent man upon inquiry as to the contents of the code of by-laws of the corporation defendant herein."

The only circumstances, however, of which the plaintiff had actual notice was that it had a similar by-law of its own, a copy of which it had printed upon every stock certificate issued by it. As the defendant did not print a copy of said by-law upon any stock certificates issued by it, we do not think that the circumstances of the plaintiff's having a similar by-law, coupled with the fact that a copy thereof was printed upon all certificates of stock issued by it, was equivalent to actual notice of the fact of the defendant having such a by-law, although the plaintiff neglected to make any inquiry, and might have ascertained if it had, that the defendant had such a by-law.

The respondent's counsel, however, insist that even if the plaintiff be "*a bona fide* purchaser for value and without actual notice," it took the certificates subject to the equities which existed, at the time of the transfer, between the defendant and Fowler. If the law conferred upon the defendant the power to make such a by-law, we are not prepared to deny that it might have the force and effect claimed for it by respondent's counsel. The provision of the Civil Code which it is claimed confers such power upon corporations declares that "every corporation, as such, has power . . . to make by-laws not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock." (Civ. Code, § 354.) The transfer of stock is provided for in another section, of which the following is a copy:—

"Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or

designation of the shares, and the date of the transfer." (Civ. Code, § 324.)

The shares for which Fowler held a certificate were personal property, i. e., his personal property, and he could transfer it by its indorsement and the delivery of the certificate to the plaintiff or any one else. Fowler being the holder of the certificate, was in the possession of the shares for which it was issued, and those shares were his personal property, which he was authorized by law to transfer by an indorsement and delivery of the certificate to the plaintiff. The defendant was not in possession of the shares for which Fowler held the certificate, and such shares being his personal property, the defendant had no general lien upon it for any balance which might be due it from Fowler in the course of business. (Civ. Code, § 3054.) The lien, if any, must have been created by the by-law above quoted, and it seems to us that no lien could be created in that way which would affect a *bona fide* purchaser for value without notice, to whom the stock was transferred in the mode prescribed by the Code. We think that the by-law which it is claimed gives the defendant such a lien, is clearly inconsistent with the provisions of section 324 of the Civil Code which we have quoted.

The provision that "the transfer is not valid, except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer" does not, as we construe it, justify the defendant in its refusal to enter upon its books the transfer from Fowler to the plaintiff, any more than it would in the absence of any such by-law as the one upon which the defendant relies for its justification in this case. If there was a valid transfer of the stock from Fowler to the plaintiff, the latter had a right to have it transferred on the books of the defendant. The defendant might make by-laws regulating the transfer of stock, but it could not, under the power to regulate the transfer of stock, create a secret lien upon it, which would adhere to it in the hands of a *bona fide* purchaser for value and without notice. This question was elaborately, if not exhaustively, discussed in *Bullard v. Bank*, 18 Wall. 589, and in *Driscoll v.*

West Bradley & C. M. Co. 59 N. Y. 96, and the conclusion reached in both cases was that a corporation could not, under the power to make by-laws for the regulation of the transfer of stock, "create or declare a lien upon the stock by by-law, nor refuse to permit a transfer until the indebtedness of the stockholder to the company be paid."

The proposition that the possession of certificates of corporate stock which bear the proper indorsements is *prima facie* evidence of ownership, and that the holder for value without notice of prior equities obtains a perfect title as against such equities is not weakened, but rather strengthened by the provisions of our Code relating to that subject.

Judgment and order appealed from reversed.

THORNTON, J., and MYBICK, J., concurred.

Hearing in Bank denied.

[Department Two.— May 8, 1883.]

P. GATELY, RESPONDENT, v. WILLIAM LEVISTON
ET AL., APPELLANTS.

STREET ASSESSMENT — JURISDICTION OF THE BOARD OF SUPERVISORS.— An assessment for grading the crossing of two streets in the city and county of San Francisco, held to be invalid for want of jurisdiction in the board of supervisors to order the work without a petition from the property owners, or a recommendation by the superintendent of streets.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

B. S. Brooks, and *Wm. Leviston*, for Appellants.

J. M. Wood, and *J. C. Bates*, for Respondent.

SHARPSTEIN, J.—Action upon a street assessment for grading the crossing of Broadway and Gough Streets. The record shows that the property owners upon whose petition the board

of supervisors is authorized to order that kind of work to be done did not petition to have it done, nor did the superintendent of streets recommend that it should be done. Without such a petition or recommendation the appellant contends that the board could not acquire jurisdiction to order the work done. Such is our understanding of the law. (Stats. 1871-72, § 4, p. 805; *Dyer v. North*, 44 Cal. 157; *Dyer v. Miller*, 58 Cal. 585.)

Judgment and order reversed.

THORNTON, J., and MYRICK, J., concurred.

[Department Two.— May 8, 1882.]

COLUMBUS BARTLETT, ADMR., ETC., RESPONDENT, v.
FRANKLIN D. COTTLE, APPELLANT.

PROMISSORY NOTE WITH SECURITY.—FORM OF ACTION.—Where a mortgage is given to secure the payment of a promissory note, an action cannot be maintained on the note alone, unless the security is valueless. If the security has any value, the action must be brought in pursuance of section 726 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The note in question was secured by a mortgage on real and personal property. The action was brought on the note alone, the complaint being silent as to the mortgage. The existence of the mortgage was set forth in the answer as matter in abatement of the action. The court below found that the security was of no value, and rendered judgment for the plaintiff.

B. S. Brooks, for Appellant, argued that the evidence did not justify the finding that the security was valueless.

C. L. Smith, for Respondent.

Section 726 of the Code of Civil Procedure is designed merely to protect defendants from more than one action for the

recovery of a debt. If the plaintiff elects to proceed on the debt alone he may do so, but will be debarred from subsequently attempting to foreclose the security in another action. (*Ould v. Stoddard*, 54 Cal. 613.)

THORNTON, J.—It is contended that the judgment in this case ought not to stand, because the security was not valueless when the action was commenced. On an examination of the testimony, we are of opinion that the security was not without value at the time referred to. The respondent in his calculation of value of the security leaves out the value of the houses on the leased property (the security in question), which was testified to by Perrine, the lessor. This action on the note, then, cannot be maintained under the provisions of section 726 of the Code of Civil Procedure. According to this section, there can be but one action, and that of the character prescribed in it.

Judgment and order reversed and cause remanded.

MYRICK, J., and SHARPSTEIN, J., concurred.

[Department One.— May 9, 1883.]

ASA FISK, RESPONDENT, v. THOMAS S. MILLER,
APPELLANT.

PROMISSORY NOTE.—INDORSEMENT.—H. made his promissory note payable to the order of M., but intended for his own accommodation. Before the maturity of the note, M. wrote his name on the back at the request of H., who thereupon sold the note to F. Held, that M. became an indorser, and is liable as such.

ID.—PLEADING.—An averment that the note was presented to the maker at maturity for payment, and payment thereof demanded, but the same was not paid, of all which due notice was given to the indorser, is a sufficient averment of presentment, refusal, and notice.

ID.—PROTEST.—The certificate of a notary showing the presentment to and demand upon the maker for payment, and his refusal to pay, and that notice of such demand and non-payment was given on the next day by the notary to the indorser by delivering the same at his residence to a person of discretion in charge apparently acting for him, is *prima facie* evidence of the facts stated, and these facts are sufficient to show notice to the indorser of the dishonor of the note.

TENDER.—A tender made was held to be bad for insufficiency in the amount.

APPEAL from a judgment of the Superior Court of the city

and county of San Francisco, and from an order refusing a new trial.

The note in controversy was payable sixty days after date, and the plaintiff purchased it before maturity at a discount of seventy-five dollars, the note being for seven hundred and fifty dollars, with interest at the rate of one per cent per month. After the commencement of the action, the indorser tendered to the plaintiff an amount equal to the sum he paid for the note and the interest and costs which had then accrued, but the plaintiff refused to accept it. The action was brought against the maker and indorser, but the only defense was by the indorser.

P. B. Ladd, for Appellant.

John H. B. Wilkins, for Respondent.

Ross, J.—The note in suit was made by the defendant Harker, indorsed before maturity at the request and for the benefit of Harker by the defendant Miller, and then sold by Harker to the plaintiff. Miller, by his act, became indorser, and liable as such. (*Fessenden v. Summers*, 62 Cal. 484.)

The averment in the complaint of presentment, demand, refusal, and notice we think sufficient. It is, "that said note at maturity was presented to said George M. A. Harker for payment, and payment thereof demanded, but the same was not paid, of all which due notice was given to said defendant, Thomas S. Miller." The protest of the notary shows the fact of presentment to and demand on the maker for payment, and refusal on his part to pay, and the further fact that notice of such demand and non-payment was given on the next day by the notary to the indorser, by delivering the same at his residence, No. 1,208 Leavenworth Street, in the city of San Francisco, to a person in charge, of discretion, apparently acting for him. The protest was *prima facie* evidence of those facts, and the facts show a sufficient notice to the indorser of the dishonor of the note. (Pol. Code, § 795; Civ. Code, § 3144.)

The tender relied on, if otherwise good, was insufficient in amount.

Judgment and order affirmed.

McKINSTRY, J., and McKEE, J., concurred.

Hearing in Bank denied.

[Department One.— May 9, 1883.]

JOSEPHINE SUNOL, RESPONDENT, v. JOHN MOLLOY,
APPELLANT.

MORTGAGE OF GROWING CROP — LANDLORD AND TENANT.— The mortgagee of a growing crop planted by a tenant under a contract which entitles the landlord to a portion of the crop, only succeeds to the interest of the mortgagor; and where the mortgage is made by the tenant, and the mortgagee takes possession, harvests the crop, and converts the whole to his own use, he is liable for the share of the landlord on a proper demand for its delivery.

EVIDENCE — DEPOSITIONS.— Certain depositions were taken on behalf of the plaintiff under subdivision 2 of section 2021 of the Code of Civil Procedure. The attorney for the defendant was present, and cross-examined the witnesses. Before the depositions were offered, it was shown that when they were taken the witnesses resided in the county of Alameda, and that they continued to reside there at the time of the trial. The action was brought and the trial had in the city and county of San Francisco. The depositions were admitted against the objection of the defendant to the sufficiency of the showing as to the absence of the witnesses. *Held*, that no error was committed in overruling the objection.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are sufficiently stated in the opinion of the court

L. S. Clark, for Appellant.

William Matthews, for Respondent, cited *Wentworth v. Miller*, 53 Cal. 10.

McKee, J.—By a verbal contract between the plaintiff and one Witt, the latter agreed to sow in grain a tract of land which the plaintiff leased to him for the farming season of 1877-78, and to harvest the crop raised thereon, have it threshed, sacked, and hauled at his own expense to a place called Sunol's Station, and deliver it there to the plaintiff, who was to divide it according to the terms of the contract.

After Witt had planted the crop he mortgaged it to the defendant Molloy, and left the leased premises; Molloy entered into possession under his mortgage and harvested the crop, but kept it all, and refused to deliver any portion of it to the plaintiff.

Molloy had no right to the whole crop. As mortgagee in possession he succeeded to the contract of his mortgagor with the plaintiff, and was bound by its terms. (§ 822, Civ. Code.) The only interest which he acquired in the crop was the interest of the mortgagor under the contract. (*Wentworth v. Miller*, 53 Cal. 10.) That was an undivided interest in common with the plaintiff; he and the plaintiff were, therefore, tenants in common of the crop; and when he repudiated the relationship, and refused to deliver to the plaintiff her share of the crop, he was guilty of a conversion, and liable for the value of the plaintiff's share in the crop.

There was no error in overruling the objections made to the admission of the depositions of witnesses for the plaintiff. The depositions had been taken under subdivision 2, section 2021, of the Code of Civil Procedure. The defendant, by his attorney, had attended the taking of the same, and cross-examined the witnesses; and before reading the depositions in evidence, testimony was given tending to show that at the time of the trial the witnesses resided in another county, and were then absent from the county where the case was on trial. This was satisfactory to the court, and the ruling of the court as to the sufficiency of that testimony is not reviewable on appeal. Upon the testimony the depositions were admissible under section 2032 of the Code of Civil Procedure.

Judgment and order affirmed.

Ross, J., and McKINSTRY, J., concurred.

Hearing in Bank denied.

[Department One.— May 9, 1883.]

COLUMBUS SCHMIDT ET AL., RESPONDENTS, v. MAT-
THEW NUNAN, APPELLANT.

SALE — DELIVERY — CHANGE OF POSSESSION.— S. C. & Co. while indebted to D. & G. sold the property in controversy — thirty-three tons of hay — to the respondents, and agreed to deliver it to them at a landing on the Sacramento River. The vendors immediately hauled the hay to the landing, and delivered it on board a schooner chartered by the respondents. While the schooner was in transit to San Francisco, where the respondents were doing business, the appellant, as sheriff, attached the property in an action by D. & G. against the vendors, and sold it, and applied the proceeds to the satisfaction of their claim. *Held*, in an action against the sheriff to recover the property or its value, that the sale was followed by an immediate and continued change of possession, and not being fraudulent in fact, the seizure was unlawful.

REPLEVIN — DAMAGES — INTEREST.— In an action to recover personal property or its value, interest on the value of the property is allowable, by way of damages for detention, from the date of the wrongful taking.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was brought to recover certain personal property or its value, and the sum of one hundred and fifty dollars as damages for the detention. There was no evidence upon the question of damages caused by the detention, but the court gave judgment for a return of the property with legal interest on its value from the wrongful taking, or if not returned, for the value of the property with legal interest thereon as damages for the detention from the date of the seizure.

The other facts are sufficiently stated in the opinion of the court.

George D. Shadburne, for Appellant.

There was no immediate delivery or continued change of possession from Schmidt, Christian & Co. to plaintiffs of the property in question, hence any transfer thereof was fraudulent as to the creditors of Schmidt, Christian & Co., and was void as to any of their creditors while they remained in possession. (§ 3440, Civ. Code; §§ 276, 278, 279, 511, 512, 519, 520, 524, 527, Story on Sales; § 531, Pol. Code; *Gray v. Corey*, 48 Cal. 208; *Watson v. Rogers*, 53 Cal. 401; §§ 483, 484, 485, 487 n,

1 490 n, r 675 n, d Benjamin on Sales, 3d ed.; *Mason v. Bond*, 9 Leigh, 181; S. C. 33 Am. Dec. 248; *Davis v. Bigler*, 62 Pa. St. 242; S. C. 1 Am. R. 393; *Edwards v. Sonoma Valley Bank*, 8 Pac. C. L. J. 705.)

The transfer claimed by plaintiffs to them of the property in question was made, if made at all, with intent to defraud. (§ 3439, Civ. Code.)

Of this the statute does not demand conclusive proof. (*White v. Leszynsky*, 14 Cal. 165; *Purkitt v. Polack*, 17 Cal. 327; *Butler v. Collins*, 12 Cal. 457.)

The one who *enabled* the fraud must suffer. (*Poorman v. Mills*, 39 Cal. 345.)

Sale of goods to be delivered on arrival is *executory* only. (*Russell v. Nicoll*, 3 Wend. 112; *Prescott v. Locke*, 51 N. H. 94; *Pattison v. Culton*, 33 Ind. 240; *Calahan v. Babcock*, 21 Ohio St. 281.)

And as long as the seller preserves sufficient control over the goods to retain the right of stoppage *in transitu*, he prevents the vendee from accepting them as his own within the meaning of the statute. (*Baldev v. Parker*, 2 Barn. & C. 37; *Howe v. Palmer*, 3 Barn. & Adol. 821; *Tempest v. Fitzgerald*, 3 Barn. & Adol. 680; *Carter v. Toussaint*, 5 Barn. & Adol. 855; *Smith v. Surman*, 9 Barn. & C. 561; *Bill v. Bament*, 9 Mees. & W. 37; *Hawes v. Watson*, 2 Barn. & C. 540; *Maberly v. Sheppard*, 10 Bing. 101; *Holmes v. Hoskins*, 9 Ex. 753; *Dodsley v. Varley*, 12 Ad. & E. 632; *Howes v. Ball*, 7 Barn. & C. 484; §§ 327, 331, 336, 337, 401, Story on Sales.)

No damages were proved or allowed at the trial, yet the judgment awards interest as damages, which we claim was error. (§§ 627, 667, Code Civ. Proc.; §§ 1917, 3336, Civ. Code.)

F. J. Castelhun, for Respondents.

There was not only an immediate delivery, but an immediate change of possession, which continued uninterruptedly until the defendant took the hay from plaintiffs' agent, Capt. Snyder.

As to the right of stoppage in transit, the seller lost it the moment the hay arrived at Hudab's Landing. (§ 1755, Civ. Code.)

But even if the seller had the right of stoppage, he could only exercise that right under the conditions contained in sections 3076, 3077, 3078, 3079, and 3080, Civ. Code.

As to all other persons but the seller, the purchaser's right is supreme. (§ 3080, Civ. Code.)

Interest was properly allowed as damages on the value of the property. (§§ 627, 667, Code Civ. Proc.; §§ 3287, 3288, 3333, Civ. Code; *Kelly v. McKibben*, 54 Cal. 192; *Hisler v. Carr et al.* 34 Cal. 641; *Page v. Fowler*, 39 Cal. 412; *Freeborn v. Norcross*, 49 Cal. 313.)

McKEE, J.—Action to recover the possession of personal property or its value. The action was tried upon an issue of justification, under a writ of attachment against the plaintiffs' vendors.

Demand and refusal were admitted; it was also admitted that the defendant, acting as the sheriff of the city and county of San Francisco, by a writ of attachment sued out in the case of Dalton & Gray against Schmidt, Christian & Co., seized the property as the property of the attachment debtors, and afterwards sold it, at execution sale, by an execution issued on a judgment rendered in the case, and applied the proceeds of the sale to the satisfaction of the execution. But the court found that the property at the time of its seizure belonged to the plaintiffs, and that it was not subject to the levy of the attachment or execution. It is contended that the finding is not sustained by the evidence.

There was no substantial conflict of evidence. The property consisted of thirty-three tons of hay, which had been raised by Schmidt, Christian & Co., on a ranch situate on the Sacramento River. In October, 1879, they sold the hay on the ranch to the plaintiffs, and agreed to deliver it to them at a landing on the river known as Hudab's Landing. Immediately after the sale they had the hay hauled to the landing, where, soon afterwards, it was taken by the plaintiffs' agents on board a schooner which the plaintiffs had chartered to bring the hay for them to San Francisco, where they wanted to use it. The schooner arrived at her wharf in San Francisco with the hay, but before it was unloaded the defendant seized it by virtue of the attach-

ment; and it is contended that being on board the schooner, the hay had not been delivered on the wharf to the plaintiffs, and was in law in the possession of the vendors, and subject to the attachment against them.

But the sale made on the ranch was complete and not executory; and it was accompanied by an immediate delivery, when the hay was hauled to the landing in pursuance of the contract of sale, and followed by a change of possession when the plaintiffs by themselves or their agents received the hay on board the schooner to be carried to San Francisco. That possession thus acquired continued uninterruptedly in the plaintiffs until the seizure of the hay by the defendant. Being in *them* at the time of the seizure, the hay was not in the possession of the vendors, and the seizure was wrongful, unless the sale itself was fraudulent and void as against the creditors of the vendors.

In the transaction between the vendors and vendees, it is not claimed there was any fraud in fact; and as the sale was *bona fide*, accompanied by an immediate delivery and followed by a change of possession, it was not fraudulent in law. Being free from fraud in law and fact, the conclusion that the hay was the property of the plaintiffs at the time of the seizure by the defendant, and not subject to the attachment against their vendors, was legitimately drawn.

It was not erroneous to allow interest, by way of damages, on the value of the hay from the day it was wrongfully taken from the plaintiffs. (*Kelly v. McKibben*, 54 Cal. 192; *Freeborn v. Norcross*, 49 Cal. 313; *Page v. Fowler*, 89 Cal. 412; § 3287, Civ. Code.)

Judgment and order affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

[Department One.—May 9, 1883.]

CHARLES S. BRYCE ET AL., RESPONDENTS, v. OREN
JOYNT, APPELLANT.

PARTNERSHIP — EVIDENCE.—On an issue as to whether one of several persons sued as partners was a member of the partnership when the transactions in question took place, the books of the firm, in the absence of other evidence, are not admissible to prove his connection with the partnership. But evidence tending to show that he was a member being first introduced, and it appearing that he had access to the books during a considerable period covering the dates at which the transactions occurred, and that he examined them on several occasions, and caused balance sheets to be taken from them and rendered to him, the books and the entries in them are competent to be submitted to the jury.

ID.—PRELIMINARY PROOFS — EVIDENCE TO CONTRADICT.—The sufficiency of the preliminary proofs to justify the admission of the books is a question for the court, and it is not error to reject evidence offered before the books are admitted to contradict these proofs. The rejection of evidence thus offered does not preclude its introduction at a subsequent stage of the trial in order to obviate the effect of the books.

ID.—INSTRUCTION.—The rights of the defendant in such a case are properly guarded by an instruction to the jury not to consider the books at all as evidence unless they believe from the evidence that the defendant knew their contents, and consented to the entries made in them, or knowing of them assented to them afterwards.

OFFER OF EVIDENCE — PRACTICE — APPEAL.—An offer of evidence cannot be considered on appeal unless there is a ruling upon it and an exception taken.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was brought against three persons as partners, but was afterwards dismissed as to two of them without prejudice to the right of the plaintiffs to proceed against the remaining defendant as a member of the firm. The facts are sufficiently stated in the opinion of MR. JUSTICE MCKEE.

E. W. McGraw, for Appellant.

1. The books were not admissible for the purpose of showing that the defendant was a member of the partnership. (*Robins v. Warde*, 111 Mass. 244; *Abbott v. Pearson*, 130 Mass. 192; *McNeill's Exrs. v. Reynolds*, 9 Ala. 313.)

2. The admissibility of the books was a question for the court, and not for the jury, and the court erred in deciding it without hearing the evidence on both sides. (Best on Evidence, 113; *Bartlett v. Smith*, 11 Mees. & W. 485, 486; *Boyle v. Wise-*

man, 11 Ex. 360; *Cleave v. Jones*, 7 Ex. 421; *Corfield v. Parsons*, 1 Crompt. & M. 730; *Harris v. Wilson*, 7 Wend. 57; *Livingston v. Kiersted*, 10 Johns. 362; *Gorton v. Hadsell*, 9 Cush. 511; *Jones v. Hurlbut*, 39 Barb. 409; 1 Greenl. on Evidence, 13th ed. § 49, note 3; Code of Civil Procedure, §§ 2101, 2102.)

Chickering & Thomas, and Wm. M. Pierson, for Respondents.

1. Before offering the books, it was proved by evidence *aliunde* that the defendant was a partner. The books were admissible in corroboration of such evidence. (2 Greenl. on Evidence, § 483; Collyer on Partnership, § 770; *Richter v. Selin*, 8 Serg. & R. 437; *Howard v. Patrick*, 38 Mich. 795; *Frick v. Barbour*, 64 Pa. St. 120; *Chidsey v. Porter*, 21 Pa. St. 393; *McCann v. McDonald*, 7 Neb. 305; 2 Wharton on Evidence, §§ 1132, 1194; Parsons on Partnership, 195.)

2. The defendant was familiar with the books, frequently examined them, and had balance sheets made from them. Under these circumstances, the books were admissible irrespective of any other proof that he was a member of the firm; and a *prima facie* case for their admission being made out, it was proper for the court to admit them without hearing further evidence. (Code of Civil Procedure, § 2102; *Verzan v. McGregor*, 23 Cal. 342.)

3. The effect of the books as evidence was carefully guarded by the instructions of the court. (*Union Water Company v. Crary*, 25 Cal. 504.)

McKEE, J.—In this case the only issue raised by the pleadings involved the question: Whether Oren Joynt, the appellant, was at the dates of the transactions in controversy, a co-partner with the other defendants in the firm of Hubbard Ward & Company. The transactions with the company took place in March, 1877.

At the trial of the issue, after evidence had been given on behalf of the plaintiffs, tending to prove that on the first of March, 1876, Oren Joynt, George C. Joynt, and Hubbard Ward formed a partnership, under the firm name of Hubbard Ward & Co., and that in March, 1877, Oren Joynt was still a member

of the firm and continued therein until the failure of the firm in the fall of 1877, counsel for the plaintiffs proved the identity of the cash book, journal, and ledger of the firm, and, in connection therewith, gave evidence tending to prove that the defendant, during the years 1876-77, had had access to the books, and on several occasions had examined them and caused balance sheets to be taken from them and rendered to him. Upon that evidence the plaintiffs then offered some of the entries in the books and the books themselves as evidence, and, over the objections of the defendant, the court admitted them, and the ruling is assigned as error.

In and of themselves the books were not admissible for the purpose of proving partnership. Until there was evidence of the fact, at the times of the entries on the books, the entries are to be regarded as *res inter alios*, mere declarations of a third person, and not made under oath, which are not binding and are inadmissible to prove the fact. Partnership, like agency, must be proved by evidence *aliunde*. But when there is such evidence, sufficient in the judgment of the court to lay the foundation for the admission of corroborative evidence, then the books and the entries therein may be admitted as the facts and declarations of parties between whom such a relationship exists. (*Abbott v. Pearson*, 130 Mass. 191; *Robins v. Warde*, 111 Mass. 244; *McNeill's Exrs. v. Reynolds*, 9 Ala. 313.)

The case of *Hale v. Brennan*, 23 Cal. 512, like the case in hand, involved a question of partnership, i. e., whether there existed, between the plaintiff and the testator of the defendant in the case, a co-partnership in the business of keeping a hotel. At the trial it was admitted that the plaintiff was owner of one half of the hotel; evidence was also given tending to prove that the business had been carried on and the books kept in the name of the "Santa Cruz Hotel"; that the entries in the books had been made by the testator and the clerk of the hotel, and that, after the death of the testator, the plaintiff had taken possession of the books. Upon that proof the books were offered and admitted in evidence, and it was held they were properly admitted. "They may," say the court, "have offered very little evidence upon the main question; . . . but if they afforded any they were admissible."

Of course, the admissibility of the books depended upon the preliminary proof of partnership before the court at the time when the books were offered as evidence. But whether there was sufficient evidence of the fact, to serve as a foundation for their admission, was a question for the court, although the fact itself was ultimately to be found by the jury.

It is conceded that the admissibility of the books was a question for the court; but it is claimed that the defendant had the right to introduce counter-testimony upon the point of access and examination of the books, and that the right was denied him. The record shows no denial of the right, if such existed; for it shows that after the witnesses who had testified to the defendant's access to and examination of the books, had been cross-examined by his counsel, the counsel then stated to the court: "If the court thinks the admissibility of the books depends on that testimony, which is a question for the court, I think we would have a right to introduce counter-testimony upon that point, as to whether Joynt ever examined the books. We offer to put Oren Joynt on the stand to show that he never did." Upon this offer no ruling was made by the court, nor was one pressed; and the court ruled "that the books were admissible under the showing made." To that ruling no exception was taken. But when the entries on the books were offered, objections were made that "*they* were not admissible to prove partnership, and that the court should not pass upon the admissibility of the books until it has heard the evidence on both sides." Those objections were overruled, and to *that* the defendant then excepted.

But the ruling was not erroneous; for the books had been admitted, and the entries upon them, which were proposed to be read to the jury, tended to prove that the defendant was a member of the firm, and participated in its profits. Besides, a court is not bound to take counter-proof upon a preliminary question raised for its consideration and decision as to the admissibility of corroborative evidence of a fact in issue. It may permit such a course to be taken; but whether it will or not is a matter within its discretion, with which the appellate court will not interfere unless there has been an abuse of discretion. (*Verzan v. McGregor*, 23 Cal. 342; *Butler v. Beech*, 55 Cal. 29.)

Nor was the defendant deprived by the ruling of the court of the right to prove on the trial that he had not had access to the books and had not examined them. That right, indeed, was reserved to him by the court, but he refused to exercise it; for, so far as the record shows, at no time during the trial did he offer any evidence in rebuttal of the plaintiff's evidence; consequently there is nothing in the record contradicting the evidence in the case, that the defendant had access to the books, examined them, and had balance sheets taken from them and furnished to him; nor is there any evidence in the record to disprove the partnership.

Moreover, the court in its charge to the jury instructed them that "they should not consider the books at all as evidence, unless they believed from the evidence that the defendant knew their contents, or consented to the entries made in them, or knowing of them assented to them afterwards." The right of the defendant could not have been more carefully guarded. There is no affirmative and prejudicial error in the record.

Judgment and order affirmed.

McKINSTRY, and ROSS, JJ.—We concur. There was evidence tending to prove that Joynt was informed of the contents of the books without objecting to the manner in which they were kept. Evidence of his having examined the books, together with the entries themselves, properly went to the jury as tending to prove his recognition of the partnership.

Hearing in Bank denied.

[Department Two. — May 9, 1883.]

WILLIAM TRENOUTH, APPELLANT, v. ALEXANDER
GORDON ET AL., RESPONDENTS.

EJECTMENT — EVIDENCE. — Under the circumstances set forth in the opinion of the court, *held*, that it was competent for the defendants to defeat the action by showing that the legal title was outstanding in third persons, without connecting themselves with such title.

APPEAL from a judgment of the Superior Court of the city

and county of San Francisco, and from an order refusing a new trial.

James B. Townsend, for Appellant.

Houghton & Reynolds, and *M. G. Cobb*, for Respondents.

The plaintiff must recover upon the strength of his own title, and not on the weakness of the title of the defendants; that being so, defendants can show title out of plaintiff and in a third party. (*Moore v. Tice*, 22 Cal. 516; *Dyson v. Bradshaw*, 23 Cal. 536; *Coryell v. Cain*, 16 Cal. 567.)

MYRICK, J.—This is an action of ejectment. Plaintiff alleges possession and ownership in himself on the 1st of July, 1874, and an ouster on that day by defendants.

Plaintiff's claim of title is, in substance, as follows: One Antonino Buelna was the owner of a Mexican grant for four leagues. He died testate, leaving a widow surviving him. His will devised the four league grant, to each of five persons an undivided one fifth, his widow being one of the five. Another of the five was one Juan Bautista Buelna, who died, leaving two children. Plaintiff claims title as grantee of these two children. The widow of Antonino executed to Salvador Castro a deed of one league of the land, who presented to the United States land commission a petition to have the same confirmed to him. The land was so confirmed, and a patent was issued in 1861. The widow presented a petition for the confirmation to her of the other three leagues, which was granted, and a patent issued in 1861. In the proceedings before the land commission the petitioners claimed to be the owners, respectively, of the lands petitioned for.

Each of the defendants has been in the possession of the tract claimed by him for ten years before the suit was commenced, under deeds, claiming ownership.

There is no evidence that either plaintiff or his grantors, the children of Juan Bautista Buelna, were ever in possession of any of the premises in controversy; nor is there any evidence that the father of the grantors was ever in possession of any particular parcel of the land. He lived on the land in 1844,

but on what portion, or how much he occupied, if any, does not appear; for aught that appears he may have been a tenant of the claimant. His children were there in 1844; one was born that year, and one the year before. He died in 1846; where, does not appear. The children had no interest prior to the death of their father; and there is no evidence that they have been on the land or in possession since that event. Under such circumstances it was competent for the defendants to defeat the plaintiff's right to recover (even if he otherwise would have had the right), by proving that the persons holding the legal title had conveyed the same to third persons without connecting themselves with that legal title.

Judgment and order affirmed.

THORNTON, J. and SHARPSTEIN, J., concurred.

[Department One.— May 11, 1883.]

WILLIAM MOHLE, APPELLANT, v. WILLIAM
TSCHIRCH, HENRY DIERKS, RESPONDENT.

ATTACHMENT — PREFERRED CLAIMS — CONSTITUTIONAL LAW.—In an attachment suit certain laborers gave notice of preferred claims under section 1206 of the Code of Civil Procedure, and on the recovery of a judgment in that suit, the attached property having been previously sold under a stipulation between the parties, and the preferred claims having also been prosecuted to judgment, the court ordered that the latter judgment be first paid out of the proceeds of the sale. On appeal from this order, the section of the Code creating the preference was objected to as being unconstitutional, and it was further objected that the preference was lost by the sale of the property under the stipulation instead of an execution. *Held*, that neither of these objections was well taken.

ID.— ASSIGNMENT OF THE CLAIMS.—In such a case the preference given is not affected by an assignment of the claims after the service of the notice.

ID.— SUFFICIENCY OF NOTICE.—The notice was served on the day succeeding the levy of the attachment, and contained a statement that the claims were "for work and labor done for the defendant during the past sixty days." *Held*, that the notice was sufficient to show that the claims were for services rendered within sixty days prior to the levy.

APPEAL from an order of the Superior Court of the city and county of San Francisco, directing the payment of certain moneys in the hands of the sheriff.

The facts are stated in the opinion of the court.

E. B. Drake, for Appellant.

C. E. Royce, for Respondent.

PER CURIAM.—Defendant was indebted to plaintiff in the sum of six hundred dollars money loaned, and the further sum of ninety-eight dollars for wages as a laborer, a portion of the latter sum being for work done within sixty days prior to the levy of the attachment as hereinafter mentioned.

Plaintiff brought suit to recover his gross demand, and issued therein an attachment on the 13th, which was levied upon personal property of defendant on the 15th of November, 1880. On the 16th of the same month six laborers served a notice of preferred claims, under section 1206, Code of Civil Procedure, on the sheriff, the plaintiff and the defendant, and the same day they and the plaintiff stipulated and agreed with defendant, by written stipulation filed in the action, that the attached property should be sold on the 18th "for the benefit of this plaintiff or those who were entitled to the proceeds of said property." On the 18th judgment was entered by confession in the action, and the property was sold by the sheriff for six hundred and twenty-five dollars, which sum is now in the hands of that officer.

Five of the six laborers subsequently assigned their claims to the sixth, Dierks, who, on the 24th of November, within the ten days, brought suit to recover the amount of the claims and recovered judgment in the justices' court.

Afterward Dierks, on petition filed in this action, obtained an order on the plaintiff and the sheriffs to show cause why the latter should not pay the amount of said justice's judgment out of the moneys in his hands. On the 19th of January, 1881, the Superior Court made the order for the sheriff to pay the amount of said judgment, from which this appeal was taken.

It is contended by appellant that section 1206 of the Code of Civil Procedure is unconstitutional, in that it provides for taking private property without due process of law, and that it is special legislation. The section provides for notice to the attaching creditor, and the latter knows that his attachment will hold the property for the benefit of the claims of the preferred class which may be established. Our attention has not

been called to any subdivision of section 25 of article 4 of the State Constitution, which prohibits such legislation as is enacted in section 1206 of the Code of Civil Procedure.

It is also urged that the claimants lost their preference because the sale was not made under execution, but under a stipulation in the cause made by plaintiff, defendant, and the labor claimants. The sale under the stipulation was, however, but a substituted sale for one under execution.

It is also urged that the judgment in this action was for ninety-eight dollars for labor done, and therefore the claimants and their assignee, Dierks, are prohibited from a preference as to that sum. But as the funds in the hands of the sheriff was six hundred and twenty-five dollars, and the amount directed to be paid to respondent was two hundred and seventy-six dollars, leaving a balance of more than ninety-eight dollars to be applied on plaintiff's judgment herein, the point of appellant is not available here.

Appellant claims the notice of the claims of the laborers did not show that their claims were for services rendered within sixty days prior to the levy of attachment herein. The attachment was levied on the 15th of November, and the notice (served on the sixteenth) contains a statement that the claims were "for work and labor done for the said defendant during the past sixty days."

Another point of appellant is that the laborers asserting their preferred claims lost the benefit of section 1206 by the assignment to one of their number, and the prosecution of their claims to judgment by him. We can see no legal reason why, after liens in favor of the claims have attached by reason of the notice, an assignment of the claims should not carry the benefit of the liens. Such must be the effect of the assignment if valid, and the assignment is not expressly, nor do we think impliedly, prohibited by the section of the Code.

Order affirmed.

[Department One.— May 11, 1883.]

D. BLAGI, RESPONDENT, v. JOHN HOWES ET AL.,
APPELLANTS.

APPEAL — DISMISSAL OF — UNDERTAKING.—The defendants appealed from an order dismissing a motion for a new trial by serving and filing a notice and giving the undertaking required by section 941 of the Code of Civil Procedure. Subsequently they served and filed a notice of appeal from the judgment and filed the undertaking required by section 942 of that Code. The plaintiff moved to dismiss the appeal from the judgment, because the undertaking required by section 941 had not been given. *Held*, 1. That the appeal from the judgment is ineffectual for want of the undertaking required by section 941 — the undertaking on appeal from the order dismissing the motion for a new trial being inapplicable to the appeal from the judgment. 2. That the attempted appeal from the judgment failing, there is no such appeal pending, and the motion to dismiss must be denied on that ground, this course being regarded as the better practice in such a case.

MOTION to dismiss an appeal from a judgment of the Superior Court of the city and county of San Francisco.

Henry E. Highton, for Appellants.

P. B. Nagle, for Respondent.

PER CURIAM.—Respondent moves to dismiss the appeal from the judgment.

Judgment was rendered and entered in the court below in favor of plaintiff March 28, 1882. On the 2d of June following, defendant's motion for a new trial was dismissed by the Superior Court. On the 17th of the same month defendant filed and served a notice of appeal from the order dismissing his motion for a new trial, and on the same day filed an undertaking on appeal, as required by section 941 of the Code of Civil Procedure.

July 12, 1882, defendant served and filed a notice of appeal from the judgment, and on the same day filed the undertaking provided for in section 942 of the Code.

Here was an attempt to take two separate and distinct appeals at different dates. The question is, could defendant, after having perfected an appeal from the order dismissing the motion for a new trial — assuming the order to be appealable — give this court jurisdiction of an appeal from the judgment by subsequently filing and serving a notice of appeal therefrom with-

out giving the undertaking required by section 941. Section 940 of the Code of Civil Procedure declares "the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal" the undertaking required by section 941 be filed. In the case before us no such undertaking was filed within five days after service of the notice of appeal from the judgment. The undertaking filed within five days after service of notice of the appeal from the order does not refer to and cannot be made applicable to the subsequent and independent notice of appeal from the judgment.

This is not the case of a single notice of appeal from a judgment and order denying a new trial, followed, within the time limited, by an undertaking for costs and damages in this court.

We cannot consider the notice of appeal from the judgment as of any avail, and inasmuch as no appeal from the judgment is pending, the motion to dismiss is denied. (*Reed v. Kimball*, 52 Cal. 325.)

The practice with respect to such attempted appeals has not been uniform. Sometimes they have been "dismissed." But as such dismissals should be without prejudice, the form of the order is not very material. We consider it better practice, however, simply to refuse to hear the party who claims to have appealed, without having appealed in fact.

The motion is denied.

[Department One.— May 11, 1883.]

WILLIAM H. CLARK, RESPONDENT, v. HANNAH M. SMITH, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF HIRAM SMITH, DECEASED, APPELLANT.

SUMMONS — SERVICE — MOTION TO DISMISS.—In an action on a promissory note given by the deceased, and to foreclose a mortgage executed to secure its payment, the summons was served on the executrix by publication ten years after the commencement of the action, and the executrix thereupon moved the court to vacate the summons and dismiss the action as to her for want of diligence in its prosecution. It appeared that the deceased had conveyed the mortgaged property to another person, and was not the owner of it at the time of his death. It also appeared that a claim for the payment of the debt had been presented to the executrix in due time, and rejected by her. The court denied the motion on condition that the plaintiff file a stipu-

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lation waiving his right to a judgment for any deficiency that might arise on a sale of the mortgaged premises. *Held*, that under these circumstances the action of the court below should not be disturbed.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

There was a large number of defendants, but the only question on appeal was between the plaintiff and the executrix. As an excuse for the delay in serving the summons, it was shown that she had been absent from the State nearly all the time subsequent to the commencement of the action, and that her place of abode could not be ascertained by the plaintiff.

Stetson & Houghton, for Appellant.

B. S. Brooks, for Respondent.

PER CURIAM.—Hiram Smith deceased January 17, 1870. In his lifetime he gave to plaintiff his promissory note, and to secure the same executed a mortgage upon certain real property. After Smith's death plaintiff presented to Hannah M. Smith, executrix of his estate, his claim for the payment of his mortgage debt, which she rejected, May 28, 1870. Plaintiff began this suit to foreclose the mortgage on the 26th of August, 1870.

In the summer of 1880, on application of plaintiff, an order was made that service of summons by publication be made upon Hannah M. Smith, and an alias summons was then issued. Subsequently Hannah M. Smith moved the court to dismiss the action against her, and to vacate the alias summons, on the ground that plaintiff had failed to prosecute the action with due diligence.

The motion was denied, "but upon condition that the plaintiff file herein within five days after receiving notice of this order, a stipulation waiving all claim for judgment for any deficiency that may arise after the sale of the mortgaged premises," etc. Hannah M. Smith appeals from this order.

It is stated in the points of appellant's counsel that in his lifetime Hiram Smith sold the mortgaged land to one B. F. Moulton.

In his affidavit, filed by appellant on her motion to dismiss

in the court below, John W. Stewart swears that he is the sole surviving executor of B. F. Moulton, deceased, and that "said B. F. Moulton was, at the time of his death, the owner of the land in the complaint described, having acquired the same by purchase from Hiram Smith," etc. Appellant on said motion also filed the affidavit of James F. Cossett, who swears therein that he was appointed by the Probate Court one of the appraisers of the estate of B. F. Moulton, deceased, that the premises described in the complaint were included in the inventory of the estate of Moulton.

It thus appears that the appellant has become merely a nominal defendant. The order of the court below by its terms limits the plaintiff to a collection of his mortgage debt out of the land mortgaged, the title to which, by appellant's own showing, had passed to Moulton in the lifetime of Hiram Smith. Under the circumstances, even if we would have otherwise been inclined to interfere with the discretion of the Superior Court, we decline to reverse an order which sufficiently protects the estate of Hiram Smith and his heirs.

Judgment affirmed.

[Department One.—May 11, 1883.]

DENNIS O. DINAN, RESPONDENT, v. F. FITZ GIBBON ET AL., APPELLANTS.

ASSAULT — DEADLY WEAPON — PROTECTION OF PROPERTY — INSTRUCTIONS.—

The plaintiff sued to recover damages for an alleged assault in which he was seriously wounded by the discharge of a gun. The defendant Gibbon and the mother of the plaintiff were the owners of adjoining lots in the city of San Francisco, and a dispute existed between them as to the division line. Gibbon erected a shed about ten feet high near the line, and the plaintiff claimed that the roof of the shed projected over upon the land of his mother. Gibbon was notified of the projection, but disregarded the notice. There was evidence tending to show that he believed the shed to be wholly on his own land, that at the time of the assault, the plaintiff, assisted by several other persons, was proceeding with force and violence to remove what he claimed to be the projecting portion of the roof, that Gibbon was not present, but his nephew, acting under directions from him, appeared with a loaded gun, and declared his intention to protect the shed from injury, that the plaintiff and one of the persons with him attempted to get possession of the gun, and that a struggle ensued in the course of which the gun was discharged and the wound inflicted. The court instructed the jury substantially that the mere fact of the use of such a weapon gave the plaintiff the right to recover. *Held*, that the instruction was erroneous.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of MR. JUSTICE MCKEE.

Jarboe & Harrison, for Appellants, argued that the instruction of the court as to the right to use fire-arms in defense of property was erroneous, citing section 197 of the Penal Code; *Pond v. The People*, 8 Mich. 166; *People v. Flanagan*, 60 Cal. 2; *Miller v. State*, 74 Ind. 1; *Taylor v. Clendening*, 4 Kan. 534; *Morris v. Platt*, 32 Conn. 75.

Fox & Kellogg, for Respondent, argued that the defendants were not acting in defense of person or habitation, and that the instructions of the court, taken as a whole, fairly submitted the case to the jury, citing *Brooks v. Crosby*, 22 Cal. 42; *Conroy v. Duane*, 45 Cal. 597; *Siemers v. Eisen*, 54 Cal. 418.

MCKEE, J.—This was an action to recover damages as compensation for injuries sustained from an assault on the plaintiff alleged to have been committed by the defendants.

The case was given to the jury upon evidence tending to show that the alleged assault had been committed under the following circumstances: Defendant Gibbon and the mother of the plaintiff were owners of adjacent parcels of land in the city of San Francisco. There was a dispute between them as to the true division line of the lots. Gibbon had constructed near to what he believed to be the line a shed about ten feet high, the roof of which, according to the assertion of the plaintiff, projected over a part of his mother's lot and came near to her house. Notice of the projection was given to the defendant, but he gave no heed to it. In that state of the question, the plaintiff on the 25th of September, 1876, took several men on to his mother's lot to saw off that part of the roof of the shed which extended over so much of his mother's lot as lay between her house and the supposed dividing line, and to move her house close up to that line. One of the men had mounted the roof of the shed and was in the act of sawing off the projection when the defendant, Quinlan, appeared on the balcony of the house on Gibbon's lot armed with

a double-barreled shotgun, which Gibbon had loaded with powder and buckshot, and put it in the hands of Quinlan, "to watch his property against the Dinans." To prevent Quinlan from using the gun against the person on the shed, the plaintiff and another caught hold of the gun and a contest resulted between the parties, in which the gun in the hands of Quinlan was discharged into the body of the plaintiff, severely wounding him.

On submitting the case to the jury, the court, among other things, instructed them as follows:—

"1. You are instructed that the controversy over this piece of land did not justify the use of fire-arms in its settlement; that a person has no right to use deadly weapons excepting it be in the defense of life or in the protection of his domicile. Those are the only cases in which a party is authorized under the laws of this State to use anything which is calculated to produce death.

"2. If you believe from the evidence that the defendant did use this weapon for the purpose of this transaction—for the purpose of producing great bodily injury—if he used it, in fact, at all, to resist the encroachment even of the plaintiff in this action, then it is your duty, under the law, to find a verdict against him for the actual damages which the plaintiff sustained, whether there was malice in it or not.

"3. The very fact that the defendant used this unlawful weapon gives the plaintiff the right to recover."

Of course, if the evidence showed that the defendant only used the weapon for the deliberate purpose of producing great bodily injury on the plaintiff, it would have been the duty of the jury to find for the plaintiff. The use of a deadly weapon for such a purpose would render a party not only civilly but criminally liable. No one is justifiable in law, even under a pretense of right, to inflict on another a wanton and malicious assault. But if the defendant used the weapon "to resist the encroachment of the plaintiff" as a trespasser on his premises, such use would not be unlawful, unless it was unnecessary. For there is no doubt that a person in the lawful possession of premises has a right to protect them or to eject an intruder upon them; and in the exercise of his right, for that purpose, he may use such force as may be reasonably necessary. Acting within

the limits of a reasonable use of force to protect himself or his property he is justifiable in law; but if he exceeds the force necessary he becomes a trespasser *ab initio*. Yet the necessity of the force which was resorted to to repel the "encroachment" of the plaintiff upon the defendants' premises, and the question whether the defendants used more force and violence upon the person of the plaintiff than was necessary for the protection of their property, should have been left to the jury. It was interfering with their constitutional right to determine all matters of fact, for the court to instruct them that the mere use of the weapon to resist the encroachment of the plaintiff gave him the right to recover.

Besides, if the plaintiff was the aggressor, and had actually employed others to destroy what was confessedly the property of the defendant, and was aiding and abetting them in such attempt to destroy it, in the performance of which he received his injuries, these circumstances were proper for the consideration of the jury in mitigation of damages, although they may not have been sufficient to justify the defendants for the use of a deadly weapon; and it was error to lead the jury away from the consideration of these things by instructing them that the mere use of the weapon entitled the plaintiff to their verdict.

Judgment and order reversed, and cause remanded for a new trial.

ROSS and MCKINSTRY, JJ.—In view of the testimony on the part of defendants, we agree that the court below erred in giving the third instruction mentioned in the opinion of MR. JUSTICE MCKEE, and, therefore, concur in the judgment.

[Department One.— May 11, 1883.]

MARY FINNIGAN, APPELLANT, v. THE HIBERNIA SAVINGS & LOAN SOCIETY ET AL., RESPONDENTS.

HUSBAND AND WIFE — EARNINGS OF WIFE.— Under section 168 of the Civil Code, the earnings of the wife are not liable for the debts of the husband.

APPEAL from a judgment of the Superior Court of the city

and county of San Francisco, and from an order refusing a new trial.

The lower court found that the plaintiff and the defendant Daniel Finnigan were husband and wife, and had been such since the year 1850, and that while this relation existed plaintiff made the sum of \$1,874.29, by renting rooms and conducting a saloon business, within five years last past, and that during this time the defendant Daniel Finnigan contributed nothing to the support of the plaintiff or his family, and that plaintiff and defendant did not cohabit, because cohabitation was disagreeable to plaintiff, and because she refused to cohabit with the defendant Daniel Finnigan. She was not a sole trader. She deposited the money in the bank, and it was seized under an execution against the husband.

Charles F. Hanlon, for Appellant.

A. A. Pardow, for Respondents.

PER CURIAM.—The respondents' proposition in this case is, that money earned by a wife may be taken for the debt of her husband. The question is solved by a provision of the Code not referred to by counsel on either side. It is section 168 of the Civil Code, and reads: "The earnings of the wife are not liable for the debts of the husband."

That part of the judgment appealed from, together with the order denying the motion for a new trial, reversed, and cause remanded.

[Department One.— May 11, 1883.]

JOHN T. JOHNSON, APPELLANT, v. WILLIAM
BROWN ET AL., RESPONDENTS.

EJECTMENT — ADVERSE POSSESSION.—A continuous adverse possession of land for five years vests the occupant with title.

ID. — AGREED BOUNDARY.—Where the owners of adjacent parcels of land recognize a particular line as the boundary between their respective parcels, and hold possession adversely in conformity to such line for more than five years, each is estopped from afterwards questioning the line so recognized as the true boundary.

Id. — PAYMENT OF TAXES. — The provision of the Code requiring the payment of taxes as an element of adverse possession, has no application where the Statute of Limitations had run prior to the adoption of that provision. A title acquired under the statute cannot be divested by a subsequent enactment.

APPEAL from an order of the Superior Court of the city and county of San Francisco refusing a new trial.

The facts are stated in the opinion of the court.

C. V. Grey, for Appellant.

Leonard Reynolds, for Respondents.

The authorities are abundant to the point that when the owners of adjoining lands have acquiesced for a considerable time in the location of a division line between their lands, although it may not be the true line according to the calls of their deeds, they are thereafter precluded from saying it is not the true line. (*Sneed v. Osborn*, 25 Cal. 626.)

When a grantee of a lot in San Francisco, by mistake and in good faith, takes possession of a strip adjoining his lot, and remains in the adverse possession of it for five years subsequent to the Act of April 18, 1863, such adverse possession would bar an ejectment. (*Grimm v. Curley*, 43 Cal. 250; *Stuyvesant v. Dunham*, 9 Johns. 61; *Columbet v. Pacheco*, 48 Cal. 395; *McCormick v. Barnum*, 10 Wend. 104; *Adams v. Rockwell*, 16 Wend. 286; *Baldwin v. Brown*, 16 N. Y. 359; *Reed v. Farr*, 35 N. Y. 113; *Biggins v. Champlin*, 8 Pac. C. L. J. 811.)

McKEE, J.— Ejectment to recover a strip of land about a foot wide and a hundred feet deep.

The case shows that the land formerly belonged to the plaintiff, as part and parcel of a tract of land one hundred feet wide and one hundred feet deep, situate on the Potrero Nuevo in the city and county of San Francisco. In October, 1870, the plaintiff, being then the owner of the tract, sold to the defendant a lot twenty-five feet wide and one hundred feet deep, off the southern side of the tract. At the time of the sale he pointed out a fence on the southern side as the southern line of the tract. The defendant, after he had received his deed for his lot, entered within that fence, and with a pole and tape line

measured off, northerly from the end of the fence, a distance, as he supposed, of twenty-five feet front. The measurement included the strip of land in controversy, but the fact was not known to the plaintiff or the defendant. The former was not present at the measurement, but he was immediately informed of it by the latter, and he recognized it and acquiesced in it as correct. At all events, being coterminous proprietors, it was then agreed between them that if the defendant would build his house close up to the supposed division line, the plaintiff would build a fence along the line from the house to the rear line of the lots. The house and fence were, in fact, built by the respective parties, and formed what was supposed to be the northern line of the defendant's lot; and that line in connection with the fence on the southern side made an enclosure of the lot within which the defendant has resided, occupying to the lines of both fences, continuously and adversely to the plaintiff, as adjacent proprietor, from October, 1870, until the commencement of the action in June, 1878. This adverse possession of the land vested the defendant with title. (*Cannon v. Stockmon*, 36 Cal. 539; *Arrington v. Liscom*, 34 Cal. 381; *Langford v. Poppe*, 56 Cal. 73.)

Besides, where owners of adjacent parcels of land have occupied adversely to each other for more than five years, their respective tracts by a division line, which each has recognized and acquiesced in as the true line, during all of that time, either is estopped from afterwards questioning it as the true line. (*Sneed v. Osborn*, 25 Cal. 626; *Columbet v. Pacheco*, 48 Cal. 395; *Moyle v. Connolly*, 50 Cal. 295; *Biggins v. Champlin*, 50 Cal. 113; *Cooper v. Vierra*, 59 Cal. 282.)

Evidence as to the payment of taxes by plaintiff on the adjacent lot of seventy-five feet front, which remained to the plaintiff after he had conveyed to the defendant, was properly excluded. The evidence was immaterial. The defendant was not bound to prove that he had paid the taxes levied on the strip of land in dispute, to establish his adverse possession of it; for the statute requiring the payment of taxes as an essential element of adverse possession was not passed until April, 1878, three years after the Statute of Limitations had run in his favor. The title acquired under the Statute of Limitations before the passage of

the law could not be divested by the law. (*Sharp v. Blankenship*, 59 Cal. 288.)

Order affirmed.

Ross, J., and McKINSTRY, J., concurred.

[Department One. — May 11, 1883.]

D. J. QUIMBY, RESPONDENT, v. JOHN L. LYON ET AL.,
APPELLANTS.

PLEADING — MONEY HAD AND RECEIVED.—In an action for money had and received to the use of the plaintiff, it is not necessary to allege a request or demand for the payment of the money. Such an allegation is usual, but not essential to the sufficiency of the complaint.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

Harmon & Galpin, for Appellants, argued that a demand was necessary, and should have been alleged. The principal authorities cited by them are referred to in the opinion of the court.

E. F. Preston, for Respondent, contended that no demand was required, and cited a large number of authorities in support of his position. The following are the most important: *Utica Bank v. Gieson*, 18 Johns. 485; *Calais v. Whidden*, 64 Me. 253; *Stetson v. Howe*, 31 Me. 353; *Hawley v. Sage*, 15 Conn. 54; *Spence v. Thompson*, 11 Ala. 746; *Rutherford v. McIvor*, 21 Ala. 750; *Hall v. Marston*, 17 Mass. 577, 579.

McKINSTRY, J.—The appeal is on the judgment roll, and the single point is made that the complaint does not allege a demand and refusal to pay the money. The objection was not made in the court below.

The complaint avers: "Heretofore, to wit, on the 29th day of December, 1878, the said defendants were indebted to the plaintiff in the sum of \$1,500, gold coin of the United States, for money had and received by said defendants upon the 28th day of December, 1878, for the use and benefit of the plaintiff. That no part," etc.

It is settled that the "common counts" can be used in this State. (*Abadie v. Carrillo*, 32 Cal. 174.)

"In point of form there are in pleading two descriptions of request, one termed a special request, and the other, the *licet sæpe requisitus*." (1 Chitty's Pleadings, 16 Am. Ed. 541.)

A special request need not be stated or proved in the case of common counts for goods sold, work and labor, money lent, etc. The *licet sæpe requisitus*, though usually inserted in the common breach to the money counts, is of no avail in pleading, and the omission of it will in *no case* vitiate the pleading. (Chitty's Pleadings, 329-331.)

As was said by the Supreme Court of Connecticut: "When money is received by one man, which belongs to another, the law raises a promise on the part of the receiver that he will pay it, and that, too, without any previous request. If, therefore, from the situation of the parties, or the relation in which they stood to each other, this implied promise could have been rebutted, the defendant should have shown it. But as he has shown nothing but a desire to keep the plaintiff's money, his case must be governed by the general rule applicable to a precedent debt or duty." (*Hawley v. Sage*, 15 Conn. 56.)

The action for money had and received may be maintained whenever an equity arises from the circumstance that one man has money which he ought to pay to another. There is no presumption that the one in possession holds the money under a contract express or implied to retain it until the party entitled to it shall actually demand it.

The California cases relied upon by appellants do not sustain their position. In *Reina v. Cross*, 6 Cal. 30, it was said: "A party receiving money to the use of another is rightfully in possession until the same is demanded." But there were two counts in the complaint and the other was held good, so that the *dictum* with reference to the first was not necessary to the determination of the appeal. In *Stanwood v. Sage*, 22 Cal. 517, it would seem that the complaint did allege a demand, and the court did not hold, nor was it called on to hold, that the averment of demand was necessary. *Campbell v. Jones*, 38 Cal. 507, was an action, *in tort*, for specific personal property, with damages for its detention. The complaint showing affirmatively that defendant

came rightfully to the possession of the property, the omission to aver a demand for its delivery or refusal, or its conversion, rendered — said two of the five justices — the complaint fatally defective.

Judgment affirmed.

Ross, J., and McKee, J., concurred.

[Department One. — May 11, 1888.]

**J. J. PETTIGREW, RESPONDENT, v. JACOB
DOBBELAAR, APPELLANT.**

DEED — SUFFICIENCY OF DESCRIPTION. — The action was ejectment, and plaintiff introduced two deeds in support of his title. The first, after stating that the property was situated in the city and county of San Francisco, State of California, described it as follows: "Gift Map No. 2, lots No. 398 to 403 inclusive," etc. The descriptive clause of the second deed was as follows: "All lands and real estate belonging to the said party of the first part wherever the same may be situated, together," etc. This deed was executed in Illinois. *Held*, 1, that if there was a map of lands in San Francisco known as "Gift Map No. 2," the description in the first deed is sufficient; and 2, that if the lands in controversy belonged to the grantor mentioned in the second deed, they passed by the execution of that deed.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the head note and opinion of the court.

N. B. Mulville, for Appellant, cited § 1092, Civ. Code: § 2077, Code Civ. Proc.; *Stanley v. Green*, 12 Cal. 149.

R. W. Hent, for Respondent.

PER CURIAM. — Appeal by defendant from a judgment for the recovery of certain lands.

Appellant claims the deed from Harvey to Lacey is void, because it contains no description of the lands sought to be conveyed.

The deed purports to remise, release, and forever quit claim . . . those certain pieces and parcels of land in the county

of San Francisco, State of California, bounded and particularly described as follows, to wit: "Gift Map No. 2, lots No. 308 to 405 inclusive. Gift Map No. 2, lots No. 406, 407; together with all tenements, hereditaments thereto belonging, and also all the estate, right, title, and interest," etc.

If there was a map of lands in San Francisco known as "Gift Map No. 2," the description is sufficient. We cannot say, therefore, that it is insufficient. (*Penry v. Richards*, 52 Cal. 496.)

Appellant also urges the second deed from Harvey to Lacey contains no description, and is void. The descriptive clause is, "all lands and real estate belonging to the said party of the first part, wherever the same may be situated, together," etc.

If the lands in controversy *belonged* to Harvey they passed by the deed last mentioned. (*Lick v. O'Donnell*, 3 Cal. 59.)

The testimony of Harvey — if believed by the court below, and it would appear from the finding it was believed — proved that defendant occupied with the consent of plaintiff's grantor, with an agreement on his part that he would surrender possession on demand. The demand was made.

Judgment and order denying new trial affirmed.

[Department Two. — May 11, 1883.]

BARBARA JENNINGS, ADMINISTRATRIX, ETC., APPELLANT, v. THEODORE LE ROY ET AL., RESPONDENTS.

CONSTITUTIONAL LAW — POWER OF THE LEGISLATURE — CHANGING THE GRADE OF A STREET. — The Act of the 1st of April, 1878, changing the grade of Bay Street in the city and county of San Francisco, was not in violation of any constitutional provision in force at the time of its passage, although its effect was to modify *pro tanto* the general statutes relating to street grades and improvements in San Francisco, and no provision was made for compensation to the owners of adjacent lots.

WORK DONE IN CHANGING THE GRADE — ASSESSMENT AND PRIOR PROCEEDINGS — STATUTES APPLICABLE. — The general statutes above referred to, as modified by the act in question, held to govern in relation to the assessment for the work and proceedings prior thereto.

IN — FINDINGS — EVIDENCE. — The court below found that the resolution of the board of supervisors ordering the work to be done was not published after its introduction and before final action thereon, and that certain notices required in the course of the proceedings prior to the assessment were not given. The plaintiff gave in evidence the assessment, diagram, warrant, and affidavit of demand and non-payment, with the indorsements thereon.

showing the same to have been duly recorded, and no other evidence was introduced in regard to the proceedings. The assessment, diagram, and warrant being *prima facie* evidence of the regularity of the previous proceedings, held, that the findings could not be sustained.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was brought to collect an assessment upon lots fronting on Bay Street, in the city and county of San Francisco, for grading that street under the act of the legislature passed April 1, 1878, entitled "an act to authorize the board of supervisors of the city and county of San Francisco to order Bay Street graded, and to change its grade."

Section one of the act authorized and empowered the board of supervisors of the city and county of San Francisco to order graded the whole or any part of Bay Street from the east line of Larkin Street to the east line of the Presidio Reservation, without receiving any petition from any person therefor, with the *proviso*, that the board shall have the grading between the east line of Larkin Street and Fillmore Street done either as a whole or in subdivisions, at their discretion; and that they shall have the grading between Fillmore Street and the east line of the Presidio Reservation done either as a whole or in subdivisions, at their discretion.

Section two of the act changed the old grade, and fixed and established a new one.

Section three of the act repealed all acts in conflict with its provisions, in so far only as they are inconsistent.

J. M. Wood, and J. C. Bates, for Appellant.

All proceedings by the board of supervisors were regular and correct, there being no objection taken to the assessment, diagram, warrant, and return when introduced and read in evidence, which of course *prima facie* proved the regularity and correctness of all prior proceedings. (Stats. 1871-72, p. 815, § 12; *Smith v. Cofran*, 34 Cal. 317.)

The conclusion of law, on page 39 of transcript, would lead one to imagine that the trial court thought the Act of

April 1, 1878, unconstitutional and void, as providing a different mode of procedure for Bay Street from other streets that required the same kind of work done. A similar question was distinctly raised and squarely passed upon in the case of *Oakland Pav. Co. v. Rier*, 52 Cal. 275.

In that case the court say: "It is urged that the sections of the act relating to Broadway Street are unconstitutional, but we see no ground upon which that proposition can be maintained. No reason is suggested why the legislature, in providing for the improvement of the streets in a city, may not devise or adopt two or more modes for that purpose, if the condition of the streets, in the opinion of the legislature, seems to require it. Nor is there any force in the objection that the council has no power to levy an assessment in the usual manner to pay for the improvement. (Cooley's Con. Lim. p. 497.)

There can be no doubt that the petition of property owners can be dispensed with in all street assessment proceedings.

In the case of *Hewes v. Reis*, 40 Cal. 263, Justice Temple uses the following language: "It was competent for the legislature to have authorized the board to make the contract without publishing a notice of intention and without inviting bids, and then to have compelled the defendants to pay the amount through its sovereign power of taxation."

B. S. Brooks, for Respondent.

The principal question is, whether the cost of grading Bay Street, under the act passed April 1, 1878, entitled "an act to authorize the board of supervisors of the city and county of San Francisco to order Bay Street graded, and to change its grade," was a charge upon the lots fronting on the said street. It was not claimed that the work had been done in compliance with the provisions of the general street improvement law of the said city and county, or so as to create any charge against the said property under that law, but the right was claimed by virtue of the special act, and it was admitted that the width and grade of said portion of Bay Street had been established before that.

To construe the act according to its terms, makes it constitu-

tional and just. To interpolate into it a clause that it is to be done at the expense of the adjoining property would render it unjust, and of doubtful constitutionality.

While it gives a discretion to the board to do the work or not at their pleasure, and if they decide to do it, then in such parcels as they please, it does not require any notice to the property owner, or fix any time or place when he can be heard. "It is fundamental law that no man shall be deprived of his rights, either of person or property, without an opportunity of being heard. He cannot be heard unless he have a reasonable notice of the time when, and the place where, his rights are to be adjudged." (*N. J. Turnpike Co. v. Hall*, 2 Har. (N. J.) 337; *State v. Newark*, 1 Dutch. 411; *Hess v. Cole*, 3 Zab. 124; *State v. Jersey City*, 4 Zab. 662.)

It was accordingly held that a law which did not itself provide for such notice and hearing was unconstitutional and void. (*Stuart v. Palmer*, 74 N. Y. 183; *State v. Morristown*, 5 Vroom, 445-454; *State v. Plainfield*, 38 N. J. L. 95, 98.)

It is a special law, "unequal and partial legislation." (*Cooley*, 389-393; *Munn v. People*, 69 Ill. 85; *Sedgwick on Stat. and Const. Law*, p. 80; *People v. Cooper*, 83 Ill. 594.)

We have a special act establishing the grades of the streets of the city, and fixing a mode of procedure by which the grade may be changed, and providing for the ascertainment and payment of damages.

This is in accordance with a principle, now recognized in all or nearly all the States, that a change of an established grade should not be made without compensation. (*Ryan v. Boston*, 118 Mass. 248; *Herzer v. Milwaukee*, 39 Wis. 360; *People v. Green*, 64 N. Y. 606; *McCarthy v. St. Paul*, 22 Minn. 527; *Mayor v. Nichol*, 59 Tenn. 838; *Elgin v. Eaton*, 83 Ill. 535; *Damour v. Lyons City*, 44 Iowa, 276; *Armstrong v. St. Louis*, 3 Mo. App. 151; *Schumaker v. St. Louis*, 3 Mo. App. 297; *Lane v. Boston*, 125 Mass. 519; *Cambridge v. Middlesex Co. Com.* 125 Mass. 529; *Akron v. Chamberlain Co.* 34 Ohio St. 328; *Donovan v. Springfield*, 125 Mass. 371.)

MYRIOK, J.—The Act of April 1, 1878, (Stats. 1877-78, p. 931), must be construed as having the effect of changing the

grade of Bay Street at the points therein designated, and of authorizing that street, between the termini named, to be graded to the line of grade thereby established, without a petition from property owners. At the time of the passage of that act there was no constitutional objection to its passage. It was competent for the legislature to pass the act, even though it might, in effect, repeal or modify some provisions of existing laws, and that without re-enacting the statutes as modified or changed. The purpose of the act is sufficiently stated in its title. The respondent claims that when the line of grade has once been established (the street not being in fact graded to the line), the adjacent property owners have a right of property in the line of grade as established which cannot be taken from them without compensation. We have not been referred to any case or to any text writer which sustains the proposition. The cases are uniform, that the owner holds his property subject to the right of the legislative authority to establish and change grades; some cases, however, have stated that the owner is entitled to damages if his improvements or his right to use them are affected. The case before us is not such a one.

The court found that the resolution ordering the work to be done was not, after its introduction, published before final action thereon; that notice of the nature and character of the work to be done, with specifications, was not posted in the office of the superintendent of streets; and that no notice of the award was published. The only evidence upon that subject was the assessment, diagram, warrant, and affidavit of demand and non-payment, with the indorsements thereon showing due recording. The statute (Stats. 1871-72, p. 815, § 12) makes the warrant, assessment, and diagram *prima facie* evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent, and of the regularity of all the acts and proceedings of the board of supervisors, upon which they are based; therefore there was some evidence of the regularity and correctness of the proceedings, and, there being no evidence in conflict, the findings above referred to are not sustained.

We are of opinion that the general statutes concerning the improvement of streets in the city and county of San Fran-

cisco, as modified by the Act of April 1, 1878, apply to the case before us.

The judgment and order are reversed, and the cause is remanded for a new trial.

THORNTON, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

[Department Two.— May 14, 1883.]

IN THE MATTER OF THE ESTATE OF FRANCISCO PALOMARES, DECEASED, A. BRISWALTER, APPELLANT.

ADMINISTRATION — SETTING APART PROPERTY FOR MINOR CHILDREN — DECREE — NOTICE. — Upon proper application the lower court made a decree setting apart certain property appraised at fourteen hundred and forty dollars, for the use and benefit of minor children. It appeared from the inventory that the whole estate did not exceed fifteen hundred dollars. The decree recited that notice had been given of the hearing of the petition as directed by a previous order of the court, that testimony was taken, and that the widow had consented. Afterwards, Briswalter, a creditor, filed a petition asking that the decree be set aside, alleging that no publication of notice to creditors had been given, that the proceedings were taken to defraud and hinder the creditors of deceased, that the proper notice had not been given, and that the property was of far greater value than fifteen hundred dollars. The court denied the prayer of the petitioner. *Held*, (1) that notice to general creditors was not necessary; (2) that the proceedings being regular, and the court having found that proper notice by posting had been given, and that the value of the estate did not exceed fifteen hundred dollars, its judgment cannot be interfered with.

APPEAL from an order of the Superior Court of Los Angeles County, refusing to vacate a decree setting apart certain property for the use and benefit of minor children.

Andres Briswalter, the appellant, was a judgment creditor of the deceased. The remaining facts sufficiently appear in the opinion of the court.

Glassell, Smith & Patton, for Appellant.

F. H. Howard, for Respondent.

MYRICK, J.—The deceased died intestate, leaving him surviving, a widow and four minor children. Letters of administra-

tion were regularly issued, and appraisers duly appointed. An inventory and an appraisement were duly made and returned on the 14th of February, 1882, with the affidavits required by the Code, from which it appeared that the estate of the deceased consisted of a piece of land of the value of \$1,440. On the 17th of February, 1882, the administrator presented and filed a petition, stating the above facts, and that the widow had property of her own, and did not require any allowance, and asking that the whole of the property, after paying the expenses of the last illness, funeral charges, and expenses of administration, be assigned for the use and support of the minor children. The court by its order of February 17th, set the hearing of the petition for February 28, 1882, and directed notice to be given by posting in three public places. On the 28th of February the court made a decree assigning the whole of the property for the use and support of the minor children. This decree recites the facts above stated; also, that due notice of the hearing had been given as required by the previous order, that testimony was taken, and that the widow had consented that the property be set apart to the children. July 12, 1882, the appellant, Briswalter, filed a petition that the decree of February 28th be set aside, alleging that no publication of notice to creditors had been given; that the proceedings to have the property set apart were taken for the purpose of hindering, delaying, and defrauding the creditors of deceased; that no notice was given of the proceedings beyond posting notices at the county clerk's office, at the county tax collector's office, and at the outer door of the court-room of the court, all of which places were in one building known as the court-house building; that the petitioner knew nothing of the proceedings until long after the order was made; and that the property was of far greater value than \$1,500. On the hearing of this petition affidavits were read on the part of petitioner stating the value of the land to be far in excess of \$1,500, and on the part of the respondents stating the value to be less than \$1,500, and the court denied the prayer of the petition. From this order of denial the petitioner appealed.

For the decision of this appeal it is necessary only to say that no notice to general creditors was required to be given; and that the proceedings appear to have been regular. According

to section 1469 of the Code of Civil Procedure, if, on the return of the inventory, it shall appear *therefrom* that the value of the whole estate does not exceed \$1,500, if there be a widow or children, or both, notice is to be given by posting or otherwise, as the court or judge may direct; and if, on the hearing, the court finds the value not to exceed \$1,500, it shall, by decree, assign for the use and support of the widow and children the whole of the estate, after the payment of the expenses of the last illness, funeral charges, and expenses of administration, and there must be no further proceedings in the administration unless further estate be discovered. In this case it does appear *from the inventory* that the value of the whole estate did not exceed \$1,500, and on the hearing the court found that notice had been given as required (thereby determining, as it had the right to do, that the places of posting were three public places in the county), and after hearing evidence found that the value of the property did not exceed \$1,500. Admitting that the court below could, if it had been imposed upon by a false inventory and appraisement, or by false testimony on the hearing, have set aside the decree of February 28th, we see no ground for doubting the correctness of the ruling in this case. The proceedings appear to have been regular and according to law. The statute has confided to the appraisers in the first instance, and to the court in the second instance, the duty of ascertaining and fixing the value; and the reasonable and proper exercise of their judgment cannot be interfered with.

Order affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

[Department Two. — May 15th, 1883.]

WILLIAM TRENOUTH, APPELLANT, v. L. B. GILBERT
ET AL., RESPONDENTS.

STATUTE OF LIMITATIONS — TENANTS IN COMMON — TRUST — FINDINGS — EVIDENCE. — In an action between tenants in common of real estate to establish a trust in favor of the plaintiff as the equitable owner of an undivided interest, the legal title having been acquired by the defendants, and the Statute of Limitations being pleaded in bar of the action, the court found in sub-

stance that the cause of action accrued more than four years before the commencement of the action, and that there had been a continuous adverse possession by the defendants for more than five years prior thereto. *Held*, on a review of the evidence, that it was insufficient to support the finding as to the adverse possession of the defendants.

10. — PURCHASE FROM TENANTS IN COMMON. — Certain findings, in relation to a purchase of the interests of some of the tenants in common by the defendants and their grantors while in possession holding adversely, examined by the court, and their effect determined with reference to the statute.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was brought to establish a trust, and for other relief in connection therewith. The additional facts, so far as they bear upon the points decided, appear in the opinion of the court.

J. B. Townsend, and McClure & Dwinelle, for Appellant.

John Reynolds, M. G. Cobb, C. N. Fox, and Arthur Rodgers, for Respondents.

SHARPSTEIN, J.—Unless his cause of action is barred by the Statute of Limitations, the plaintiff is entitled to a part of the relief prayed in his complaint. By the deeds of Maria Louisa and Juan B. Buelna, plaintiff acquired whatever right or interest they had in the rancho San Gregorio, at the date of said deeds. They never had more than an undivided fifth interest in said rancho, and previously to their conveyance to the plaintiff they had conveyed all their interest in four thousand acres of said rancho to one Hamilton. So that the interest conveyed to the plaintiff is not more than an undivided one fifth of the residue of said rancho. In 1839 said rancho was granted by the Mexican government to Antonio Buelna, who in 1842 made a will by which he devised the entire rancho to his wife Maria Concepcion Valencia, Juan Bautista Buelna, and three others, share and share alike: that is, to each an undivided one fifth. In 1842 said Antonio died, leaving said will and all of said devisees surviving him. In 1846 said Juan Bautista died intestate leaving, him surviving, as his only heirs-at-law, the said Maria Louisa and Juan B. Buelna. After the death of her

husband said Maria Concepcion made a conveyance of one league of said rancho to one Castro; and in 1852 said Castro and said Maria Concepcion presented a petition to the board of land commissioners to have the claim of said Castro to one league, and the claim of said Maria Concepcion to the other three leagues, confirmed, and their said respective claims were accordingly confirmed, and patented to them in 1861. That they held the legal title to an undivided interest in said rancho in trust for the said Maria Louisa and Juan B. Buelna is too clear to admit of any doubt.

The court found that "the defendants, and those from and under whom they hold and claim the possession, have been in the open, notorious, and exclusive possession of the premises described in the complaint, holding separately, as stated in their several answers, claiming to own the same and to have the whole title thereto for more than five years next before the commencement of this action.

"The defendants, and those from and under whom they respectively hold and claim, more than five years before the commencement of this action, to wit, in the year 1857, being in possession respectively as aforesaid, acquired by purchase all the right, title, and interest of the patentees and all of the legatees under the said will of Antonio Buelna, except said Juan B. Buelna, to their respective portions of said land, and still hold and own the same.

"The plaintiff's cause of action arose and accrued to him more than four years before the commencement of this action; and the defendants and each of them had held all the land described in said complaint, claiming to own the title to the same, and in open and notorious hostility to the plaintiff's claim, and to any trust or equitable interest claimed by him for more than five years before the commencement of this action."

The evidence sustains the finding that the defendants and those under whom they claim were in possession of the premises in 1857, and that while so in possession "they acquired by purchase all the right, title, and interest of the patentees and of all the legatees under the will of Antonio Buelna, except said Juan B. Buelna, to their respective portions of said land, and still hold and own the same."

The court did not find that, prior to the purchase and acquisition of the interests of said patentees and devisees, the defendants, and those under whom they claim, had acquired title to said premises by an adverse possession of five years; and in the absence of such a finding, the finding that the defendants and those under whom they claim were in possession of the premises when they purchased the interests referred to is not of the slightest importance. It does not appear that they had acquired any title to the premises before the date of said purchase, and the defendants occupy no stronger position than they would if they had gone into possession under said purchase, and not otherwise. It would be different if, at the date of said purchase, they had been in the adverse possession of the entire rancho for five years or more. In that event they might have taken deeds from some of the tenants in common without affecting in any way the title acquired by an adverse possession of five years, as against other tenants.

As it is, they are bound to show that their possession since they purchased the interest of some of the tenants in common has been of such a character as to warrant a presumption of ouster of the other tenants, before they can successfully claim that they have acquired title as against the tenants, of whom they have not purchased, by an adverse possession of five years. "There must not only be an exclusive possession, but the possession must be under a claim to title to the whole estate either brought home to the knowledge of the other tenant, or so notorious that his knowledge of such adverse claim can be presumed. And the evidence must be much stronger than would be required to establish a title by possession by a stranger." (Wood on Limitation of Actions, 559.)

The only evidence tending to prove an adverse possession in this case is the testimony of one witness called by the defendants, who on his direct examination testified as follows:—

"I have been acquainted with the persons who have occupied the San Gregorio Ranch and with the extent of their occupation. The earliest period that I knew of its occupation was 1858; it was all occupied about 1858—as early as 1858. Prior to that it was not all occupied. Then, in 1858, it was occupied by parties living on it, fencing it up, and using it for farming and pas-

turing. The occupation has been continued ever since. I know all the defendants who have answered herein, personally, and the land described in their respective answers. This land has come down to them from those persons who were in occupation in 1858. That has been continuous. In 1858 they claimed to own the land occupied and possessed by them respectively. I know the tract occupied by defendant H. W. Seale. That tract was not within the four thousand-acre tract conveyed by Juan and Maria Louisa to Hugh Hamilton."

No other evidence was introduced to prove the character of the defendants' possession, and this evidence, considered in connection with the fact that the defendants were in possession under deeds conveying to them more than four fifths of the rancho, signally fails to establish an adverse possession of five years as against those who were tenants in common of the grantors of the defendants at the time of the execution of said deeds.

As was said in *Owen v. Morton*, 24 Cal. 373: "This testimony, taken together, falls short of establishing an adverse possession, and furnishes no evidence of an ouster of the plaintiff by the defendants."

The patentees and devisees who conveyed to the defendants did not attempt to convey any other or greater interest than they, said patentees and devisees, had in said rancho. They simply quit-claimed whatever interest they had, and nothing more.

Conceding, therefore, that the court found facts sufficient to establish such an adverse possession by the defendants as would bar the plaintiff's cause of action, it seems to us quite clear that the evidence is insufficient to support such a finding, and for that reason the judgment and order appealed from must be reversed.

Judgment and order reversed, and cause remanded for a new trial.

THORNTON, J., and MYRICK, J., concurred.

Hearing in Bank denied.

[In Bank. — May 15, 1883.]

PEOPLE OF THE STATE OF CALIFORNIA, RESPOND-
ENT, v. Y. R. DE PELANCONI ET AL., APPELLANTS.

ACTION ON FORFEITED BAIL-BOND. — An action on a forfeited bail-bond may be brought in the name, either of the people or of the county; and the district attorney is authorized to bring the action.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are sufficiently stated in the opinion of the court.

F. H. Howard, for Appellants.

The action must be brought in the name of the party interested. There is no provision of law authorizing the district attorney to bring such an action. (Code Civ. Proc. § 367; *Mendocino Co. v. Lamar*, 30 Cal. 628.)

Stephen M. White, District Attorney, for Respondent.

The suit was properly brought. Section 1570 of the Penal Code merely provides for the disposition of funds after collection. The bond runs to this plaintiff. (See § 369, Code Civ. Proc.)

As to the authority of district attorney, see § 4256, sub. 3, Pol. Code.

Actions such as this brought in the name of "The People of the State of California" have frequently passed unchallenged in this court, and the practice thus sanctioned should not be departed from. (See *People v. Carpenter*, 7 Cal. 402; *People v. Smith*, 18 Cal. 498; *People v. Love*, 19 Cal. 677; *People v. Penniman*, 37 Cal. 271.)

MYRICK, J.—One Ramirez, being in custody under a bench warrant issued out of a Superior Court, upon an information for the crime of forgery, was ordered to be admitted to bail in the sum of \$2,000, and the defendants in this action executed an undertaking in the form prescribed by section 1287, Penal Code. The bond becoming forfeited, this action was brought by the district attorney against the sureties.

The only point presented on this appeal is: The action should have been brought in the name of the county; the county is the only party in interest, as the money recovered must go into the county treasury; the action cannot be sustained in the name of the people, and the district attorney is not authorized to bring the action.

In several cases in this State, the action has been sustained when brought in the name of the people. (*People v. Smith*, 18 Cal. 498; *People v. Love*, 19 Cal. 677; *People v. Penniman*, 37 Cal. 271.) It has also been sustained when brought in the name of the county. (*Mendocino County v. Lamar*, 30 Cal. 628; *City and County of San Francisco v. Randall*, 54 Cal. 408.) We see no objection to sustaining the action when brought either in the name of the county or of the people. The section above referred to requires that the amount named shall be payable to the people of the State of California; when recovered, it is to take certain named directions.

The district attorney is authorized to proceed by action. (§ 1306, Pen. Code; § 4256, subd. 3, Pol. Code.)

Judgment affirmed.

THORNTON, J., SHARPSTEIN, J., MCKINSTY, J., and MCKEE, J., concurred.

[Department One. — May 17, 1883.]

J. W. ARMSTRONG, PETITIONER, v. THE SUPERIOR COURT OF LAKE COUNTY, RESPONDENT.

CHANGE OF VENUE — RESIDENCE — CONVEYANCE OF WITNESSES.—In an action commenced in Lake County, the defendant demurred to the complaint, and moved to change the place of trial to Sonoma County where he resided. The plaintiff opposed the motion on the ground of the convenience of witnesses. No answer having been filed, *held*, that the motion could not be resisted on that ground.

ID. — ORDER GRANTING MOTION ON PAYMENT OF COSTS.—An order made granting the motion on the payment of costs is a conditional order, and amounts to a denial of the motion if the costs are not paid. It is interlocutory in its nature, and contemplates a further order granting or denying the motion absolutely upon the payment or non-payment of the costs as required. In determining the effect of the order in these respects, the power of the court to impose costs is an immaterial matter.

CERTIORARI to the Superior Court of Lake County to review

an order setting aside a previous order made on a motion to change the place of trial.

The facts are stated in the opinion of the court.

E. W. Britt, and Woods Crawford, for Petitioner.

R. W. Crump, for Respondent.

PER CURIAM.—*Certiorari.* Petitioner prays for the annulment of an order of the Superior Court setting aside an order made in response to an application by defendant in an action, wherein one Estep is plaintiff and the petitioner is defendant, for a change of the place of trial from Lake to Sonoma County.

The motion was made on the ground that the action had been brought in the wrong county, and was supported by the defendant's affidavit that he was, and for many years had been, a resident of Sonoma. The plaintiff resisted the motion, asking that the cause be retained in Lake County, and filed and read an affidavit setting forth facts tending to prove that it would be for the convenience of witnesses to retain the cause. As the motion was made before answer the plaintiff was not authorized to resist it on the ground that it would be more convenient for witnesses to try the action in Lake. (*Cook v. Pendergast*, 61 Cal. 72.)

January 29, 1883 — the return day of the motion — the court below ordered: "That the motion to change the place of trial be granted, upon the payment by defendant of all fees accrued in this court to date."

A demurrer to the complaint had been filed by the defendant contemporaneously with his demand for a change of venue, and, on the 12th day of February, 1883, the plaintiff asked the court to set down the demurrer for argument and proceed with the determination thereof, claiming that a reasonable time had elapsed since the making of the order respecting a change of the place of trial, and the defendant had not paid the costs as therein required.

Thereupon it was by the court ordered:—

"Whereas, in this cause, the court, on the 29th day of January, 1883, made an order, on the application of the defendant, that the same be transferred for further proceedings to the

Superior Court of the county of Sonoma, upon payment by defendant of all costs accrued and to accrue in this court, and whereas at this date said defendant has not paid said costs, nor offered any excuse for his failure to do so; now, therefore, it is ordered by the court that the order made on the 29th day of January, 1883, be annulled and set aside." And it was then and there further ordered "that the demurrer aforesaid be set for hearing on the 29th day of February, 1883."

It is insisted by the petitioner that the condition in the order of January 29th, as to the payment of costs, was and is *void*, being a condition which the court had no right to require, and, as a consequence, that the order should be read as if no such condition had been inserted, and was and is an order granting the motion for a change of the place of trial; that the order granting the change necessarily included an adjudication as to the defendant's residence; that the power of the court was exhausted in the premises when it found that the defendant resided in Sonoma and granted the motion, and that, immediately upon the entry of the order, the Superior Court of Lake lost and the Superior Court of Sonoma *acquired*, jurisdiction of the action.

The intent and meaning of a judicial order are to be derived from its language. Even if the court had no power to insert in the order the condition as to costs, there is no strict analogy between the order and a deed — for example — which may take effect as a conveyance, although it contains a condition, *void* because against public policy, or for any other reason. An order that a motion be granted, upon the payment of certain costs, is an order denying the motion, unless the costs be paid. We are not authorized to exclude the condition and thus make the order the reverse of, or distinctly different from, what it was evidently intended to be. The order of the 29th of January is not an order absolute, either granting or denying the motion for the change of the place of trial. It provides that the motion shall be granted, if, within a reasonable time, the costs are paid by the defendant; that the motion shall be denied if a reasonable time shall lapse without the payment of the costs by the defendant. It is an order to take effect in the future as an order granting, or as an order denying, the motion, as one of two events shall occur. In determining its meaning it is entirely immaterial

whether the court had or had not power to insert the condition, or whether the insertion of the condition was error. In any case the defendant did not get the order which he asked for unconditionally; he did not get it at all, nor did he entitle himself to an order final, based upon the payment of the costs — if such further order was necessary — because he did not pay the costs.

If, in response to the defendant's motion, the court had no jurisdiction to make an order other than an order unconditionally granting or denying the motion, petitioner is not entitled to have annulled the order setting aside the order of the 29th of January. The effect of the order of February 12th would be simply to disencumber the record of the Superior Court of an order it had no jurisdiction to make, and would leave the motion for a change of venue undisposed of. If the order of the 29th of January was one which the Superior Court had power to make, it was not and did not purport to be a final order, taking effect, in the then present, as an order granting or denying the motion, and we know of no reason why the court did not have power to set it aside. Certainly, as the defendant did not pay the costs within a reasonable time, or offer to pay them, he cannot complain of the order setting aside the order of January 29th — whether his failure to pay did or did not of itself operate as an order *denying* the motion for a change of the place of trial.

But we are of opinion that the order of the 29th of January was, in its nature, interlocutory, and contemplated — in case the defendant should fail to pay the costs — another and subsequent order, based upon a finding that a reasonable time had elapsed without the costs having been paid. We have assumed, as is claimed by petitioner, that the order of the 12th of February is to be treated as an independent order setting aside the previous order. It may be that the proceedings of the day last mentioned read together constitute only a declaration that a reasonable time had passed, and the defendant had not paid the costs, followed by an order setting down the demurrer for argument, the legal effect of which was finally to deny the motion for a change of the place of trial. Upon this last matter we express no opinion. If the order setting the demurrer for argument, following upon an adjudication that a reasonable time had expired without pay-

ment of costs by defendant, was an order denying the defendant's motion for a change of venue, the defendant — petitioner — had an appeal from that order.

But treating the action of the court on the 12th of February, which preceded the setting down of the demurrer, as an independent order setting aside the order of the 29th of January, the petitioner cannot have the order of the 12th of February annulled, because up to the last named date, no final order had been made, granting the motion for a change of the place of trial.

It is not necessary to decide whether the Superior Court would have power to set aside a final order changing the place of trial.

The petition and proceedings thereunder are dismissed.

[In Bank. — May 19, 1882.]

IN THE MATTER OF THE ESTATE OF SUEZ
MAGEE, DECEASED, ALBERT E. REMOND, APPELLANT,
& PETER CUNNINGHAM ET AL., RESPONDENTS.

SUCCESSION — ILLEGITIMACY — SECTIONS 1386, 1387, AND 1388 OF THE CIVIL CODE CONSTRUED. — Sabra Magee had two legitimate daughters — Eliza and Susan. The descendants of Eliza were all legitimate, but Susan had two illegitimate daughters — Elizabeth and Suez. Elizabeth died after her mother, leaving one legitimate child — Albert. Suez died subsequently intestate and without issue. The descendants of Eliza claim to succeed to the estate of Suez as against Albert. *Held*, on a construction of sections 1386, 1387, and 1388 of the Civil Code, that Albert is entitled to succeed to the estate as heir of Susan, the mother of Elizabeth and Suez.

APPEAL from a decree of distribution of the Superior Court of Santa Barbara County.

The facts are stated in the opinion of the court.

Paul R. Wright, and *A. A. Oglesby*, for Appellant, cited *Apsden's Estate*, 1 Wall. Jr. 368; *Larabee v. Larabee*, 1 Root, 555; *Mace v. Cushman*, 45 Me. 250; *McKinney v. Stewart*, 5 Kan. 384; *Estate of Wardell*, 57 Cal. 484; *Swanson v. Swanson*, 2 Swan, 446; *McGunnigle v. McKee*, 77 Pa. St. 81; *Burlington v. Fosby*, 6 Vt. 83; *Lewis v. Eutsler*, 4 Ohio St. 354.

W. C. Stratton, and *C. A. Storke*, for Respondents, cited *Pina v. Peck*, 81 Cal. 359; *Stevenson's Heirs v. Sullivant*, 5 Wheat. 207; *Jackson v. Jackson*, 10 The Reporter, 425.

MYRICK, J.—The question involved in this appeal concerns the right of succession under the statute of this State, as affected by illegitimacy. Sabra Magee was the common ancestor. She had two legitimate daughters—Eliza and Susan. The descendants of Eliza (all legitimate) are the claimants on one side; they are named Cunningham. Albert E. Remond claims that he, as descendant of Susan, is entitled, on the other side, to the property. His claim is based on the following facts: Susan had two illegitimate daughters—Elizabeth and Suez. Albert E. is the legitimate son of Elizabeth. Susan and Elizabeth died before January 1, 1880. Suez Magee (the intestate, whose property is the subject of consideration) died March 24, 1880; and the question is, will the property left by Suez Magee go to the Cunninghams, as heirs of the intestate, or will it go to the claimant Albert E. Remond?

According to section 1388, Civil Code, if any illegitimate child (not acknowledged or adopted by his father) dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs at law. Suez Magee was illegitimate; she died intestate; Susan, her mother, had died before her; therefore, upon the death of Suez, the property of the latter was to go to the heirs of the mother, Susan. The next question, then, is who are the heirs of Susan? Section 1387, Civil Code, we think, answers the inquiry. Every illegitimate child is in all cases an heir of his mother, and inherits in the same manner as if born in lawful wedlock. There is no question as to the heirship of Albert E.; he is the legitimate son of his mother, Elizabeth. She (Elizabeth) was the illegitimate daughter of Susan. By section 1387, just referred to, Elizabeth was the heir of her mother, in the same manner as if born in lawful wedlock. If, then, Elizabeth had been born in lawful wedlock, she would unquestionably have been heir of her mother; being born out of wedlock, she is by the statute made heir of her mother in the same manner as if born in wedlock. Being, then, the heir of her mother, and dying leaving issue,

the property of Suez goes to such issue; not because the issue is heir of Suez, but is heir of Susan. In this same section there is a proviso regarding the inheritable blood of an illegitimate child, expressed in the following words: "But he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried," etc. This proviso does not apply to the case before us. If Eliza, the other daughter of Sabra, the common ancestor, had died leaving estate, the illegitimate children of Susan (Elizabeth or Suez), or their descendants, could not have represented Susan for the purpose of inheriting from Eliza; Eliza's estate would, rather, have escheated. We think the word "kindred" used in the above-quoted clause relates to the kindred referred to in section 1386, meaning lawful kindred, and is for the purpose of qualifying the general words used in section 1387, and excluding the illegitimate from inheriting, through the mother, the estate of other relatives.

"By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate, unless a different intention is clearly manifest." (*McCool v. Smith*, 1 Black, 459; *Hughes v. Decker*, 38 Me. 153; *Cooley v. Dewey*, 4 Pick. 93.) In using the word "kindred," in section 1387, the legislature intended to preclude from the general words preceding it the construction that an illegitimate might by representation inherit from those whom the common law or section 1386 acknowledges as kindred; but did not intend to prevent a legitimate son (Albert E.) from inheriting through his mother (an illegitimate daughter), from her mother, Susan, nor from being her heir. Otherwise, we would have the construction that an illegitimate daughter is an heir of her mother, and as such may take the estate of another illegitimate daughter of the same mother, but that the legitimate child of such illegitimate daughter cannot take.

If Elizabeth had died intestate and without issue, doubtless the estate of Suez would have gone to the Cunninghams, as the heirs of Susan, the mother of Elizabeth and Suez; but as Albert E. is, through his mother, Elizabeth, the heir of Susan, he is entitled to the estate of Suez — not, perhaps, because he is

the heir of Suez, but because he is the heir of the mother of Suez, and as such is, under the statute, entitled to take.

We do not think that the provisions of section 1386 have application to illegitimates; but that the rights of such persons are derived from sections 1387 and 1388. Section 1386 provides for the course of succession among legitimates; sections 1387 and 1388 refer to illegitimates, and provide for the course of succession as to them; and each provision is complete, so far as the legislature has seen fit to declare. One system is provided for in the one section; another system is provided for in the others.

The decree is reversed and the cause is remanded with instructions to render a decree in accordance with this opinion.

McKEE, J., THORNTON, J., SHARPSTEIN, J., and ROSS, J., concurred.

[Department One.— December 15, 1882. In Bank.— May 28, 1883.]

L. B. ADAMS ET AL., RESPONDENTS, v. ADOLPH
DOHRMANN ET AL., APPELLANTS.

NEW TRIAL — AUTHENTICATION OF STATEMENT.— A statement on motion for a new trial must be certified by the judge in accordance with section 659 of the Code of Civil Procedure. Without the certificate of the judge, the statement is a nullity, and the omission cannot be supplied after the motion has been disposed of, and an appeal taken.

HEARING IN BANK — COMPUTATION OF TIME.— When a cause has been heard and decided by one of the departments, a hearing in Bank cannot be granted after the expiration of thirty days, although the last day may fall on Sunday.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The statement on the motion for a new trial was agreed to by the counsel for the respective parties, and used on the hearing of the motion, but was not certified by the judge. Pending the appeal, the judge certified the statement *nunc pro tunc* as of a day anterior to the hearing of the motion, and by order of the court below the statement was refiled *nunc pro tunc* as of the same day. The counsel for the appellants thereupon moved to

amend the transcript in this court by adding thereto a copy of the statement thus certified.

John M. Burnett, and Cope & Boyd, for Appellants, argued in favor of the motion, citing *Westcott v. Thompson*, 16 N. Y. 613. They also contended that as the statement was agreed to by the parties, and used on the hearing of the motion, the objection for want of a certificate by the judge came too late, and cited *Paige v. Fazackerly*, 36 Barb. 392.

E. S. Pillsbury, for Respondents, argued against the motion, and claimed that the statement should be disregarded, citing *Satterlee v. Bliss*, 36 Cal. 521; *Smith v. Davis*, 55 Cal. 26; *Schreiber v. Whitney*, 60 Cal. 431; Code Civ. Proc. § 659, sub. 3.

McKEE, J.—The appeal in hand is from the final judgment in this case, and from an order denying a motion for a new trial.

The notice of intention to move for a new trial designated that the motion would be made “on a statement of the case, and on the papers and records in the cause.”

In the transcript there is a paper marked, “defendant’s proposed statement on motion for a new trial and on appeal,” which appears to have been filed April 10, 1880; but it was not, at any time, signed by the judge of the court, nor certified by him to the effect that it had been settled and allowed as was required by section 659 of the Code of Civil Procedure.

When notice is given of a motion for a new trial, to be made on a statement of the case, it is the duty of the moving party to propose such a statement, and have it settled, signed, and certified by the judge. The statement must be authenticated in that way before it can be filed with the clerk of the court. (§ 659, *supra*.) After it has been signed and certified and filed, the motion upon it may then be brought to a hearing by either party; and as the statement used on the hearing, it constitutes part of the record of the case on appeal from the order granting or denying the motion. But the signature and certificate of the judge are indispensable. (*Schreiber v. Whitney*, 60 Cal. 431; *Keller v. Lewis*, 56 Cal. 466.) Without them there is no statutory statement on which the motion may be heard.

An unauthenticated paper in the transcript, purporting to be a statement, is no part of the record on appeal, and must be disregarded. Nor can this court return the record of a case to the court below for the purpose of having that court supply, in a document in the transcript, those things which were indispensably necessary to constitute it part of the record in the first instance. The signature and certificate of the judge to a statement on motion for a new trial, *after* the motion has been heard and determined, and an appeal taken from the order, would not (as MR. JUSTICE MYRICK observed in *Keller v. Lewis*, *supra*) aid the appellant, for the Code of Civil Procedure requires that the bill be certified as allowed, "before filing." (§ 650, Code Civ. Proc.) This court cannot make a record or supply the existence of papers which constitute part of a record, on which a court below may act. Nor can we amend a record of a lower court—that must be done in the lower court; and after an appeal has been taken and perfected, that court, losing, as it does, jurisdiction over the case, has no power to make another record by adding to the record already made a new statement on motion for a new trial or on appeal.

In some instances we have sent down the record of a cause to have inserted in it some matter omitted from a bill of exceptions or statement in the transcript; but there is no case in which the practice has been adopted of returning the record of a case for the purpose of supplying a bill of exceptions or statement which did not legally exist.

The motion made to return the record in this case for that purpose must therefore be denied; and as there is no error in the judgment roll, the judgment and order appealed from are affirmed.

McKINSTRY, J., and ROSS, J., concurred.

The counsel for the appellants subsequently filed a petition asking that the judgment of the department be vacated, and that the cause be heard and decided by the court in Bank. On the thirty-first day after the judgment was pronounced—the day previous being Sunday—an order was made granting the petition. The counsel for the respondents thereupon moved the court in Bank to vacate the order, and for a remittitur, on

the ground that the judgment had become final before the order was made. The motion was argued orally by the respective counsel.

PER CURIAM.— On the 15th day of December, 1882, Department One of this court affirmed the judgment appealed from herein, and on the 15th day of January, 1883, the court made an order that the case be heard in Bank. The Constitution (§ 2, art. vi.) provides that “where a cause has been allotted to one of the departments (as this cause was), and a judgment pronounced thereon, the order (that the same be heard and decided in Bank) must be made within thirty days after such judgment, . . . and if so made it shall have the effect to vacate and set aside the judgment. . . . If the order be not made within the time above limited the judgment shall be final.” The respondent now moves to have the order of January 15, 1883, vacated, on the ground that it was not made *within thirty days* after the judgment of the department had been pronounced. As to the fact that the order was not made within the time prescribed, there can be no controversy. But the thirtieth day after the judgment of the department was pronounced fell on Sunday, and the order was made on the following Monday. There is a general provision in the Code that the time in which any act provided by law is to be done is computed by excluding the last day if it be a holiday. (Code Civ. Proc. § 12.) And as Sunday is a holiday, it is contended by appellants’ counsel that the last day upon which an order that this case should be heard in Bank could be made being Sunday it must be excluded; and if excluded, the order made on the following day was made within thirty days after the judgment had been pronounced in the department. Whether, in the absence of other provisions of the Code, and the Constitution relating to this same subject, that would be so, it is not now necessary to decide, because the Constitution declares that this court “shall always be open for the transaction of business,” and the legislature when prescribing on what days courts may be held and judicial business transacted, provides “that the Supreme Court shall always be open for the transaction of business,” and that provision is inserted among the exceptions to the general rule, that no court

shall be open or transact any judicial business on Sunday. (Code Civ. Proc. §§ 133, 134.) It is therefore quite clear that this court might have been open for the transaction of business on the last of the thirty days within which an order that this case be heard in Bank could be made, and there is no *legal* reason why it should not have acted on that day, and consequently no reason why the judgment of the department should not have become final at the expiration of that day. The court is not required to take any formal action in regard to a judgment pronounced by a department within thirty days thereafter. The Constitution simply limits the time within which an order that it be heard in Bank may be made. The court may act or not as it chooses within that time, but it cannot, after the expiration of that time, order a cause to be heard in Bank. That the framers of the Constitution did not intend that the law relating to holidays should apply to the Supreme Court is made apparent by a comparison of the clause of the Constitution, which declares that the Supreme Court "shall always be open for the transaction of business," with the provision that the Superior Courts "shall be always open (legal holidays and non-judicial days excepted)." The provision (§ 12, Code Civ. Proc.) of the Code upon which appellant relies does not attempt to define what days shall be non-judicial. But that is done in section 133, and as before stated, the Supreme Court is expressly excepted from its operation.

Motion granted.

Petition for a rehearing denied.

[In Bank.— May 29, 1883.]

THE PEOPLE, RESPONDENT, v. SIMON RATEN,
APPELLANT.

HOMICIDE — BURDEN OF PROOF — REASONABLE DOUBT. — When the fact of a homicide is shown, then it is incumbent upon the defendant to show by a preponderance of testimony that the killing was justifiable.

Id. — INSTRUCTIONS — DEGREES OF MURDER. — A charge upon the subject of the degrees of murder discussed and held not misleading.

- Id. — ARREST OF FELON BY PRIVATE CITIZEN. — The court charged, in addition to section 837 of the Penal Code, that "the crime of assault with intent to commit murder is a felony. It is the right, and is expected of all good citizens that they aid in the capture or arrest of any person who has committed a felony." The evidence tended to show that the defendant shot at one Erickson, and fled pursued by a crowd of men with a view to capture him. The deceased was one of the crowd, and while in pursuit defendant turned and shot and killed him. *Held*, that the evidence justified the instruction.
- Id. — SELF-DEFENSE. — Upon the authority of *People v. Herbert*, 61 Cal. 544, one instruction given in regard to the right of self-defense, *held*, not erroneous.
- Id. — MALICE. — The defendant claimed that the verdict was against both law and evidence; that to constitute murder of the first degree express malice must be proved *alunde* — not inferred alone from the act done, or the means used in doing it. *Held*, that as the question of malice was submitted to the jury under proper directions, the judgment could not be interfered with.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Ellwood Bruner, for Appellant.

Attorney-General, for Respondent.

THORNTON, J. — The defendant was convicted of the crime of murder in the first degree, committed on one James Lansing, and adjudged to suffer the death penalty. He moved for a new trial which was denied. From the order denying his motion for a new trial, and the judgment, he prosecutes this appeal.

Several questions were discussed on the argument arising on the instructions given by the court below, which we are called on to consider and determine.

1. The court directed the jury as follows:—

"Upon a trial for murder the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable, and this he may show by preponderance of evidence merely."

It is urged that this direction is erroneous, because it deprives the defendant of the doctrine of reasonable doubt. We have to say in reply to this that the jury was fully and correctly instructed upon the question of reasonable doubt, and that the

instruction above given was approved by this court in *Bank in People v. Hong Ah Duck*, 61 Cal. 387.

2. Our attention is called to the following direction to the jury:—

“If the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, the killing is murder of the first degree, and no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing. But if you find the defendant guilty of murder, and still are not convinced beyond all reasonable doubt that such murder was accomplished or characterized by some one of the circumstances just explained as indicative of murder of the first degree, you can find him guilty of murder of the second degree only.”

Counsel for defendant in regard to this portion of the charge says: “While the jury were instructed as to the requisites of murder of the first degree in the first clause of the above instruction, they were in the second clause instructed, that to reduce the offense to murder of the second degree, two or more of the requisites of murder of the first degree must be wanting”; and then proceeds to argue that the instructions are contradictory, and that they misled the jury to the prejudice of the defendant.

There is some plausibility in the contention of the counsel upon the premises on which he has constructed his argument. But in presenting this question he has omitted from the direction of the court a material portion of it in relation to the very subject-matter of his contention. We quote here the omitted portion, which precedes immediately the portion quoted by him:—

“The chief difference which distinguishes murder of the first degree from murder of the second degree consists in the presence or absence of a wilful, deliberate, and premeditated intent to kill. If you find the defendant guilty of murder the next question to be determined is, was the murder accompanied with a deliberate and clear intent to take life? In order to constitute murder of the first degree the intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion

sufficient to preclude the idea of deliberation. There need be no appreciable space of time between the intention to kill and the act of killing; there may be as instantaneous as successive thoughts of the mind."

The court had previously in the charge defined murder in the language of the Code (Penal Code, § 187), and had pointed out the distinction between express and implied malice as given in section 168 of the same Code.

The foregoing explains the language referred to by counsel, and is in accordance with the provisions of the Penal Code (§ 189), indicating the difference between murder of the first and murder of the second degree. Certainly, the only fair mode of arriving at the meaning of a judge's charge on any subject to which it relates, is to consider the whole of it relating to the particular subject on which he is giving directions. This we have done in regard to the charge before us, and, applying this well-known rule of interpretation, we cannot avoid the conclusion that the counsel has gone astray in his contention, and the court has not erred. We see nothing in the charge on the matter discussed at all calculated to mislead or confuse the jury.

3. It is further contended that the court erred in giving the instructions relating to arrest by a private person. As to this matter, the court instructed the jury in the identical words of section 837 of the Penal Code, and added the following: "The crime of assault with intent to commit murder is a felony. It is right and is expected of all good citizens that they aid in the capture or arrest of any person who has committed a felony."

In relation to the above, this point is made, that the court assumed the existence of testimony, and of facts of which there was no proof whatever.

The evidence abundantly justifies the directions, and called for the observations made by the court. The evidence tends to show this: The defendant met, in the street in the city of Sacramento, one Erickson, drew a pistol and shot at him; he then fled, was pursued by a crowd of men with a view to capture him. While the pursuit was going on, the deceased, one James Lansing, joined in it, and, while thus in pursuit of the defendant, defendant turned and shot at Lansing, inflicting a fatal wound, of which, in a few hours afterwards, Lansing died.

Under such circumstances the point contended for by counsel is untenable. We fail to perceive any error in the ruling of the court on this point.

4. The defendant asked an instruction as follows:—

“If a timid, cowardly man, much alarmed, in imminent danger of a violent and instant assault, and cut off from the chances of probable assistance, as the result of fear, kill the man from whom the danger is apprehended, and the jury believe that the defendant was in danger of great bodily harm from the deceased, or thought himself so, then the killing would be in self-defense. And if the defendant thought the deceased intended to commit a battery upon him less violent, to prevent which he killed him, the killing would be manslaughter, and you must so find your verdict.”

The court refused this request, and defendant excepted.

The requested instruction abounds in error. In the first place there is no evidence that the defendant is or was a timid, cowardly man, nor is there any circumstance from which such could be reasonably inferred. Nor do we perceive that there was the least evidence that defendant was in imminent danger of a violent or instant assault by the deceased. There is no evidence whatever that defendant was in the least danger of great bodily harm from Lansing, and nothing tending to show it. Lansing was pursuing the defendant with other persons to arrest him on account of his having shot at Erickson, was unarmed, and while so pursuing him and unarmed received at the hand of the defendant the fatal wound of which he afterward died. There are other considerations which demonstrate that the request was properly refused, but deeming the foregoing sufficient, we forbear to discuss the point further.

5. It is said that the court erred in its direction to the jury in regard to the right of self-defense.

The direction challenged here is substantially the same as that given in *People v. Herbert*, and approved by this court in Bank, 61 Cal. 544. On the authority of the case last mentioned we must hold the direction without error.

It is further argued that the verdict is contrary to the law and the evidence.

It is said that to constitute murder of the first degree express

malice must be proved; that it must be proved *aliunde*, and that it cannot be inferred or implied alone from the act done, or the means used in doing it. To this we have only to say that the questions as to malice were fairly submitted to the jury, the proper tribunal to pass on them, and that they were submitted with appropriate directions.

We find nothing in the case which calls for any other judgment than that of affirmance.

Judgment and order affirmed.

MYRICK, J., MCKEE, J., MCKINSTY, J., and ROSS, J., concurred.

[Department One. — May 30, 1883.]

ELIZABETH THOMAS, APPELLANT, v. THOMAS
DESMOND, SHERIFF, ETC., RESPONDENT.

MARRIED WOMAN — CAPACITY TO SUE.—A married woman cannot sue alone to recover personal property wrongfully taken from her possession, unless the property thus taken is shown to be her separate property.

ID.—SOLE TRADER -- SEPARATE PROPERTY OF THE HUSBAND — CREDITORS.—Separate property of the husband, though appropriated and used by the wife in carrying on business as a sole trader, is liable for his debts, and may be seized under process against him in favor of his creditors.

PLEADINGS — COMPLAINT — DEMURRER.—In alleging facts, the ultimate facts should be stated, and where a complaint merely states the evidence from which such facts are deducible, a demurrer lies.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order setting aside a default.

Charles F. Hanlon, for Appellant.

Clitus Barbour, for Respondent.

MCKEE, J.—Upon a showing made by the defendant, the default entered against him was set aside by the court, with leave to answer. Instead of filing an answer, the defendant demurred and the court sustained the demurrer, with leave to the plaintiff to amend her complaint; but she declined to amend and judgment final was entered against her, and from the judgment and the order setting aside the default the plaintiff appealed.

The action was brought to recover damages for an alleged wrongful seizure of personal property. It is alleged in the complaint that the plaintiff was a married woman and the wife of William A. Thomas; and it may be gathered from the complaint that she had possession of the property, and that the defendant, as the sheriff of the city and county of San Francisco, took it from her possession by process issued in the suit of Amos Williams against William A. Thomas, her husband, and converted it to his own use. But that statement does not constitute a cause of action in her favor. It is only where property taken from a married woman belongs to her as her separate property that she is considered in law as a *femme sole* and entitled to sue for its recovery or conversion. And in such a suit, the pleading in the action should disclose the fact that the property was her separate property. That is a fact which must be averred and proved. The complaint does not show, by distinct affirmative averments, that the title to the property was in the plaintiff as her separate property, or that she was possessed of it as of her separate property as a sole trader or otherwise. On the contrary, the complaint *does* show, by recitals of evidential facts, that the property was the separate property of the husband, but, having become intemperate and dissolute, he had spent all his money and run in debt, and failed to support his wife, and she in consequence of the intemperate and dissolute habits of her husband, acting under the advice of counsel, asserted her claim over all his property, took possession of it and invested it in the business of letting furnished rooms, with or without board, in the city of San Francisco — a business which she was authorized to carry on as a sole trader by a decree of the Superior Court of said city and county rendered December 21, 1880.

These recitals are insufficient as a statement of her right to the property. They are not a statement of the material and ultimate facts — facts as distinguished from argument, from hypothesis, and from evidence — which is required by the Code. (§ 426, Code Civ. Proc., *Green v. Palmer*, 15 Cal. 410; *Piercy v. Sabin*, 10 Cal. 27; *Grewell v. Walden*, 23 Cal. 165; *Moore v. Murdock*, 26 Cal. 514; *Miles v. McDermott*, 31 Cal. 271.) The complaint was, therefore, demurrable.

Besides, as the fact appears from the recitals that the property

belonged to the husband as his separate property, it was subject to his debts, unless his title to it had passed from him to his wife, to the exclusion of his creditors. Of course, the interest of the husband was not divested by the advice of counsel to his wife; nor did she acquire any separate right to it merely by that advice; nor did she acquire title to it by the decree of the Superior Court which authorized her to carry on a specific business in her own name and for her own account.

The statute under which that decree was rendered provided that property derived from the community property or the separate property of the husband not exceeding in value five hundred dollars might be invested in a business carried on by the wife as a sole trader. (§ 1814, Code Civ. Proc.) The statute did not prevent her from obtaining and using the husband's property in the business. But she could only derive title to such property by the mutual consent of herself and husband, and by an act of transfer by the husband to her in the mode prescribed by law. From the recitals of the complaint there was no consent and no transfer; there was, therefore, no divestiture of the legal estate of the husband; the property belonged to him and was subject to attachment or execution against him.

Moreover, the pleader admits that, at the time when the wife took possession of the property and invested it in business on her own account, the husband was in debt. As a debtor he could not voluntarily surrender property to his wife, nor could she voluntarily assume the possession and ownership of it, to the prejudice of his creditors. Such transactions are considered in law fraudulent and void as to the creditors of the husband. (*Guttmann v. Scannell*, 7 Cal. 455; *Hurlburt v. Jones*, 25 Cal. 225.)

Judgment and order affirmed.

ROSS, J., and McKINSTRY, J., concurred.

[Department One. — May 30, 1883.]

WILLIAM McINTYRE, APPELLANT, v. CHARLES
TRAUTNER, RESPONDENT.

MECHANIC'S LIEN — NOTICE — TIME OF FILING — NONSUIT. — The court below granted a nonsuit on the ground that the notice was not filed in time, and because of a variance between the pleadings and proof. *Held*, on a review of the facts as alleged and proved, that the nonsuit was improperly granted.

ID. — SUFFICIENCY OF NOTICE. — Certain objections to the sufficiency of the notice examined and overruled.

APPEAL from an order of the Superior Court of the city and county of San Francisco refusing a new trial.

Wm. H. H. Hart, for Appellant.

Oscar T. Shuck, for Respondent.

PER CURIAM.—The appeal is from an order of the Superior Court denying plaintiff's motion for a new trial. The action was brought to enforce an alleged lien for work done by plaintiff as a plumber, and materials by him furnished and used in a building of defendant. At the conclusion of plaintiff's evidence defendant moved for nonsuit, or that the action be dismissed, upon the grounds following: "That said lien had not been filed in the time required by law, and that plaintiff's proof directly controverted his allegations in his complaint and in his notice of lien in this: that said complaint and notice of lien set forth and allege that plaintiff was a sub-contractor for the work for which he demands payment in this action, whereas his evidence given on this trial clearly states that he was the sole and original contractor; that as the plaintiff seeks to foreclose a sub-contractor's lien, and as his testimony shows he was an original contractor, there is a fatal variance between the pleadings and his proof." The court below granted defendant's motion, to which ruling plaintiff, appellant here, duly excepted.

1. As appears by plaintiff's testimony — which must be conceded to be true in determining the propriety of the nonsuit — defendant, about the middle of February, objected that "the job was not satisfactory, and that he would not accept," etc. — that "the pipes leaked," and requested plaintiff "to go and put them into proper shape." The leaking was stopped and the

work perfected April 25, 1878. The lien was filed May 24, 1878. Defendant cannot be heard to say that the additional work, done at his request to complete the contract, was not a continuation of the previous work, and done under the same contract. The notice of lien was filed in time.

2. The complaint does not set forth that plaintiff was a subcontractor. On the contrary, it sets forth an original contract between plaintiff and defendant. The oral testimony on the part of the plaintiff tending to prove an original contract accords with the averments of the complaint.

3. Did the notice of lien filed by plaintiff fail to state any of the material matters required by the Code to be stated in a notice of lien filed by one claiming as an original contractor?

Section 1187 of the Code of Civil Procedure provides:—

“Every original contractor, within sixty days after the completion of his contract, and every person, saving the original contractor, claiming the benefit of this chapter, must within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the county recorder of the county in which such property, or some part thereof, is situated, a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself, or of some other person.”

The notice of claim filed by plaintiff contained a “statement of his demand after deducting all just credits and offsets.” Also the “name of the owner.” Also the name of the person by whom he was employed “and to whom he furnished the materials, with a statement of the terms,” etc., and a description of the property to be charged with the lien.

It contains a statement that defendant agreed to pay the amount to be paid for the work and materials, and that one George Scheibel was the name of the contractor who, “as such

contractor and as agent for and on behalf of said Trautner (defendant), entered into a contract with said McIntyre (plaintiff), under and by which" the work was done and materials furnished.

As a matter of strict *pleading*, a contract made by an agent should, perhaps, be alleged to have been made by the principal. But no such recognition of the maxim, "that which is done by another he himself does," is requisite to the validity of a notice under the mechanics' lien law. As *contractor* Scheibel had authority to enter into a sub-contract, by virtue of which the sub-contractor might acquire a lien, and as an *agent* empowered to do so, he was authorized to enter into an original contract for and on behalf of Trautner. Scheibel swore as a witness that defendant requested him to employ plaintiff to do the work for which the latter now claims the lien. Such work and materials constituted no portion of the work and materials to be done and furnished by Scheibel by the terms of his original contract with defendant.

The notice of lien is not vitiated by the words "as a contractor." Those words are surplusage, and do not detract from the effect of the statement that Scheibel, in employing plaintiff, acted as agent for the defendant.

The nonsuit should have been denied.

Order reversed and cause remanded for a new trial.

[Department One. — May 30, 1883.]

MARY JANE MACDOUGALL, APPELLANT, v. CENTRAL
RAILROAD COMPANY, RESPONDENT.

NEGLIGENCE — PERSONAL INJURY — INSTRUCTION. — In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defense, and it is error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence.

APPEAL — ERRONEOUS INSTRUCTION. — An erroneous instruction cannot be disregarded on appeal, unless it appear that no prejudice could have resulted from it.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

At the time of the alleged injury, the plaintiff was a passenger on a railroad owned and operated by the defendant in the city and county of San Francisco. The plaintiff was examined as a witness, and testified that she stopped the car in which she was riding for the purpose of getting off, and that while she was in the act of alighting, the car started, and she was thrown to the ground and injured. She also testified that some delay occurred by a woman getting off in front of her at the same time.

Crittenden & Moses, for Appellant.

Gunnison & Booth, for Respondent.

PER CURIAM.—The case was submitted to the jury, on the part of the plaintiff, upon the plaintiff's testimony and that of a medical gentlemen, who described the injuries she had sustained. The verdict was for the defendant, and, as there was at least a substantial conflict in the evidence introduced by plaintiff and defendant respectively, we cannot say the verdict was not justified by the evidence.

The first two of the points urged by the appellant are:—

1. "The court erred in instructing the jury that the burden of proof of establishing her case is on the plaintiff, and she must show, 'that the injury resulted from the negligence of the defendant *without any contributory negligence upon her part.*' "

2. "The court erred in instructing the jury 'that plaintiff, if negligent, could not by her own negligence cast upon the person in charge of defendant's car the necessity of exercising extraordinary care and skill.' "

With respect to these instructions, we may remark, first, the burden of proof was on the *defendant* to show plaintiff was guilty of contributory negligence, unless plaintiff had already shown such negligence; and, second, if plaintiff was guilty of no negligence, still defendant was bound to exercise a great degree of care and skill. (*Robinson v. W. P. R. R. Co.* 48 Cal. 426; *Nehrbas v. C. P. R. R. Co.* 62 Cal. 320.)

The portions of the charge above recited were specifically objected to by plaintiff's counsel as follows: "Another [ground of objection] is that the instruction as to casting upon the driver extraordinary care or vigilance by reason of negligence, if

the jury should suppose any such thing on the part of the plaintiff, is likely to mislead the jury in regard to the question of the degree of extraordinary care and diligence required on the part of the defendant in conveying and letting the plaintiff off the car. Another is that the instruction as to the burden of proof being upon the plaintiff, and that the plaintiff is required to show that the injury complained of resulted from the negligence of the defendant, without any contributory negligence on her part, is not law, and is ambiguous and calculated to mislead the jury."

The court had charged the jury: "The law imposes upon the defendant the duty of exerting and using the *utmost* care, foresight, diligence, and skill in the selection and employment of a driver for its car, and in the management, driving, and stopping of said car, and in the taking in and letting out of said car of passengers for hire." And had also read to the jury from section 2100 of the Civil Code: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose, and must exercise to that end a *reasonable* degree of skill."

We would hesitate to order a new trial if the only error complained of were the charge, "plaintiff if negligent could not by her own negligence cast upon the person in charge of defendant's car the necessity of exercising extraordinary care and skill." It is true, it would be difficult to distinguish between "extraordinary" and "utmost" care and skill. It is also true the language employed suggests that if a plaintiff is not guilty of contributory negligence he cannot recover if a defendant has used a degree of care and skill somewhat less than extraordinary or utmost. But if plaintiff was guilty of negligence, directly contributing to the injury—amounting to want of ordinary care—she ought not to recover. The language of the court, therefore, while it gave a wrong reason for the rule, might perhaps be construed as a statement, that, if guilty of contributory negligence, the jury should find against her. We might *perhaps* say, in view of the other charges, to the effect that defendant was responsible for any want of the utmost care, that the charge complained of could not have misled the jury.

But, however this may be, the charge, "the burden of proof

of establishing her case is on the plaintiff, and she must show that the injury resulted from the negligence of the defendant, without any contributory negligence on her part," was clearly erroneous. (*Robinson v. W. P. R. R. Co.*, *Nehrbas v. C. P. R. R. Co.*, *supra.*) Of course, the circumstances, as related by the plaintiff's witnesses, will often satisfy the court or jury that plaintiff has been guilty of such contributory negligence as will prohibit a recovery. But whether the evidence on the part of a plaintiff establishes contributory negligence is a question of fact for the jury, unless it is so clearly established as to justify the court in granting a nonsuit.

In the case before us, it might be argued upon the evidence, that, if the plaintiff—as the only witness—was to be believed, she clearly proved she was guilty of no contributory negligence, and therefore the charge that the burden of proof was upon her to establish the negative, could have done her no harm. But to assume that the case, as made by plaintiff, established she was guilty of no negligence, would be to take the fact in that regard, and so far as her evidence was concerned, from the jury; and would have justified a charge, that, if the jury believed her testimony, they should find her guiltless of contributory negligence. The defendant might well complain of such a charge and insist that her own testimony, bearing upon the question whether she was guilty of the degree of negligence which should prevent a recovery, ought to go to the jury, to be weighed and canvassed by them. An extremely cautious person might have retained her seat, or remained entirely within the car, until the woman who, as she testifies, preceded her, had reached the pavement. Although, if called upon to decide the *fact*, we might be of opinion that, by doing what she says she did, she was guilty of no negligence, we cannot say that the jury would have found that she proved herself guiltless of negligence. The jury might have found that her evidence showed negligence on the part of defendant, but failed affirmatively to establish an absence of fault on her own part.

It must be admitted that the charge was erroneous, and we cannot declare, as matter of law, that it could not have misled the jury.

Judgment and order reversed and cause remanded for a new trial.

[Department One. — May 30, 1883.]

FRANK CURTIS, PETITIONER, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, AND F. W. LAWLOR, JUDGE, RESPONDENTS.

PROHIBITION — APPEAL FROM JUSTICES' COURT. — NEW TRIAL IN SUPERIOR COURT — JURISDICTION. — In an action in the Justices' Court of the city and county of San Francisco, wherein one Wilhelm was plaintiff, and the petitioner herein defendant, a judgment was rendered in favor of plaintiff. The defendant had answered denying all the allegations of the complaint, but failed to appear at the trial, whereupon the court gave judgment without the introduction of any evidence. The defendant appealed on questions of law alone, and the Superior Court reversed the judgment, and ordered a new trial in that court. The petitioner asked that the Superior Court and judge thereof be restrained by prohibition from trying the case. *Held*, that the new trial was properly ordered to take place in the Superior Court, and that the writ be denied.

APPLICATION for a writ of prohibition.

Carroll Cook, for Petitioner.

William Reade, for Respondents.

PER CURIAM.—A judgment was rendered in the Justices' Court in favor of the plaintiff, and against the defendant in an action, wherein one A. Wilhelm was plaintiff, and this petitioner defendant, from which the defendant appealed "on questions of law." The judgment was reversed, and a new trial ordered in the Superior Court. Petitioner prays the Superior Court, and judge thereof may be restrained by prohibition from trying the case.

The demand of petitioner herein is not sustained by *Rickey v. Superior Court*, 59 Cal. 661; nor by *Sanborn v. Superior Court*, 60 Cal. 425. In the first of the cases it was said that on an appeal by defendant from a judgment taken against him by default in the Justices' Court, the Superior Court acquired no jurisdiction to allow the defendant to file an answer and to retry the case. *Rickey v. Superior Court* is not like the case now before us. The return shows that in *Wilhelm v. Curtis* (the petitioner), the defendant answered in the Justices' Court, and the statement provided for in section 975 of the Code of

Civil Procedure was filed the appeal being "on questions of law alone."

In the action considered in *Sanborn v. Superior Court*, the appeal from the Justices' Court was by the petitioner for the writ of prohibition. It was said by this court that the party thus invoking by his own act the jurisdiction of the Superior Court, ought not to receive the benefit of the writ to which he was entitled only on the theory that the Superior Court had no jurisdiction to proceed.

In the case brought before us in *S. P. R. R. Co. v. Superior Court*, 59 Cal. 471, the justice had not acquired jurisdiction of the person of the defendant, but, nevertheless, without any general appearance on the part of the defendant the justice rendered a judgment against the *plaintiff*, from which the plaintiff appealed. It was held the Superior Court had no power on such appeal to order the defendant to file an answer, etc., because by plaintiff's appeal the Superior Court only acquired jurisdiction to affirm or reverse the justice's judgment.

In the case we are now considering, an issue of fact was joined in the Justices' Court. If the statement prepared by the defendant therein showed that the justice erred in giving judgment for the plaintiff, *without sufficient or any evidence*, this was error for which the Superior Court was justified in reversing the judgment and ordering a new trial. When the defendant fails to appear at the trial the justice "may proceed" with the trial at the request of the plaintiff (Code Civ. Proc. § 884), but the justice ought not without evidence to render a judgment in favor of the plaintiff, if the answer denies the averments of the complaint. Such a judgment is erroneous. It may have been based upon an erroneous notion that, by failing to appear at the trial the defendant admitted the averments of the complaint. But it must be treated simply as a judgment without evidence to sustain it.

The Superior Court properly ordered the new trial to take place in the Superior Court. (*People v. Freelon*, 8 Cal. 517.)

Writ denied and proceedings dismissed.

[Department One. — May 30, 1883.]

JEREMIAH CALLAHAN ET AL., APPELLANTS, v.
CATHERINE HICKEY, ET AL., RESPONDENTS.

PRACTICE — OVERRULING DEMURRER FOR WANT OF APPEARANCE — NOTICE MUST BE GIVEN. — Under rule 16 of the Superior Court of the city and county of San Francisco, when a demurrer to the complaint has been overruled for want of an appearance, notice of the ruling of the court must be given to the demurring party before the entry of a judgment.

APPEAL from an order vacating and setting aside a judgment.

The facts are sufficiently stated in the opinion of the court.

Carroll Cook, for Appellants.

The court had no power or jurisdiction to render the said order, for the proceeding had been ended, judgment rendered, and the execution returned satisfied at the time of its rendition, and the court exercising a limited and special jurisdiction in a summary proceeding under the statute could assume no powers not delegated to it by such statute. (Chap. 4, part 3, tit. 3, Code Civ. Proc.; *O'Connor v. Blake*, 29 Cal. 316; *Winter v. Fitzpatrick*, 35 Cal. 273; § 1169, Code Civ. Proc.)

If rule 16 could be construed so as to make the proceeding appear irregular, then the rule itself under such a construction would be void, as in conflict with the statute. (Code Civ. Proc. § 1169; *People v. McClellan*, 31 Cal. 101.)

R. Percy Wright, for Respondents.

We are unable to see how a rule of court giving five days' time to answer after the overruling of a demurrer can possibly be in conflict with section 1169 of the Code of Civil Procedure. That section applies only where the defendant *does not appear* and defend. In such case it is proper, as well in summary proceedings as in an action on contract, "to enter default and render judgment in favor of the plaintiff, as prayed in the complaint."

The defendants *had appeared* and *demurred*, and on the overruling of the demurrer they had, by virtue of the statute and the rule of court combined, a right to answer within five days after service of notice of the ruling of the court.

It is because the judgment was entered contrary to the rule of court, and the defendants were thereby deprived of any opportunity to answer, that the court ordered the judgment to be set aside.

PER CURIAM.—In the absence of defendant's counsel the court overruled a demurrer which had been interposed by the defendant to the plaintiff's complaint, without giving time to the defendant to answer. But there was a rule of the court which provided as follows: "Rule 16. When a demurrer to any pleading is sustained or overruled the adverse party shall have five days within which to amend or answer after receiving notice of the ruling of the court. When a demurrer to the complaint has been overruled for want of an appearance of the party demurring, or where, in the opinion of the court, the demurrer was frivolous or interposed for delay, leave will not be given to the party to answer such complaint, except upon an affidavit of merits, within five days, or such further time as may be allowed by the court or judge thereof."

Instead of giving the notice required by the rule, the plaintiff, immediately after the overruling of the demurrer, took judgment against the defendant, and had the same entered against him. The taking and entry of the judgment were in violation of the rule of the court, and the judgment was irregular, and being irregular, upon the showing made by the defendant, the court properly set it aside and allowed the defendant to answer the complaint.

[Department One. — May 30, 1883.]

**S. DRISCOLL, RESPONDENT, v. THOMAS B. HOWARD,
APPELLANT.**

STREET ASSESSMENT — FORECLOSURE OF LIEN. — Where an action to enforce the lien of a street assessment is against two or more owners, no decree can be entered after a dismissal as to one of the defendants. All the owners must be before the court.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are sufficiently stated in the opinion of the court.

Jarboe & Harrison, for Appellants.

A decree cannot be rendered in an action to foreclose the lien of a street assessment, unless all of the parties interested in the lot are before the court. (*People v. Doe*, 48 Cal. 560; *Hancock v. Bowman*, 49 Cal. 413; *Clark v. Porter*, 53 Cal. 409; *Diggins v. Reay*, 54 Cal. 525; *Harney v. Applegate*, 57 Cal. 205.)

C. H. Parker, for Respondents.

The plaintiff complied with the doctrine laid down in *People v. Doe*. There is no question of pleading in this case.

In *Hancock v. Bowman*, the plaintiff took judgment against a defendant not served or dismissed. This is not that case.

In *Clark v. Porter*, a defendant was dismissed against the objection of a co-defendant, and the latter was not allowed to plead the necessity of a joinder of said defendant as one of the owners. This is not that case.

Here the appellant, for aught that appears of record, had the opportunity to set up the non-joinder of the wife.

Harney v. Applegate has no application to this case. No similar question arises here.

In *Diggins v. Reay* the case shows that no disposition was made as to one defendant.

That is not this case; as here, the wife of appellant was dismissed, which fact is shown in the judgment, p. 7 of the transcript.

Nothing in the record appearing to the contrary, the presumption is, that the dismissal was proper.

By the COURT.—The action was brought to enforce the alleged lien of a street assessment. The action was brought against Thomas B. Howard and Mary T. B. Howard as defendants. The complaint avers "that said defendants are the owners in fee of said described land, and in possession of and claiming to own the same, and exercising acts of ownership over

the same. That the legal title of said land appears by deeds recorded in the recorder's office of said city and county to be in defendants." The action was *dismissed* by plaintiff as to defendant Mary T. B. Howard. Upon the default of the defendant Thomas B. Howard, judgment was rendered against him and for a sale of the premises. From such judgment the defendant, Thomas B., appeals.

The original complaint was not amended. From the judgment roll it appears that the land being owned in fee by Thomas B. and Mary T. B. Howard, a decree for the sale of the premises was entered against the sole defendant Thomas B. Howard. But a decree cannot be entered in an action to foreclose the lien of a street assessment, unless all the owners of the lot are before the court. (*People v. Doe*, 48 Cal. 560; *Hancock v. Bowman*, 49 Cal. 413; *Clark v. Porter*, 53 Cal. 409; *Diggins v. Reay*, 54 Cal. 525; *Harney v. Applegate*, 57 Cal. 205.)

Judgment reversed and cause remanded for further proceedings.

[Department One. — May 30, 1883.]

PATRICK CARROLL ET AL., RESPONDENTS, v.
EDWARD ELLIS, APPELLANT.

HOMESTEAD — DESTRUCTION OF RIGHT BY CONVEYANCE OF AN UNDIVIDED INTEREST. — In 1865, the defendant and his wife, who had filed a declaration of homestead upon certain premises, conveyed to third persons an undivided one half thereof. *Held*, that as at that time, a homestead right could not attach to lands held in common, or by joint tenancy, the homestead right became thereby destroyed.

ID. — Such right is destroyed notwithstanding the undivided moiety was, at the same time, and as a part of the same transaction, reconveyed to the husband. There was a period of time, however short, during which the title to the undivided one half was vested in the third persons.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

In 1864, the defendant Edward Ellis and his wife filed a declaration of homestead upon the premises in controversy. In 1865, they executed a deed of conveyance of the undivided one half of said premises, in conjunction with other property, to

Thomas B. Howard and W. H. Ladd, and Howard and Ladd, at the same time, and as a part of the same transaction, reconveyed to defendant Edward Ellis the same undivided one half. This last named conveyance was the only consideration for the first. There was no change of possession. In 1875, the defendant Edward Ellis executed and delivered a mortgage upon the premises to secure a note payable to the plaintiffs. The note was not paid at maturity, and this action was brought to foreclose the mortgage.

E. A. & G. E. Lawrence, for Appellants.

The lower court held that by virtue of the conveyance, the homestead right was abandoned. This is assigned for error. The case of *Kellersberger v. Kopp*, 6 Cal. 563, does not sustain the ruling of the court. There the occupant of the homestead only owned the undivided one half of the premises. Here defendants never parted with the title or possession, and were always owners of the whole. The homestead was not lost by a simple exchange of deeds. (*Eby v. Foster*, 61 Cal. 282.)

Frank & Carson, and J. D. Sullivan, for Respondents.

As a husband and wife may, by joining in a conveyance, destroy a homestead right already acquired by selling the whole, so they may equally destroy it by selling or conveying a part of it, if it be done in the shape of an undivided moiety, so as to turn the estate into a tenancy in common; and when it has been thus destroyed no question of homestead can be raised against a *bona fide* creditor. (*Kellersberger v. Kopp*, 6 Cal. 563; *Bishop v. Hubbard*, 23 Cal. 517; *Elias v. Verdugo*, 27 Cal. 425; *Seaton v. Son*, 32 Cal. 481.)

Such a conveyance clearly invalidates the homestead. (*Ashley v. Olmstead*, 54 Cal. 616; *Grogan v. Thrift*, 58 Cal. 378.)

A homestead cannot be carved out of land held in joint tenancy or by tenancy in common. (*Elias v. Verdugo*, 27 Cal. 418; *Wolf v. Fleischacker*, 5 Cal. 244; *Reynolds v. Pixley*, 6 Cal. 165; *Giblin v. Jordan*, 6 Cal. 416; *Seaton v. Son*, 32 Cal. 481.)

PER CURIAM.—When the several transactions between these

parties occurred a homestead right could not attach upon lands held in common, or by joint tenancy. (*Kellersberger v. Kopp*, 6 Cal. 563; *Bishop v. Hubbard*, 23 Cal. 517; *Elias v. Verdugo*, 27 Cal. 418.)

And in *Kellersberger v. Kopp*, 6 Cal. 565, it was held: "As husband and wife may, by joining in a conveyance, destroy a homestead right already acquired, so they may equally destroy it by selling and conveying a part of it, if it be done in the shape of an undivided moiety, so as to turn the estate into a tenancy in common; and when it has been thus destroyed, no question of homestead can be raised against a creditor."

The court below found, that, ten years prior to the execution by the husband of the mortgage sought to be foreclosed in this action, "the defendant, Edward Ellis, and his said wife, Kate Ellis, made and executed a deed of conveyance to the undivided one half of said premises, . . . to Thomas B. Howard and William H. Ladd."

It is urged by appellant that the homestead right was not destroyed by such conveyance, because the court also found "and the said Thomas B. Howard and William H. Ladd at the same time, and as part of the same transaction, executed to the defendant Edward Ellis, a conveyance of the same undivided half of said premises."

There can be no doubt, however, there was a period of time, however short, during which the title to the undivided one half was vested in Howard and Ladd.

Judgment and order affirmed.

[Department One. — May 30, 1883.]

C. A. KENNEY ET AL., APPELLANTS, v. DANIEL KELLEHER ET AL., RESPONDENTS.

PRACTICE — RENEWAL OF MOTIONS. — Leave to renew a motion may be given after the original motion is denied, and the granting or refusal of leave is within the legal discretion of the court, and will not be interfered with except in case of abuse; and it is not an abuse to grant leave upon the same facts more fully stated.

ID. — LEAVE TO RENEW MAY BE GRANTED AT CHAMBERS. — The judge may at chambers grant leave to renew the motion.

APPEAL from an order of the Superior Court of the city and county of San Francisco vacating and setting aside a default and judgment.

Judgment by default was entered against the defendant Catherine Kelleher, and she moved the court to set aside the default and judgment, which motion the court denied. Subsequently she renewed the motion, and the following order was written upon the notice of motion: "Good cause being shown therefor, on motion of Sullivan and Severance, attorneys for defendant Mrs. C. Kelleher, it is ordered that the time of service be shortened, and that the motion therein specified be heard at the time and place therein named, April 27th, 1880.

"M. A. EDMONDS, Judge."

This order was made at chambers. The court granted the motion and set aside the default and judgment with leave to answer, and the plaintiff appealed from the order.

Pillsbury & Titus, for Appellants.

The decision of the first motion became the law of the case on all points involved therein. The only legal remedy for the losing party was an application to renew upon the ground of facts discovered after the determination of the first motion, or an appeal. (*Lang v. Specht*, 7 Pac. C. L. J. 236.)

A motion cannot be renewed without leave of the court. (*Ford v. Doyle*, 44 Cal. 635; *Bowers v. Cherokee Bob*, 46 Cal. 279; *Reed v. Allison*, 54 Cal. 490; *Mitchell v. Allen*, 12 Wend. 290; *Dwight v. St. John*, 25 N. Y. 203; *Pierce v. Kneeland*, 9 Wis. (s. p.), 33, 34; *Ray v. Connor*, 3 Ed. Ch. 478; *Dodd v. Astor*, 2 Barb. Ch. 396; *Bellinger v. Martindale*, 8 How. Pr. 113; *Re Brockway*, 14 The Reporter, 454.)

Leave to renew could only be granted by the court, and not by the judge at chambers. (*Dollfus v. Frosch*, 5 Hill, 493, 495.)

Leave will not be given to renew a motion to enable a party to insist on facts known to him, but not relied on at the first hearing. It must be upon newly discovered facts. (*Pattison v. Bacon*, 21 How. Pr. 478; *Lovell v. Martin*, 21 How. Pr. 238; *Schlemmer v. Myerstein*, 19 How. Pr. 412.)

Philip G. Galpin, W. S. McPheters, and John Coffey, for Respondents.

Applications to open defaults are addressed to the legal discretion of the court, and unless there is a plain case of an abuse of this discretion, the Supreme Court will not interfere. (*Coleman v. Rankin*, 37 Cal. 247; *Watson v. S. F. and H. B. R. R. Co.* 41 Cal. 17; *Santa Barbara L. S. Co. v. Thompson*, 46 Cal. 63.)

PER CURIAM. — Leave to renew a motion may be given after the original motion is denied, and when given may be acted upon. In this case there must necessarily have been an application to the court for leave to renew the motion, and the application must have been granted. This is evident from the fact that the court entertained the motion for an order to show cause, and afterward, when the principal motion came on to be heard, entertained and granted it against the objections of the opposite party. (*Bowers v. Cherokee Bob*, 46 Cal. 286.)

It is insisted that leave to renew can only be granted by the court, and not by a judge in chambers. But a judge of the Superior Court may, at chambers, grant all orders which are usually granted upon *ex parte* application. (Code Civ. Proc. § 166.) Orders to show cause are made *ex parte*. The final order was made by the court. It was said in *Ford v. Doyle*, 44 Cal. 635, that the doctrine of *res adjudicata*, in its strict sense, does not apply to motions made in the course of practice, and the court may, upon a proper showing, allow a renewal of a motion once decided. It is added that this leave will rarely be granted unless it appears that a new state of facts has arisen since the former hearing, or that the then existing facts were not presented by reason of surprise or excusable neglect.

But this is not a determination that leave may never be granted upon the same facts more fully stated. The granting or refusing of leave to renew the motion is within the legal discretion of the court, which we ought not to interfere with except in case of abuse.

No point is made by appellants as to the sufficiency of the affidavit of the defendant as an "affidavit of merits."

Upon the affidavits and proffered answer of the applicant we cannot say the court below erred in granting the motion to set aside the default judgment.

The portions of the testimony objected to were not entirely irrelevant.

Order appealed from affirmed.

[Department One. — May 30, 1883.]

J. F. G. EGGERS, APPELLANT, v. P. H. HINK, RESPONDENT.

TRADE MARK — BUSINESS SIGNS. — The object of a trade-mark is to indicate by its own meaning, or by association, the origin or ownership of the article to which it is applied. A sign placed over a man's place of business with a row of beer barrels painted on it, and the letters "P. B." stamped on the head of the barrels, and the words "Depot of the Celebrated" placed above, and the words "Philadelphia Beer" placed below the barrels, would relate only to the description of the beverage dealt in by him, and cannot be protected as a trade-mark.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are sufficiently stated in the opinion of the court.

John H. Dickinson, for Appellant, cited *Shaffer v. Korbell*, 9 Pac. C. L. J. 958; *Derringer v. Plate*, 29 Cal. 298; *Lawrence Manufacturing Co. v. Lowell Hosiery Mills*, 10 The Reporter, 809; *Fetridge v. Merchant*, *Cox's Am. Trade Mark Cases*, 194; *Burke v. Cassin*, 45 Cal. 469; *Falkinburg v. Lucy*, 35 Cal. 52; § 3199, Pol. Code; *Hier v. Abrahams*, 82 N. Y. 519; *Coddington's Digest of Trade Mark*, §§ 985, 261; *Coddington's Digest of Trade Marks*, § 1018.

William Leviston and *T. D. Riordan*, for Respondent, cited § 991 of the Civil Code; § 3196 of the Political Code; *Browne on Trade Marks*, § 143; *Amoskeag Co. v. Spear*, 2 Sandf. 605; *Amoskeag Co. v. Trainer*, The Reporter, Sept. 22, 1880; *Moorman v. Hoge*, 2 Sawy. 78; *Falkinburg v. Lucy*, 35 Cal. 65; *Choyinski v. Cohen*, 39 Cal. 501; *Burke v. Cassin*, 45 Cal. 467; *Wotherspoon v. Gray*, 36 Scot. Jur. 24; *Perry v. Truefit*, 6

Beav. 72; *Kinney v. Birch*, Codd's Dig. Tr. M. Cases, 1037; *Raggett v. Findlater*, Law R. 17 Eq. 29; *Stokes v. Langraff*, 17 Barb. 608; *Corwin v. Daley*, 7 Bosw. 222.)

PER CURIAM. — The action is to recover damages for a violation of the plaintiff's alleged trade-mark, and to restrain the use of it by the defendant in the future. The sufficiency of the complaint is the question for consideration. According to its averments the plaintiff is engaged in conducting a saloon business in the city and county of San Francisco, particularly for the sale of a certain kind of beer known as Philadelphia Beer; and what he seeks to protect as a trade-mark, and which is used by him as a sign over the doors of his place of business, and as a label for the beer bottled by him, consists of a row of beer barrels so painted upon the sign and printed upon the labels as to show the top-head and outline of each barrel, with the letters "P. B." indicating and standing for Philadelphia Beer, stamped or printed upon the head of each barrel, together with the words "Depot of the Celebrated" over, and the words "Philadelphia Lager Beer" below the row of barrels. The act of the defendant complained of is the erection by him over his place of business of a sign similar to that of the plaintiff, the chief difference being the insertion of the letters "F. B.," indicating and standing for "Fredericksburger Beer," in lieu of the letters "P. B.," and the insertion of the word "Fredericksburger" where the word "Philadelphia" appears on the sign and label of the plaintiff.

The object of a trade-mark is to indicate by its own meaning, or by association, the origin or ownership of the article to which it is applied. Section 991 of our Civil Code provides:—

"One who produces or deals in a particular thing, or conducts a particular business, may appropriate to his exclusive use, as a trade-mark, any form, symbol, or name, which has not been so appropriated by another, to designate the origin or ownership thereof, but he cannot exclusively appropriate any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced, or the business is carried on." And by section 3196 of the Political Code it is declared:—

"The phrase 'trade-mark' as used in this chapter includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper, usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman, to denote any goods to be imported, manufactured, produced, compounded, or sold by him, other than any name, word, or expression generally denoting any goods to be of some particular class or description."

We do not perceive that either the letters or words upon the plaintiff's sign or label, nor the device as a whole, in any manner indicated origin or ownership. A sign placed over a man's place of business with a row of beer barrels painted on it would indicate that he sold beer; the letters "P. B." stamped on the head of the barrels, and the words "Depot of the Celebrated" placed above, and the words "Philadelphia Beer" placed below the row of barrels, would indicate that he sold Philadelphia Beer. It does not appear that the plaintiff is the manufacturer of the Philadelphia Beer nor the sole agent for its sale. For aught that appears any one else has as much right to sell Philadelphia Beer as the plaintiff. In our opinion the sign and label of the plaintiff relates only to the description of the beverage dealt in by him, and therefore cannot be protected as a trade-mark.

Judgment affirmed.

[In Bank. — May 30, 1883.]

J. S. DYER, APPELLANT, v. R. J. HARRISON ET AL.,
RESPONDENTS.

STREET ASSESSMENT.—The board of supervisors of San Francisco ordered that the roadway and sidewalks of Greenwich Street from Laguna to Fillmore Street—a distance of three blocks—be macadamized, and that redwood curbs be furnished and laid thereon. In making the assessment, the superintendent of streets separated the roadway and curbing from the sidewalks, and as to the latter, three lots chargeable with their proportion of the cost of the work were omitted from the assessment. *Held* (1), that the assessment, even if properly made in other respects, was invalid as to the sidewalks by reason of the omission of these lots; (2) that in estimating the cost of the work, and distributing the same over the lots liable therefor, the roadway and curbing could be separated from the sidewalks, and that the entire assessment was void:

(3) that if a separate assessment were required for each kind of work, the assessment here could not be sustained, because the cost of the curbing and the expense of macadamizing the roadway are united.

Id. — NUMBERING THE LOTS AND SHOWING THEIR FRONTAGE. — The assessment was also held to be invalid as to one of the lots, for the reason that the provisions of the statute requiring each lot or portion of lot to be numbered, and the frontage shown were not complied with. The lot was numbered, but portions thereof assessed for work done on the street crossings were not numbered either in the assessment or on the diagram, nor did the diagram show the number of feet frontage of the portions so assessed.

APPEAL from an order of the late District Court of the Third Judicial District in and for the city and county of San Francisco refusing a new trial.

Action on a street assessment. No work was done on the sidewalks in front of the lots omitted from the assessment. The additional facts sufficiently appear in the head notes and opinion of the court.

J. C. Bates and J. M. Wood, for Appellant.

Cope & Boyd, for Respondents.

PER CURIAM.—Three of the lots on Greenwich Street, liable to assessment for the construction of sidewalks on Greenwich, between Laguna and Fillmore Streets, are omitted from the assessment. The property liable to assessment for sidewalks also constituted the district subject to assessment for the curbing and macadamizing the roadway. If the property fronting on Greenwich constituted two separate and conterminous assessment districts, one to be assessed for sidewalks and the other to be assessed for the roadway and curbing, then the whole assessment for *sidewalks* is void, because certain lots included within the assessment district for sidewalks were omitted. (*People v. Lynch*, 51 Cal. 15.)

It is urged, by respondent, that the assessment applicable to the defined district is an entirety, and that the whole assessment is void because of the omission of the three lots; that the only assessment which the superintendent was authorized to make was a distribution, proportionate to frontage (upon all the lots opposite to the work done), of the *gross sum* to be paid the contractor, with incidental expenses. It is admitted that for the

"work done on main street crossings" separate assessment districts are provided. The statute declares, "The expenses of such work shall be assessed upon the four quarter blocks adjoining and cornering on the crossings." (Stats. 1871-72, p. 810, sub. 3.) But as to work done on the street improved, except at the crossings, it is provided (Stats. 1871-72, p. 809, sub. 1), the expenses "incurred for any work authorized by section 3 (of the act) shall be assessed upon the lots and lands fronting on the work, . . . each lot or portion of lot being separately assessed, in proportion to its frontage, at a rate per front foot sufficient to cover the *total expense* of the work."

If it be admitted that the resolutions of intention and ordering the work, and the award, authorized the superintendent to agree in *one contract* for macadamizing the roadway, constructing sidewalks and curbs, it would seem the more reasonable construction of the statute that the assessment should be distributed with reference to the gross sum to be paid under the contract. Section 8 of the act means this, or it means that there shall be a separate assessment for *each kind of work* mentioned in section 3. If it means a separate assessment for each kind of work done under a single contract, the assessment herein is invalid, because it adds the price of the curbing to the expenses of macadamizing the roadway, and distributes the aggregate amount upon the lots fronting on the street.

If the statute requires the "total expense" incurred for macadamizing the street, macadamizing the sidewalks and erecting curbs to be apportioned in a single assessment (and this we think the true interpretation), the assessment which attempts to divide these charges is invalid.

The ninth section of the Act of 1872 (Stats. 1871-72, p. 813) requires the superintendent to make "an assessment to cover the sum due for the work done and performed *under the contract* . . . in conformity to the provisions of this act, and according to the character of the work done," etc. When the work done, of one or more kinds, is a charge upon the same property — or same assessment district — the act can be complied with only by distributing the total expense. Each and every portion of the work is ratably a charge upon the lots included within the

district. All the work done under the contract—the work done as a whole—is the benefit conferred upon the property within the district, in return for which the property within the district is assessed.

The assessment on lot 15 for the crossing is void, because it does not conform to section 11 of the act. The section requires an assessment to designate “the number of each lot or portion of lot assessed,” and that the accompanying diagram shall exhibit the relative location of such lot, or portion of lot, to the work done, “numbered to correspond with the numbers in the assessment, and showing the *number of feet* frontage assessed for said work,” etc.

Judgment and order affirmed.

Petition for a rehearing denied.

[In Bank. — May 30, 1883.]

FRANCIS M. MATTHEW AND NANCY MATTHEW,
RESPONDENTS, v. THE CENTRAL PACIFIC RAIL-
ROAD CO., APPELLANT.

DAMAGES — PERSONAL INJURIES TO WIFE — EXTENT OF RECOVERY IN ACTION BY HUSBAND AND WIFE. — In an action for damages for personal injuries to the wife, the husband must be made a party plaintiff, but the recovery cannot extend to any matters for which the husband must sue alone, as loss of service and the like.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order refusing a new trial.

The facts are sufficiently stated in the opinion of the court.

Glassel, Smith & Patton, for Appellant.

Brunson & Wells, and *Eb. Williams*, for Respondents.

PER CURIAM.—Action for damages. The complaint charges that on the 11th of March, 1880, the plaintiff, Nancy Matthew, was a passenger in a passenger coach in one of the defendant's trains of cars en route from Sacramento to Los Angeles, and

that while at a station on the line of the road she was, by the negligent starting of the train, violently thrown to the floor of the car, thereby receiving great and permanent injuries. The plaintiffs are the said Nancy Matthew, and her husband, Francis M. Matthew.

The ground of the action is the wife's personal injuries. The cause of action is hers. The husband was joined as a plaintiff because the common-law rule requiring that he do so is yet in force. But the husband could not himself recover for the personal injuries sustained by the wife. He might, however, recover such damages as he has suffered *in consequence* of such injuries. Under this head fall the loss of the wife's services to the husband, and such expenses as he may have been put to by reason of the injuries. Such *consequential* damage constitute the husband's cause of action, and in a suit to recover it the wife could not join.

These views will be found supported by the following authorities: *Sheldon v. Steamship Uncle Sam*, 18 Cal. 526; 1 Chitty's Pl. 78; Bliss on Code Plead. § 27; Pomeroy's Civil Rem. § 191; *Fuller et ux. v. Naugatuck R. R. Co.* 21 Conn. 571. It results, necessarily, that in the joint action of husband and wife for the personal suffering of or injury to the wife, the recovery cannot extend to any matter for which the husband must sue alone; and it was expressly so decided in the case of *Sheldon v. Steamship Uncle Sam*, 18 Cal. *supra*, whence it follows that the court below erred in instructing the jury in the case at bar that, in awarding damages to the plaintiffs they should take into consideration the loss of the services of the wife to the husband, and the value of such services.

Judgment and order reversed, and cause remanded for a new trial.

[Department One. — June 4, 1888.]

C. D. HAVEN, APPELLANT, v. F. M. HAWS,
RESPONDENT.

EVIDENCE — DECISION OF UNITED STATES LAND DEPARTMENT. — The finding of any fact involved in a contest before the land department of the United States is conclusive upon the courts of this State in an action to hold the successful party as a trustee for the other, or to deprive him of the benefit of his success in the department, except, perhaps, in cases of fraud.

ID. — CERTIFICATE OF PURCHASE — ADVERSE POSSESSION. — In an action of ejectment, brought by one holding a certificate of purchase from the United States, against one in adverse possession, the effect of the certificate as evidence being statutory, the inquiry as to adverse possession to overcome it is one which has no relation to any judgment or action of any of the officers of the land department, by virtue of which the certificate was issued. Adverse possession is a fact to be determined by the State courts.

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order refusing a new trial.

The action was ejectment. The plaintiff held a certificate of purchase issued by the United States, and which grew out of a controversy before the land department, entitled *John D. Osborne v. Cyrus D. Haven & F. M. Haws*, involving the west half of a quarter section of government lands. The plaintiff and defendant had filed their declaratory statements to pre-empt the lands, and Osborne, holding a soldier's certificate, had located it upon the same lands. The contest thus begun resulted in a decision of the secretary of the interior awarding the land to the plaintiff Haven.

The defendant answering averred that he was, at the time plaintiff filed his declaratory statement, and since 1873 had been, in the adverse possession of the land in controversy, and by way of cross-complaint set up all the proceedings and findings of the land department in the contest between Osborne and the plaintiff and defendant, and prayed that the plaintiff be declared a trustee for him, and that all the rights secured by the certificate of purchase be conveyed to him. The plaintiff demurred to the cross-complaint, the demurrer was sustained, and the case went to trial upon the answer. On the trial the plaintiff offered in evidence the decision of the secretary of the interior, by virtue of which the certificate was issued. The court refused to admit it, and found that the defendant was, at

the time the plaintiff filed his declaratory statement to pre-empt the land, and at the commencement of this action, and has been continuously since 1873, in the adverse possession thereof, and gave judgment for the defendant.

C. W. C. Rowell, for Appellant, cited *Dilla v. Bohall*, 53 Cal. 709; *Powers v. Leith*, 53 Cal. 711.

Satterwhite & Curtis, for Respondent, cited *Conlan v. Quinby*, 51 Cal. 412; *Hutton v. Frisbie*, 37 Cal. 475; *Page v. Fowler*, 28 Cal. 605.

PER CURIAM.—Section 1925 of the Code of Civil Procedure provides that a certificate of purchase of any land issued in pursuance of any law of the United States is “primary” evidence that the holder thereof is the owner of the land described therein; but the evidence may be overcome by proof that at the time of filing the pre-emption claim on which such certificate may have issued, the land was in the adverse possession of the adverse party.

The adverse possession of defendant was a question of fact to be passed upon by the court that tried this action.

In case of contest between opposing claimants to a portion of the public lands in the land department of the United States, the finding of any fact involved in such contest is conclusive upon the courts of the State, in an action or proceeding brought here to hold the successful party in the contest as *trustee* for the other, or to deprive him of the benefit of his success in the department; except, perhaps, in certain cases where the officers of the land department have been imposed upon by false testimony or fraud.

But the certificate of purchase is evidence, *prima facie*, of title, only because the section of the Code makes it such evidence, and the same section provides that the evidence of the certificate may be overcome by proof of adverse possession, etc.

This leaves the inquiry as to adverse possession to overcome the effect of the certificate an independent inquiry, which has no relation to any action or judgment of the secretary of the interior or other officer of the United States. It is the fact of the adverse possession which is to be ascertained by the State

court. The finding of the land officers may have led up to the issuance of the certificate, but the *effect* of the *certificate*, as evidence in our courts, depends entirely upon our own legislation.

The court below properly refused to admit in evidence the decision of the secretary of the interior in the contest between plaintiff and Osborne, as conclusive or any evidence upon the question of the adverse possession of the defendant herein.

Judgment affirmed.

[Department Two. — June 4, 1883.]

IN THE MATTER OF THE ESTATE OF HENRY
C. HUDSON, DECEASED.

ADMINISTRATION — DECREE OF DISTRIBUTION — JURISDICTION OF PROBATE COURTS — JURISDICTION OF SUPERIOR COURTS AS SUCCESSORS. — Letters testamentary were issued in New Jersey and in this State. The administration in this State being completed, and the court finding that there were funds enough in the hands of the executor in New Jersey to satisfy the legacies to persons outside of this State, distributed the estate and discharged the executor. After six years the legatees in New Jersey filed a petition in the Superior Court, as successor of the Probate Court, alleging the inadequacy of the funds in the hands of the New Jersey executor to pay their legacies, and praying that the decree be set aside on account of false representations made to the court by the resident executor. *Held*, (1), that such decree is not void for want of jurisdiction; (2), that the Probate Courts had no jurisdiction to entertain a petition by a legatee to set aside a decree of distribution, after the time specified in section 473 of the Code of Civil Procedure, for fraud or imposition by false representations to the court; nor has the jurisdiction of the Superior Courts, as succeeding to the powers of the Probate Courts, been enlarged in this regard. Courts of equity can afford the proper relief.

APPEAL from an order and judgment of the Superior Court of the city and county of San Francisco sustaining the demurrer to and dismissing the petition to set aside the decree of distribution.

The facts sufficiently appear in the opinion of the court.

Hammond & Wright, for Appellants.

The decree of distribution is in excess of the jurisdiction of the court, and is void on its face. The California court of probate could have no jurisdiction to determine that there were

assets enough in New Jersey to pay the legacies there. (Story's Conflict of Laws, 422, 424, 429, 513, 586; *Jackson v. Johnson*, 34 Ga. 511; *Fay v. Haven*, 3 Met. 109-114; *Sparks v. White*, 7 Humph. 86; *Vermilya v. Beatty*, 6 Barb. 429; Story's Eq. Pl. 179; *Ex parte Lange*, 18 Wall. 175.)

The power of courts of probate to set aside their decrees for fraud in a suit by citation is in other States as unquestioned as that of the court of chancery to set aside any common-law judgment for fraud. (Gary on Probate of Wills, 608; *Waters v. Stickney*, 12 Allen, 11; *Sever v. Russell*, 4 Cush. 513-518; *Jennison v. Hapgood*, 7 Pick. 7; *Paine v. Stone*, 10 Pick. 76; *Gould v. Gould*, 3 Story, 519; *Morgan v. Dodge*, 44 N. H. 255.)

A. N. Drown, for Respondent, argued that the decree is final and that the court had no jurisdiction of the subject-matter of the petition or the parties. (Citing *Estate of Garraud*, 36 Cal. 279, 280; *Ex parte Smith*, 53 Cal. 204; *Wheeler v. Bolton*, 54 Cal. 302; *Reynolds v. Brumagim*, 54 Cal. 254; § 1908, Code Civ. Proc.; § 1686, Code Civ. Proc.; *Estate of Dall*, Myrick's Prob. Rep. 159.)

That a bill in equity is the only proper remedy. (*Chester v. Miller*, 13 Cal. 560.) That the decree is not void, but at most merely erroneous, and could have been corrected only by appeal. (*Ex parte Lange*, 18 Wall. 175.)

MYRICK, J.—Henry C. Hudson, a resident of New Jersey, died in that State December 6, 1871; his will was admitted to probate, in that State, December 28, 1871, and on the 28th of April, 1872, an exemplified copy was admitted to probate in this State. William H. Brokaw received letters testamentary in New Jersey, and C. C. Burr in this State. The will bequeathed to the present petitioners, residing in New Jersey, \$4,700, to persons residing in San Francisco, \$4,100, and to other persons, \$5,300. The remainder, if any, after the payment of debts and legacies, was to go to the widow of deceased. In January, 1874, the administration in this State being completed, the Probate Court, after finding that the estate here in the hands of the executor was equivalent in value to \$13,914.08,

after paying all debts and the legacies to persons residing in California, and was community property, and that there was then in the hands of the executor in New Jersey abundant property to satisfy the legacies to persons residing out of California, and all debts to persons residing out of this State, and the expenses of administration, distributed the residue in this State to the widow of deceased, Mary Hudson; and on the production of her receipt the executor here was discharged. In 1880, more than six years after the distribution and discharge, the petitioners presented their petition, asking that the decree of distribution and the discharge be set aside, and that a sufficient sum of the California assets be turned over to the New Jersey executor to pay the balances of the legacies now left unpaid. The petition avers that ten per cent of the legacies have been paid out of the New Jersey assets. It appears by the petition that on a settlement of the accounts of the New Jersey executor there remained in his hands \$5,441.63.

The petitioners aver that certain of them, acting for themselves and others, addressed letters to Burr, before and after his application for distribution, regarding the progress of his administration, and received information except as to the proceedings for distribution. It thus appears that they had actual knowledge of the administration here, and could before distribution have made such application as would have been necessary to protect their rights. It appears that they relied upon Burr, and they complain that he misled them.

The petition was demurred to (after due service upon them of citation) by the said Mary Hudson and C. C. Burr, upon the grounds that the court had no jurisdiction of either of them, or of the subject-matter of the petition; all other grounds of objection were waived.

We are of opinion that the demurrer was well taken, upon the ground that the court had no jurisdiction of the subject-matter of the petition. By section 1667 of the Code of Civil Procedure the Probate Court was authorized, on proceedings for distribution, *in case it was necessary*, to order the money here to be remitted to the New Jersey executor to pay legacies there. The fact that such action could be had in case it was necessary implies, of course, the right to hear and determine as to the

necessity; and we must presume that the court heard proof that the New Jersey assets were ample to pay all there. Therefore, the decree is not void on its face. Section 1666 of the Code of Civil Procedure makes the decree of the Probate Court on distribution conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal. Under the late Constitution, the Probate Courts were to have such jurisdiction as should be prescribed by law. There is no provision of the statute which gave to the Probate Court jurisdiction to entertain, after a decree of distribution and discharge (and after the time specified in section 473 of the Code of Civil Procedure), a petition to set aside the decree for fraud, or because the court had been imposed upon by false testimony. The jurisdiction of the Superior Courts, as succeeding to the powers of the Probate Courts, is not enlarged in this regard. In such cases, courts of equity have jurisdiction to afford proper relief; and if it be true that, by means of false testimony, the Probate Court was imposed upon, and induced to make a decree which it would not otherwise have made, doubtless a court of equity can charge the distributees as trustees.

It is proper to remark that we are not passing upon the power of the Probate Courts, or of the Superior Courts as successors, to entertain applications to afford relief pending the administration. We are passing upon the statute making the decree of distribution final.

Judgment affirmed. •

THORNTON, J., and SHARPSTEIN, J., concurred.

[Department Two. — June 4, 1883.]

IN THE MATTER OF THE ESTATE OF THOMAS
BEECH, DECEASED.

ADMINISTRATION — APPLICATION FOR LETTERS. — Two applications were made for letters of administration, one by the public administrator, and the other by a person who based his claim upon the written request of a son of the deceased residing in Great Britain. The court below decided in favor of the public administrator on the ground that no effect could be given to the request of the son by reason of his non-residence. *Held*, on a construction of certain provisions of the Code of Civil Procedure that the decision was correct.

STATUTE — CONFLICTING PROVISIONS — REPEAL BY IMPLICATION. — The provisions of section 1369 of the Code of Civil Procedure excluding non-residents is not repealed by section 1379 of the same Code. There is no express repeal, and no such conflict as to work a repeal by implication.

APPEAL from an order of the Superior Court of the city and county of San Francisco denying the application and petition of Thomas Menzies for letters of administration, and granting the same to the public administrator.

The decedent died in England, being at that time a resident of that country. He was never a resident of California, but left an estate here consisting of ten thousand dollars, deposited in the Security Savings Bank of San Francisco. The heirs of the decedent were Walter H. Beech, his son, and Mary L. F. Beech and Mrs. Bell, his daughters, all residents of the kingdom of Great Britain. There were no heirs or relatives residing in California. The decedent left a will which was admitted to probate in said kingdom, and the said Walter H. Beech was a devisee and legatee, and was named as an executor and trustee thereof. Walter H. Beech was never a resident of California. A copy of the will and probate were filed in the Superior Court of the city and county of San Francisco. Walter H. Beech made a written request asking the appointment of Thomas Menzies, the petitioner, as administrator with the will annexed, and that letters of administration be issued to him.

B. A. Reynolds, public administrator, also petitioned for letters of administration.

The court granted letters to the public administrator, and Menzies appealed.

Sydney V. Smith & Son, for Appellant, argued that he was entitled to letters under section 1379 of the Code of Civil Procedure as amended in 1880, and contended that the right of nomination conferred by that section is not lost by non-residence. That section 1369 of the Code of Civil Procedure is but a limitation upon the right of a non-resident to serve as administrator, citing *Estate of Cotter*, 54 Cal. 215; *Lucas v. Todd*, 28 Cal. 186.

John A. Wright, for the public administrator, cited in opposition to the appellant, *Estate of Kelly*, 57 Cal. 81; *Estate of Cotter*, 54 Cal. 215; *Estate of Morgan*, 53 Cal. 243.

SHARPSTEIN, J.—Section 1369 of the Code of Civil Procedure declares that “no person is competent or entitled to serve as administrator who is . . . not a *bona fide* resident of this State.” Section 1379 of the Code of Civil Procedure provides that “administration may be granted to one or more competent persons, although not entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the State, affidavits or depositions, taken *ex parte* before any officer authorized by the laws of this State to take acknowledgments and administer oaths out of this State, may be received as primary evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court.”

Were it not for the last clause of this section it probably would not be claimed that the court erred in refusing to appoint the appellant, whose sole right to administration is based upon the request of a non-resident, who, if a *bona fide* resident of this State, would himself be entitled to administration. And unless the clause of section 1369 above quoted is repealed by the last clause of section 1379, the request to have the appellant appointed was not made by a person who was himself either competent or entitled to serve as administrator.

There is no express repeal of the earlier statute, and a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior, if the two acts may well subsist together. (*Dr. Foster's Case*, 7 Rep. 87; *Bowen v. Lease*, 5 Hill,

221; *Canal Co. v. R. R. Co.* 4 Gill & J. 1; *Street v. Commonwealth*, 6 Watts & S. 209; *Commonwealth v. Easton Bank*, 10 Barr. 322; *Brown v. County Commissioners*, 21 Pa. St. 37; *Williams v. Potter*, 2 Barb. 316; *Commonwealth v. Herrick*, 6 Cush. 465.)

If the latter part of this statute be repugnant to the former part the latter part must stand, and so far as it is repugnant, be a repeal of the former, because it was last agreed to by the makers of the statute. (*Attorney-General v. Governor & Co. of Chelsea Water Works*, Fitzg. 195; Dwarries on Statutes, 515, 534.)

The question to be determined here is, whether the two clauses of the Code above quoted are repugnant or irreconcilably inconsistent. The former positively declares that no person is competent or *entitled* to serve as administrator who is not a *bona fide* resident of the State. The latter does not expressly declare that any person who is not a *bona fide* resident of the State shall be competent or entitled to so serve. It says, "When the person so entitled is a non-resident" his identity may be proven in a certain way. But "the person so entitled" never can be a non-resident so long as the clause which we have quoted from section 1369 stands unrepealed. So the legislature appears to have provided for a contingency which cannot arise under the law as it now stands, and until that contingency does arise the latter clause of section 1379 must remain practically inoperative.

Order appealed from affirmed.

MYRIOK, J., and THORNTON, J., concurred.

[In Bank. — June 4, 1883.]

J. W. CROWLEY, APPELLANT, v. A. E. DAVIS,
RESPONDENT.

PUBLIC STREET — CONSTRUCTION OF RAILROAD THEREON — INJUNCTION. — The owner of land bordering on a public street, but not including any portion of the street, cannot enjoin the obstruction of the street by a railroad, unless the injury to him will be different in character, and not merely greater in degree than that which the general public will suffer.

APPEAL from a judgment of the Superior Court of the county of Alameda.

The action was brought to enjoin the defendant from constructing and operating a steam railroad on Webster Street in the city of Oakland. The city council had passed an ordinance granting to the defendant the right to construct and maintain the road, but the validity of this ordinance was assailed on various grounds. The injunction was denied, and a judgment rendered dismissing the action.

W. W. Foote, Vrooman & Davis, and J. C. Martin, for Appellant.

Plaintiff has a right to maintain the action. (*Ford v. C. & N. R. R. Co.* 14 Wis. 669; *Williams v. N. Y. C. R. R. Co.* 16 N. Y. 97; *Wager v. Troy Union R. R. Co.* 25 N. Y. 529; *Im-lay v. Union Br. R. R. Co.* 26 Conn. 249; *S. P. R. R. Co. v. Reed*, 41 Cal. 259; § 14, art. 1, Cal. Const.; Code Civ. Proc. 731; *Blane v. Klumpke*, 29 Cal. 158; *Grigsby v. C. L. W. Co.* 40 Cal. 406; *Schulte v. N. P. T. Co.* 50 Cal. 594.)

Greathouse & Blanding, for Respondent.

SHARPSTEIN, J.—It appears by the statement of facts, upon which this case by stipulation of the parties was submitted to the court below, that the easterly line of the street in which the plaintiff seeks to have the defendant enjoined from constructing and operating a railroad, constitutes the western line of plaintiff's land, and "that the laying down of railroad tracks by defendant, and the operation of a railroad along said street, would impede and obstruct the use thereof as a public street to the same extent as other steam railroads laid down and operated in any street in a city, and to that extent does impede the free access, ingress, and egress to and from plaintiff's property and across said street, and that his property will be damaged thereby to the same extent as property would be damaged on any other street by the construction and operating thereon of a steam railroad."

The plaintiff's land "run up to the eastern line, and not to the middle of the street." (*Severy v. C. P. R. R. Co.* 51 Cal. 195.)

In *Bigley v. Nunan*, 53 Cal. 403, it was held that a private party is not entitled to an injunction to prevent the obstruction of a public highway, unless the injury which he will suffer thereby is shown to be different in character, and not merely greater in degree than that which the general public will suffer. And the court says that that rule is without exception. That case was approved and followed in the recent case of *Payne v. McKinley*, 54 Cal. 532.

In the case now before us it does not appear that the injury which the plaintiff will sustain, if said railroad be constructed and operated in said street, will be different from, or even greater than that which the public at large will suffer if said railroad be constructed and operated in said street; and, upon the authority of the cases above cited, the judgment must be affirmed.

Upon the other questions arising in this case we express no opinion.

Judgment affirmed.

ROSS, J., McKEE, J., and McKINSTY, J., concurred.
MYRICK, J., concurred in the judgment.

[In Bank. — June 4, 1883.]

HENRY BARROILHET, RESPONDENT, v. JEAN FISCH
ET AL., APPELLANTS.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS — REPEAL OF STATUTE. — The provisions of the Civil Code in relation to assignments for the benefit of creditors are not repealed by the insolvent law of 1880.

ID. — INVENTORY OF INDEBTEDNESS. — A mistake in computation, or an unintentional error, whereby the indebtedness to some of the creditors is represented in the inventory as larger than the amounts actually owing, is not enough to vitiate the assignment.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The assignment in question was made by *Joseph F. Vorbe* to the plaintiff in trust for the creditors of *Vorbe*. One of the

principal objections to the assignment arose on an indebtedness of three thousand five hundred dollars appearing in the inventory as due to *Madam M. Grandvoinet*. This was originally a *bona fide* indebtedness, but prior to the assignment, the parties entered into an agreement by which the indebtedness was changed to an annuity for life. The court below found that the error in regard to the indebtedness as stated in the inventory was accidental, and without any fraudulent intent.

The action was brought to determine the rights of the plaintiff under the assignment, and to enjoin a sale of the assigned property under a judgment recovered by the defendant *Fisch* against *Vorbe* subsequent to the assignment. The court held that the assignment was valid, and vested in the plaintiff the title to the property for the benefit of the creditors. A judgment was rendered in his favor as demanded in the complaint.

Stephen G. Nye, and York & Whitworth, for Appellants.

Edward J. Pringle, for Respondent.

SHARPSTEIN, J.—In *Dresbach v. His Creditors*, 63 Cal. 187, it was held that the Code which provides for “assignments for the benefit of creditors” (Civ. Code, tit. 3, part 2, div. 4), was not repealed by the insolvent law of 1880, which contains a provision that all acts and parts of acts in conflict with it are repealed.

Conceding that the assignor in some instances inventoried his indebtedness to some of the creditors, for whose benefit said assignment was made, too high, we think, in the absence of any evidence that it was designedly done, the assignment should not be held void for that reason. A mere mistake of computation ought not to vitiate such an assignment, and we are not prepared to say from an inspection of the record that there is anything more than that apparent in this case. The court below found that there was not, and we must presume that the evidence justified that finding unless the contrary appears.

Judgment and order affirmed.

MYRICK, J., MCKEE, J., THORNTON, J., and MCKINSTRY, J., concurred.

[Department One. — June 6, 1888.]

MARY KANE, RESPONDENT, v. THOMAS DESMOND,
SHERIFF, ETC., APPELLANT.

GIFT — HUSBAND AND WIFE. — A verbal gift of personal property — a piano — by a husband to his wife, is valid as between the parties, the piano being delivered to and continuously used by the wife as her property. Such a gift would be void as to existing creditors of the husband, but in the absence of evidence that the husband was indebted at the time, there is no presumption of its invalidity as to subsequent creditors.

SEIZURE UNDER EXECUTION — JUSTIFICATION OF THE OFFICER. — Where property of the wife is seized under an execution against the husband, the officer is not in a position to justify the seizure, unless, in addition to the execution, he also produces the judgment on which it was issued.

JUDGMENT — JUSTICE OF THE PEACE. — In order to support a judgment rendered by a justice of the peace, whose jurisdiction is special and limited, the jurisdictional facts must be shown. There is no presumption in favor of the jurisdiction. An entry in the docket of the justice to the effect that the summons was returned served, does not show such a service as the law required to give jurisdiction of the person.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The defendant was sheriff of the city and county of San Francisco, and the action was brought to recover the property or its value. The additional facts are sufficiently stated in the opinion of the court.

H. C. Firebaugh, for Appellant.

H. G. Sieberst, for Respondent.

McKEE, J. — The defendant seized the piano in controversy in this case from the possession of the plaintiff, by an execution, issued in favor of *A. L. Day v. Thomas Kane*, and sold it at execution sale as the property of Kane to satisfy the execution. Thomas Kane was the husband of the plaintiff. On the trial of the case the court found the plaintiff was, at the time of the seizure and sale, the sole and exclusive owner of the property in her own right, and entitled to its possession, and that her husband had no right or title to it. The seizure of the property was, therefore, wrongful (*Wellman v. English*, 38 Cal. 583;

Lewis v. Johns, 34 Cal. 629; *Van Pelt v. Littler*, 14 Cal. 194), and the plaintiff was entitled to recover.

But the finding is attacked as against the law and the evidence, in this, that the evidence showed the plaintiff's claim of title to the property was founded on a gift from her husband, which was void as to his creditors. But it does not appear that the husband was indebted to any one at the time of the gift, except to the person from whom he had rented the piano under an agreement to purchase it on the instalment plan. Being free from debt the husband had the right to transfer his interest in the property to his wife by gift, and the wife, under the law, had the capacity to take and hold it in her own name and right. (*Dow v. Gould & Curry S. M. Co.* 31 Cal. 629; *Woods v. Whitney*, 42 Cal. 358; *Higgins v. Higgins*, 46 Cal. 259; *Peck v. Brummagim*, 31 Cal. 440.) The gift was complete; for the evidence tended to show that immediately after the husband had rented the piano under the agreement to purchase, he delivered it to his wife as a gift, and she accepted it, and used it continuously as her separate property until the time of the seizure. Now this transfer by gift was valid and effectual between herself and her husband and all the world, except existing creditors and *bona fide* subsequent purchasers without notice. There was no proof that Day—the execution creditor—was a creditor of the husband at the time of the gift, and there is no presumption that the gift was void as to him as a subsequent creditor. (*Wells v. Stout*, 9 Cal. 480; *Hussey v. Castle*, 41 Cal. 239.)

Presumptively, therefore, the gift was valid as between the parties; and, being valid, it vested in the plaintiff, as of her own right, whatever interest her husband had in the property. It was, therefore, her separate property; and the transaction by which she acquired it cannot be attacked as fraudulent and void as to subsequent creditors, except by such a creditor or an officer representing him. Here, however, the suit is not against one who claims to be a creditor; it is against the officer who levied the execution. But an officer, who seizes the separate property of the wife by an execution against her husband, is not the representative of the execution creditor, for the purpose of attacking a legal transfer to the wife, unless he produces the judgment upon which the execution was issued. It is well settled that,

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where an officer is sued for seizing or selling the property of one under an execution against another, he must, in order to show that the transfer of the property by the execution debtor was fraudulent and void as to the execution creditor, prove not only the issuing of the execution, the levy, and that he was a creditor, but also the *rendition* of a judgment upon his debt, and that the execution was issued upon the judgment. (*Bickerstaff v. Doub*, 19 Cal. 109; 2 Hilliard on Torts, 544; *Ames v. Sturtevant*, 2 Allen, 583; *Martin v. Padger*, 5 Burr. 2633; *Lake v. Billers*, 1 Raym. Ld. 733.)

It was admitted that the defendant seized the property under color of the execution in his hands. The execution itself showed that it was issued by a justice of the peace of the city and county of San Francisco; but there was no proof that it had been issued on a judgment rendered by him or any other justice. The docket of the justice was given in evidence, but that contained only the following recitals: "No. 2241. *A. L. Day v. John Kane*, Leman, Justice; suit for \$296.81 goods sold. The date of the case, September 16, 1880. September 17th, return served summons; 23d, case called, plaintiff appearing by *H. C. Firebaugh* and the defendant failing to answer, the plaintiff has default and judgment entered against defendant, \$296.81, and \$6.50 costs. Signed Walter M. Leman, Justice of the Peace. Dated 23d September, 1880. October 11th, execution issued at request of plaintiff's attorney, returnable in 60 days." These recitals do not show that the justice acquired jurisdiction of the person of the defendant. According to the act concerning the Justices' Court of the city and county of San Francisco, approved April 3, 1876 (Statutes 1875-76, page 855), the summons issued from a Justices' Court had to be served and returned as provided in title v., part ii., of the Code of Civil Procedure; and until served according to the provisions of section 410 of that title the court was not deemed to have acquired jurisdiction of the defendant. There was no appearance by the defendant; the judgment purports to have been rendered by default; and the mere recital in the docket, viz.: "September 17th—Return served summons," affords no proof of the jurisdictional facts necessary to support the judgment—it is of no weight as proof of the proper service of the summons. "The

"*Second*—That the defendant is a corporation existing under the laws of the United States, and of this State, and as such is now, and for many years last past has been, the owner of a line of railroad known as the Central Pacific Railroad, extending from a point in the city of San Francisco, in the State of California, to Ogden, in the Territory of Utah; that the length of said road in the city and county of San Francisco is four miles from a point within said city to the eastern shore of the southern arm of the bay of San Francisco; that from said point on the eastern shore of the bay of San Francisco, to a point on the western shore of said bay, where the railway of defendant again commences, is about twelve miles; that across said bay no line of railroad has been constructed; and freight and passengers carried upon said road are taken across said bay upon steam ferry-boats; that, for more than four years last past, the defendant has owned and possessed the two steamers, to wit, the *Thoroughfare* and *Transit*, mentioned in plaintiff's complaint; that said steamers now are, and ever have been, respectively, of the burden of one thousand five hundred and sixty-six and one thousand and twelve tons, and are vessels entitled to be and are, and for more than four years last past have been, enrolled and registered in the port and harbor of San Francisco; that upon the decks of said vessels are laid railroad tracks, and the said vessels now are, and for more than four years last past have been, exclusively used for the purpose of transporting the cars of the defendant, and used in operating the said railroad across said bay of San Francisco, from the road of defendant on the eastern shore to the same upon the western shore and for no other purpose.

"And as a conclusion of law, from the foregoing facts, the court finds that the plaintiff is entitled to judgment against the defendant herein for the sum of \$1,039.70 and costs.

"And judgment therefor is hereby rendered and directed to be entered."

The sole question presented for decision herein is whether the steamers *Thoroughfare* and *Transit* mentioned in the above findings are to be assessed by the assessor of the city and county of San Francisco or by the State board of equalization.

The property to be assessed by the board is defined in the

10th section of article ix. of the Constitution of 1879. It is the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in the State.

All property, other than the above mentioned is to be assessed by the local assessors. Are the steamers above named embraced within the category of property named in the section above referred to? The relation of such steamers to the Central Pacific Railroad Company is set forth in the findings. They are certainly not the franchise of the defendant corporation. They may constitute an element to be taken into the computation to arrive at the value of the franchise of such corporation, but they are not such franchise. It is equally as clear that they are not rails or rolling stock. These words are to be construed according to their ordinary and popular meaning, and we do not think that it would be contended that rails or rolling stock in their ordinary and popular signification include the steamers above mentioned. Are they then embraced within the words roadway or road-bed, in the ordinary and popular acceptation of such words, as applied to railroads? These two words as applied to common roads, ordinarily mean the same thing, but as applied to railroads their meaning is not the same. The *road-bed*, referred to in section 10, in our judgment, is the bed or foundation on which the superstructure of the railroad rests. Such is the definition given by both Worcester and Webster, and we think it correct. The *roadway* has a more extended signification as applied to railroads. In addition to the part denominated road-bed, the roadway includes whatever space of ground the company is allowed by law in which to construct its road-bed and lay its track. Such space is defined in subdivision 4 of the 17th section and the 20th section of the act "to provide for the incorporation of railroad companies, etc., approved May 20, 1861." (Stats. 1861, p. 607; *S. F. & N. P. R. R. Co. v. State Board*, 60 Cal. 12.)

With these views of the signification of the words roadway and road-bed, we do not think they include the steamers above named, and therefore, we are of opinion that the assessment of the steamers above mentioned pertained to the local assessor, and was properly made by the assessor of the city and county of San Francisco.

Judgment affirmed.

MYRICK, J., McKEE, J., McKINSTRY, J., and SHARPENSTEIN, J., concurred.

[In Bank. — June 6, 1883.]

CITY AND COUNTY OF SAN FRANCISCO, Re-
SPONDENT, v. J. D. FRY, APPELLANT.

TAXATION — STOCKS. — Shares of stock in a corporation, the tangible property of which is situated in another State, and subject to taxation under the laws thereof, such shares being owned by a resident of this State, are taxable here without regard to the taxes thus imposed upon the corporate property. Section 3640 of the Political Code has reference to corporations whose property is situated in this State. The inhibition against double taxation only applies to such taxation by the same State or government.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are sufficiently stated in the opinion of the court.

W. H. Sears, for Appellant.

Louis H. Sharp, for Respondent.

THORNTON, J.—Action to recover taxes. The assessment, on which this action was brought, was for “mining stocks” (the property was so described in the assessment book or roll), for the fiscal year 1876–77. The case was heard below, and is argued here on the following facts agreed on:—

“That at the time this action was commenced there existed on the assessment roll of personal property for the fiscal year 1876–77, of the city and county of San Francisco, unpaid taxes amounting to one thousand and sixty-two dollars, and accruing interest; that the same have not been paid, and that judgment therefor is claimed against said defendant, and that the following exhibit ‘A’ relating thereto is a complete and accurate copy of the said assessment roll.

“That the assessment, from which the aforesaid taxes had accrued, had been levied for the said fiscal year on ‘mining

stocks of certain mining companies incorporated under the laws of, and having their principal offices in, the State of California.

“That the taxes sued upon in this action were assessed and levied upon mining stocks of certain mining corporations, whose entire tangible property was situated in the State of Nevada, and was taxed under the laws of that State, and were wholly paid by the companies for that year.”

Exhibit A referred to above shows an assessment of property described as “mining stocks” and valued at fifty thousand dollars.

It is contended that, as the tangible property belonging to the corporations in which the defendant owned shares was situate in and taxed in the State of Nevada, and the taxes paid there by the corporations, it could not be subject to taxation here.

1. It is said that such shares were not subject to taxation in this State, in virtue of the provisions of section 3640 of the Political Code. This section only applies to corporations whose property is situate in this State. The legislature could pass no laws which would operate in the State of Nevada, and it could not be held as law that the legislature of California was engaging in its appropriate work of legislation with regard to property situate in another State.

The presumption relied on in *Burke v. Badlam*, 57 Cal. 594, cannot be relied on here. If any of the property, including the franchise of the corporations referred to, had been assessed in this State, it was readily susceptible of proof. It does not appear in the case by any finding or admission that such was the case, and it would be an unheard of proceeding to reverse the judgment of the court below on a disputable presumption, imported into the case in this court, with nothing in the record to justify it. Every intendment must be made to sustain the correctness of the action of the court *a qua*. Error cannot be presumed. It must be shown by the record, and pointed out by him who avers that it exists.

2. It is further urged that to tax the shares in this State, when the property of the corporations is taxed in the State of Nevada, would be *double taxation*. But the inhibition of double taxation only applies to such taxation made by the same State or government. There is a double taxation or “duplicate taxa-

tion," as it is styled by Judge Cooley, which is wholly inadmissible under any constitution requiring equality and uniformity in taxation. "By duplicate taxation in this sense," says the learned author above named, "is understood the requirement that one person or any one subject of taxation shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once." (Cooley on Taxation, p. 164.)

It will be seen that, in this State, the shares of the corporation alone are taxed. Its property is not here assessed. Conceding that taxation of the shares and property of a corporation by the State of California would be double taxation, there is here no taxation of that kind.

Very similar to this case is that of *Dwight v. Mayor etc. of Boston*, 12 Allen, 316. A statute of the State of Massachusetts required that, in assessing the stockholders for their shares in any manufacturing corporation, "there shall first be deducted from the value thereof the value of the machinery and real estate belonging to such corporation." Dwight, a citizen of Boston, had been assessed upon shares of stock owned by him in a manufacturing corporation, established in the State of Maine, without any deduction. He asked for the deduction prescribed by the statute above mentioned from the value of his shares in the Maine corporation, and it was contended that Dwight would be doubly taxed without such deduction. The court refused it, holding that such shares, if owned by a citizen of Massachusetts, were taxable therein at their full value, without the deduction asked; that the statute referred to did not relate to corporations existing in other States. The court said: "The clause in this section of the statute requiring a deduction of the value of machinery and real estate is not to be taken as a general provision, regulating the taxation of all shares in manufacturing corporations wherever the corporations may be situated, but as *directly* connected with the previous clause, requiring the assessment of the machinery and real estate in the towns where the machinery is situated and employed. That provision can only be applicable to manufacturing corporations established within this commonwealth, as it is only in relation to such corporations that our legislature could so require. As to them,

having provided for taxation of a certain part of the capital in the towns in which they were situated, the statute requires a deduction of a like amount from the value of the shares, in order to avoid double taxation in this commonwealth of property wholly taxable here. But our whole system of taxation, as established and practiced, is to disregard the liability of shares in foreign corporations to taxation in the States where they are situated. Thus shares in foreign railroad corporations held by citizens of this State are fully taxed here, and no deduction is made for any taxation to which the corporations are subject in the States where they are situated. So it is in regard to shares held by our citizens in banks, insurance companies, and other moneyed corporations situated in other States. Such shares, when held by our citizens, are here treated as so much personal estate, following the person of the owner, and taxable at their full value in this commonwealth, regardless of what may be the foreign law as to taxation of the capital or any part of it elsewhere." (See *State Tax on Foreign Held Bonds*, 15 Wall. 323, 324; 18 Am. L. Reg. for 1879, N. S., and cases there cited.)

The above quoted remarks are true of the system of taxation established in this State. Our system of revenue laws is entirely independent of the laws of any other State.

Judgment and order affirmed.

McKEE, J., MYRICK, J., and MCKINSTY, J., concurred.

Rehearing denied.

[In Bank. — June 6, 1883.]

E. W. DEAN, PETITIONER, v. SUPERIOR COURT OF
THE COUNTY OF SANTA BARBARA,
RESPONDENT.

PROBATE PROCEEDINGS — DECREE OF DISTRIBUTION — DISCHARGE OF EXECUTORS.

— A decree of the Probate Court distributing the estate of a deceased person, and also settling the accounts of the executors, and discharging them from further liability, is not void on its face in respect to such discharge, upon the ground that it was premature, and to that extent in excess of the jurisdiction of the court, there being nothing in the decree to show that any part of the estate still remained in the hands of the executors.

! ID. — FRAUD — SETTING ASIDE THE DECREE. — After the lapse of six months from the rendition of the decree, it cannot be set aside for fraud on a mere petition under section 473 of the Code of Civil Procedure, even if the provisions of that section are applicable to decrees of the Probate Court. The only remedy is in equity, and a suit must be brought in the manner prescribed by the Code for the commencement of civil actions.

CERTIORARI to the Superior Court of the county of Santa Barbara, to review an order setting aside a decree of the Probate Court in the matter of the estate of H. W. Dean, deceased.

This proceeding was instituted by one of the executors of the last will and testament of the deceased. The order in question was made on a petition filed by the residuary legatee more than four years after the decree was rendered. The additional facts, so far as they bear upon the questions decided, are stated in the opinion of the court.

R. B. Canfield, for Petitioner.

W. C. Stratton, for Respondent.

PER CURIAM.— On the 13th July, 1876, the petitioner filed his final account and petition for distribution of the estate of H. W. Dean, deceased, of which he was executor; and on the 25th of the same month the Probate Court rendered a decree discharging the executors, releasing their bond and decreeing that the remainder of the estate “be and is hereby wholly set over and distributed to Mrs. H. W. Dean,” etc. The petition of the executor stated “that the real estate and personal property described in the inventory remains on hand,” and, “said estate is now ready for distribution.” The decree allowing the final account and distributing the estate, after reciting that the account “contains a just and full account of all the moneys received and disbursed by said executor from the date of his appointment as such to the said 25th day of July, A. D. 1876,” the day when the decree was entered; “that all necessary vouchers were produced and duly filed herein; that the total amount received by such executor as such is \$232.95, and the full amount expended \$157.75, leaving a balance of \$75.25 in gold coin”; and after other recitals with respect to the payment of debts and of a certain specific legacy, and as to the assumption by the residuary legatee of the payment of executor’s fees, and

the consent of the executor to release the estate therefrom, and as to the payment of all other expenses of administration, proceeds: "and it further appearing that the aforesaid final account embraces all the moneys received and paid out by the co-executor Sylvester Trule, and that he has ceased to act as such executor; and further, that said estate is now ready for final distribution, and that said account is entitled to be allowed, and the court having duly considered all the matters aforesaid: It is ordered and declared that the said final account of E. W. Dean, co-executor, etc., be and the same hereby is, in all respects, as the same was rendered and presented for settlement, approved, allowed, and settled, and that both of said executors, E. W. Dean and Sylvester Trule, be and are hereby finally and fully discharged from the further execution of their trust, and their bond fully exonerated, and that the remainder of said estate be and is hereby wholly set over and distributed to said residuary legatee, Mrs. H. W. Dean, otherwise Nellie T. Dean."

Section 1697 of the Code of Civil Procedure reads: "When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court must make a judgment or decree discharging him from all liability to be incurred thereafter."

Until the entry of a judgment or decree discharging the executor, the trust still continues in contemplation of law, and such executor remains clothed with the duty and authority of his office. (*McCrea v. Haraszthy*, 51 Cal. 151; *Dohs v. Dohs*, 60 Cal. 255.)

It may be admitted, for the purposes of this decision merely, that if it appeared from the decree that it had not been shown to the Probate Court "by satisfactory vouchers" that the executor "had paid all sums due from him," or had not been shown, to the satisfaction of the court, that he had delivered up all property of the estate to the persons entitled, etc., the decree in so far as it attempts to "discharge" the executors would be void, because in excess of the jurisdiction; and, being void,

that the court, of its own motion, or on motion of any party in interest, would be authorized to set aside or strike from its records such invalid portion of the decree.

But, inasmuch as the statute does not require that the judgment or decree shall contain copies of the vouchers mentioned in section 1697, or recite the evidence which shall satisfy the court that the executor has delivered all the property of the estate, the judgment discharging the executor, upon any construction of the section of the Code, is not void on its face unless it affirmatively appears therefrom that it was shown to the court that the executor had not complied with the prerequisites to the judgment.

It may be said that every portion of the decree before us which took effect at all, took effect at the same moment of time, and therefore it appears that the order discharging the executors was premature; that we cannot divide the decree and hold that, *perhaps*, the account was approved, the order of distribution made, the distribution made in fact, and afterwards satisfactory vouchers and evidence were produced by the executor, and *then* an order made discharging him.

But the section of the Code does not provide that the discharge can only be made *after* the decree of distribution, but after the estate has been fully administered. It may be admitted there must be an order of distribution to support the judgment of discharge, but may not the two take effect contemporaneously? In anticipation of the approval of his account, and of a decree of distribution, the executor may have paid the \$75.25 to the residuary legatee, or arranged with her for its application upon the executor's fees which she was to pay. As to the real estate, if she was already in actual possession of it, it was only necessary to show that fact to the court. The decree does not recite in terms that the \$75.25 is "in the hands" of the executor, but that, deducting from the moneys received by the executors the amount of the sums by him paid out, there remains a balance of \$75.25. Nor do we attach so much consequence as does respondent to the words in the decree, "it further appearing . . . that said estate is now ready for final distribution." It would be equally ready for the *decree* of distribution — for the action of the court, which would give legal effect to the distribution — whether the property had or had not previously

been actually delivered by the executor to the parties who should be determined by such decree to be entitled to it. It may be that it was made to appear to the Probate Court that the money had been paid or the property in fact distributed, in the manner in which the decree provided that it should be distributed. If so, there is no reason why the decree of distribution and discharge should not take effect contemporaneously. We cannot say that the judgment itself shows that the portion of it discharging the executor is void.

Due notice was given of the hearing of the application of the executor for a settlement of his final account and for a distribution of the estate. The notice recites, that, the executor "having filed in this court his *final account* and petition for distribution of the estate of said deceased," the hearing of the same had been fixed by the court for a certain day and place, and proceeds: "All persons interested in said estate are notified then and there to appear and show cause, if any they have, why the *said account* should not be allowed and petition granted." This certainly notified all persons interested that the account to be acted upon was the "final account" of the executor.

From the judgment or order, as a judgment or order settling the final account of the executor and directing distribution of the estate, an appeal lay to this court.

The petition to set aside the judgment or order was filed in the Superior, as successor of the Probate, Court, several years after the same was entered, long after the period had elapsed within which the appeal could have been taken, and long after the expiration of the six months mentioned in section 473 of the Code of Civil Procedure. The prayer that the judgment or order be set aside and annulled is based upon allegations in the petition of false representations and of fraudulent practices, on the part of the executor, by which the court was induced to approve the account and decree distribution.

If section 473 of the Code of Civil Procedure was applicable to judgments rendered by the late Probate Court, and a judgment induced by the fraudulent practices alleged in the petition is one which may be relieved against, as one taken against the residuary legatee through her "mistake, inadvertence, surprise, or excusable neglect," the application to the successor of the

court which had rendered the judgment came too late — more than six months of time having expired, it was too late to ask relief on motion. If section 473 of the Code of Civil Procedure did not apply to judgments or proceedings of the late Probate Court the judgment or order became final in that court, subject only to appeal, when it was entered.

If the judgment or order was obtained by the employment of frauds or artifices such as would justify a court of equity in annulling it (upon which it is unnecessary to express an opinion), the remedy of the party aggrieved was by independent action in equity, and the issuing and service of summons thereon. The matter had passed beyond the jurisdiction of the Superior Court as a court of probate.

The order on the 5th day of September, 1881, vacating and setting aside the judgment or order of the 25th day of July, 1876, approving and settling the final account of the executor, and distributing the remainder of the estate and discharging the executors is hereby annulled.

[In Bank. — June 6, 1882.]

**JAMES STRATHERN, APPELLANT, v. EDWARD
DAKIN ET AL., RESPONDENTS.**

MOTION FOR A NEW TRIAL — ORDER OF DISMISSAL — REVIEW ON APPEAL. —

An order dismissing a motion for a new trial cannot be reviewed on appeal in the absence of a statement or bill of exceptions containing the papers on which the order was made. The papers are not of themselves a part of the record.

ORDER REFUSING TO STRIKE OUT PARTS OF A PLEADING — HOW REVIEWED. —

Such an order may be reviewed on appeal from the judgment, but the motion and order must be incorporated in a statement or bill of exceptions.

APPEAL from a judgment of the District Court of the Twelfth Judicial District, and from an order dismissing a motion for a new trial.

The facts are stated in the opinion of the court.

W. H. Allen, for Appellant.

G. F. & W. H. Sharp, and *E. G. Knapp*, for Respondents.

This court will not review the order of the court below dismissing and denying plaintiff's motion for a new trial in the absence of a statement settled by the judge. (*Hoadley v. Crow*, 22 Cal. 265; *Wetherbee v. Carroll*, 33 Cal. 549, 555.)

The order denying plaintiff's motion to strike out portions of the answer will not be reviewed without a bill of exceptions. (40 Cal. 236; 41 Cal. 437; 43 Cal. 180; 31 Cal. 238; 28 Cal. 295.)

McKEE, J.—Judgment was given and entered for the defendants in this case on November 14, 1879. Within ten days after the entry of the same the plaintiff gave notice of his intention to move for a new trial upon the grounds of insufficiency of the evidence to justify the decision, and errors of law occurring at the trial. The notice designated that the motion would be heard on "a proposed statement to be served with the notice." It appears that a statement was settled December 31, 1879; but the plaintiff, claiming that the settlement had not been made according to law, gave notice of a motion based on an affidavit, for a resettlement of the statement. That motion was heard and denied. Meanwhile the defendants gave notice of a motion to dismiss the plaintiff's motion for a new trial upon the ground, among others, that the court had settled the statement and ordered it to be engrossed by the plaintiff, as the moving party, and that he had wilfully disobeyed the order. This motion was heard and granted; and from the order of dismissal and the judgment the plaintiff appeals.

In the transcript there is no bill of exceptions, no statement on appeal, and no papers identifiable as the papers used on the hearing of the motion to dismiss. That being the condition of the record, the validity and regularity of the order of dismissal is not reviewable on appeal. The presumption is that the order was properly made, and in the absence of a bill of exceptions or statement on appeal making the motion and order part of the record of the case, that presumption is conclusive. (*Nash v. Harris*, 57 Cal. 242.)

On the appeal from the judgment the errors assigned are: "That the court denied a motion made by the plaintiff to strike out parts of the defendants' answer, and also overruled a de-

murrer to the answer." But the motion and order denying the motion are no part of the judgment roll, and, as the appellant has not made them part of the record by bill of exceptions or statement on appeal, the ruling of the court is not reviewable on an appeal on the judgment roll. (*Abbott v. Douglass*, 28 Cal. 295; *Douglas v. Dakin*, 46 Cal. 49.)

The demurrer and order thereon are parts of the judgment roll; but we see no prejudicial error in overruling the demurrer. The several defenses as pleaded were sufficient to sustain the judgment.

Judgment and order affirmed.

Ross, J., McKINSTRY, J., MYRIOK, J., and SHARPSTEIN, J., concurred.

[In Bank. — June 7, 1883.]

THE PEOPLE, RESPONDENT, v. MARTIN MITCHELL,
APPELLANT.

CRIMINAL LAW — EVIDENCE — PREPONDERANCE — REASONABLE DOUBT. — The truth or falsity of the testimony of a witness, on which depends in part the defendant's guilt, is to be determined by the jury from all the circumstances bearing upon the question, and a fact tending to prove the one or the other need not be established beyond a reasonable doubt; a preponderance of evidence is sufficient.

APPEAL from a judgment of the Superior Court of Butte County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Attorney-General, for Respondent.

Reardan & Freer, for Appellant.

PER CURIAM.—A conviction of perjury. The appeal is from the judgment and from an order denying a motion for a new trial. The perjury was alleged to have been committed on the trial of one Taylor for the crime of arson.

The bill of exceptions sets forth that at the trial of this information Taylor, being on the stand as a witness, was shown certain letters which tended, in some degree, to show that the

testimony of the present defendant, at the trial of Taylor on the charge of arson (and which is charged in the information to have been false and perjured) was true; that the witness Taylor denied having written the same. That the present defendant then called an expert, who gave testimony tending to prove that the letters were written by Taylor.

The court charged the jury: "The question whether Taylor is the author of these letters is a question of fact, to be determined by you from the evidence in the case bearing upon that question; and in order to find that Taylor is the author of these letters you must be entirely satisfied, *beyond a reasonable doubt*, from the testimony adduced before you in this case."

Taylor, as a witness, on the trial of the alleged perjury, had also testified that "he had nothing to do and had no connection with setting fire to any barn in connection with defendant herein, or any other person." The false testimony alleged in the information to have been given by the present defendant, was to the effect that he and Taylor and a third person together committed the arson. The bill of exceptions before us recites that the letters referred to tended to show that the defendant here testified truly at the arson trial; they therefore tended to prove that Taylor testified falsely at the trial for perjury, and were material evidence.

The court, therefore, charged, in effect, that a fact material to his defense must be proved by defendant "beyond reasonable doubt."

Taylor was not the defendant on trial for perjury. He was a witness, and the truth or falsity of his testimony, upon which depended in part the defendant's guilt of perjury, was to be determined by the jury from all circumstances bearing upon that question. A fact tending to prove that he testified falsely on the trial of this case, and that the present defendant testified truly at the former trial, needed to be proved only by a preponderance of evidence.

Judgment and order reversed, and cause remanded for a new trial.

[In Bank. — June 7, 1883.]

THE PEOPLE, RESPONDENT, v. EZRA THOMAS,
APPELLANT.

CRIMINAL LAW — ATTEMPT TO SUBORN PERJURY — INFORMATION. — "Attempting to suborn perjury" is not the generic name of any class of offenses, and where an information charges such an offense in those terms, without anything more, except that the defendant endeavored to procure another person to swear falsely and commit perjury in a specified suit, it is insufficient.

APPEAL from a judgment of the Superior Court of Shasta County, and from an order denying a motion in arrest of judgment.

The information is as follows:—Ezra Thomas is accused by the district attorney for the county of Shasta, State of California, by this information, of the crime of attempting to suborn perjury committed as follows: The said Ezra Thomas, on or about the 21st day of October, 1882, at and in the county of Shasta, and State of California, and prior to the filing of this information, then and there being, then and there did wilfully, deliberately, and feloniously attempt and endeavor to procure another person, to wit, one Lee Thomas, to swear and testify falsely, and commit the crime of perjury in a certain law suit then and there pending in a Justices' Court of township No. 5, in and for said county of Shasta, and before one James P. Smith, a justice of the peace, wherein said Ezra Thomas was plaintiff, and John J. Kern et al. were defendants, all of which is contrary, etc.

Hart & White, for Appellant, cited Penal Code, § 951; *People v. St. Clair*, 55 Cal. 524; 1 Wharton Cr. Law (7th ed.), 374; 2 Wharton Cr. Law (7th ed.), 2705; *State v. Loftin*, 2 Dev. & B. 81; Penal Code, §§ 966, 118; Archibald Cr. Pr. & Pl. 592; 2 Wharton Cr. Law (7th ed.), 2233-2265.

Attorney-General, for Respondent, cited 39 Cal. 690; 5 Met. 241.

PER CURIAM.—The demurrer to the information should have been sustained. The information neither gives the legal appellation of any crime, nor states facts necessarily constituting a crime. "Attempting to suborn perjury" is not the generic

name of any class of offenses. There is nothing stated to indicate that the act of defendant would have resulted in a subornation of a witness if it had not been frustrated by extraneous circumstances (1 Wharton's Cr. L. 181); or that the testimony which defendant tried to have given was material to the issue; or that he did not believe it to be true, or, indeed, what was the testimony he asked any person to give.

Judgment and order reversed with direction to the court below to sustain the demurrer to the information.

[Department Two.— June 8, 1883.]

MARY ANN WOLFORD AND ELLEN WOLFORD,
RESPONDENTS, v. THE LYON GRAVEL GOLD MIN-
ING COMPANY, APPELLANT.

DAMAGES — NEW TRIAL. — In an action for negligence resulting in the death of a human being — nothing appearing to justify merely nominal damages — a verdict assessing the damages at one dollar may be set aside as inadequate, and a new trial granted.

APPEAL from an order of the Superior Court of El Dorado County granting a new trial.

The facts are sufficiently stated in the opinion of the court.

G. G. Blanchard, and *Charles F. Irwin*, for Appellant.

The court will not impute to the jury improper motives merely from the smallness of their verdict. (12 Pick. 547.)

There should have been a statement containing the evidence before the court could determine that the jury had acted improperly. (2 Bay, 446; 7 Ga. 200.)

Dibble & Kitts, *M. P. Bennett*, and *G. J. Carpenter*, for Respondents.

There was no necessity for a statement. (*Harper v. Minor*, 27 Cal. 111; *Lewis v. Kelton*, 58 Cal. 303.)

Having determined the liability of the defendant, the jury disregarded the instructions and evidence in relation to the

damages, and the court properly set aside the verdict. (*Sweeney v. C. P. R. R. Co.* 57 Cal. 15; *Emerson v. County of Santa Clara*, 40 Cal. 544; *Mariani v. Dougherty*, 46 Cal. 26.)

MYRICK, J.—The question involved in this case is of easy solution. The action was brought to recover damages for negligence on the part of defendant, by which, it is alleged, the husband of the plaintiff Ellen lost his life. It was admitted by the pleadings that the deceased had during their married life supported himself and his wife comfortably, solely by his labor, that by his death she was deprived of that support, and that he was sober and industrious. It was in evidence that the deceased was twenty-five years of age, with an expectation of thirty-six years longer, was careful and prudent, had been foreman in mines, and that the average pay of foreman was about one hundred dollars per month. No evidence on the issue of damages was offered by the defendant. The issues in the case involved the question of negligence on the part of the defendant, and of contributory negligence on the part of the deceased.

The jury rendered a verdict for plaintiff of one dollar. This verdict was set aside and a new trial granted. Upon what theory of facts this verdict was arrived at, or upon what theory of law it can be sustained, we cannot perceive. Its only possible excuse is the statement of the court, in reply to inquiry by the jury, that if the jury agreed upon a verdict for plaintiffs they could assess the damages at any sum between one cent and fifty thousand dollars. If the defendant was not responsible for the death of the deceased, the verdict should have been in its favor; if it was responsible (and the jury by the verdict said it was), it being admitted that the wife was by the death of her husband deprived of maintenance by him, to say that such deprivation is compensated by a verdict of one dollar is grossly absurd. The statute is, that the jury shall, in such case, render a verdict for such sum as, under all the circumstances, shall be just. (Civ. Code, § 377; *Beeson v. Green Mountain G. M. Co.* 57 Cal. 20; *Cook v. Clay Street Hill R. R. Co.* 60 Cal. 604.) The plaintiffs are entitled to have the case tried before a jury having a proper conception of what is just; either to render a verdict for the defendant, or, if the evidence shall justify,

in favor of plaintiffs, with damages in a sum reasonably adequate to the case as presented to them. The rendition of the verdict in this case was trifling with the forms of law. (*Hall v. Bark Emily Banning*, 33 Cal. 522.)

The order is affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred; the latter on the authority of *Hall v. Bark Emily Banning*, cited in the opinion.

[In Bank.—June 9, 1883.]

THE CITY AND COUNTY OF SAN FRANCISCO,
APPELLANT, v. SOPHIA G. TALBOT, EXRX., ETC. ET AL.,
RESPONDENTS.

VESSELS — TAXATION. — A vessel registered out of the State, and never here except transiently in the course of her voyages for the purpose of receiving and discharging cargo, is not subject to assessment for taxes within the State. In such a case it makes no difference that the vessel is owned in part by residents of the State.

ASSESSMENT — NOT A JUDICIAL ACT. — The assessor does not act judicially in making an assessment for taxes.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are sufficiently stated in the opinion of Mr. Justice SHARPSTEIN.

John P. Bell, and Louis Sharp, for Appellant.

The acts of the assessor in making an assessment are judicial. (Cooley on Taxation, 288, 550–552; Burroughs on Taxation, §§ 202, 238, 242.)

Vessels are assessable and taxable where owned, and not where registered. The *situs* or home port for the purpose of taxation is where the vessel is owned. (U. S. Rev. Stats. § 4141; *Jennings v. Griffith*, Ryan & M. 42; *Thomas v. The Steamboat Kosciusko*, 11 N. Y. Leg. Obs. 44; Abbott on Shipping, 39–115; 3 Kent's Com. 144; *Hill v. Golden Gate*, Newb.

Adm. 308; *St. Louis v. Ferry Co.* 11 Wall. 423; *In re Mary Bell*, 1 Sawy. 135; *The Albany*, 4 Dill. 439; *The Plymouth Rock*, 13 Blatchf. 505.)

McAllister & Bergin, for Respondent.

Property transiently in the State is not subject to State taxation. (*Mayor v. Baldwin*, 57 Ala. 69; *People v. Niles*, 35 Cal. 287; *City of Oakland v. Whipple*, 39 Cal. 115; *Hays v. P. M. S. S. Co.* 17 How. 596; *St. Louis v. Ferry Co.* 11 Wall. 423; *People v. Home Ins. Co.* 29 Cal. 542.)

The home port of vessels determines the locality of their taxation, and the court found that the vessel never was in California, save transiently. (*Hays v. P. M. S. S. Co.* 17 How. 596; *People v. Com. of Taxes*, 58 N. Y. 246; *Burroughs on Taxation*, § 46.)

In answer to appellant's point that the acts of the assessor in making the assessment are judicial and his decision final unless reviewed in the manner provided by statute, respondent's counsel cited *Middletown v. Low*, 30 Cal. 607; *Low v. Austin*, 13 Wall. 34; *P. M. S. S. Co. v. Bd. of Sup.* 50 Cal. 282.

SHARPSTEIN, J.—This action was brought to recover taxes assessed and levied upon the *Bark Buena Vista* for the fiscal year 1875–76.

The findings are in substance: 1. That at the time of said levy and assessment, and for a long time prior thereto, said vessel was registered at Port Townsend in Washington Territory, where the ship's husband resided, and that said vessel has been taxed in said Territory during all the times mentioned in the complaint herein. 2. That said vessel sailed out of said Port Townsend to various ports and countries in the regular course of commerce, transporting lumber and other freight, and was in the State of California only transiently in the course of its voyages, and only remained therein long enough to take in and discharge cargo, and was never permanently or at all in said State otherwise than as above stated.

It further appears by stipulation of counsel of the respective parties that said vessel was owned in the proportions of nine tenths by Pope & Talbot, who resided in San Francisco,

and one tenth by one Walker, a resident of Washington Territory, who as the managing owner registered said vessel at said Port Townsend. It was admitted at the trial that said vessel had never been registered at San Francisco. Upon these facts the question whether said vessel was assessable at San Francisco for city and county and State taxes, must be determined.

According to the Code, vessels which are by law required to be registered must be assessed only in the county or city and county where registered. (Pol. Code, § 3644.) And vessels registered "out of and plying in whole or in part in the waters of this State, the owners of which reside in this State, must be assessed in this State." (Pol. Code, § 3645.)

There are two conditions which must exist concurrently before a vessel registered out of this State is required by said Code to be assessed in this State: (1) she must ply in whole or in part in the waters of this State; (2) her owners must reside in this State. "Plying," when used in connection that it is here, is a nautical phrase, which is defined by Webster as follows: "To make regular trips; as a vessel plies between the two places." It might well be urged that a vessel making *regular* trips between any port in California and some port outside of California, was "plying in part in the waters of this State." But can that be properly said of a vessel which sails out of a port outside of this State "to various ports and countries in the regular course of commerce, transporting lumber and other freight," and touching at the port of San Francisco transiently in the course of her voyages, and "only long enough to take in and discharge cargo?"

"Plying" implies regularity, and is not the term used to express the character of the irregular and transient visitations of a ship to a port in the course of her voyage to various ports. In that case a vessel is said to *touch* at each of the ports which she visits. A vessel *plies* between two places—she may *touch* at many. But even if "plying in whole or in part in the waters of this State," a vessel registered out of it is not, by the Code, required to be assessed and taxed in it, unless her owners reside here. Two of her owners do. Another, the managing owner, or the ship's husband, resides in Washington Territory, within the district in which the custom house at which she is registered

is situated, and in which she is taxed and her taxes paid by her owners. A *part* of her owners, not *all* of them, reside here. To say that her owners reside here is no more correct than it would be to say that her owner resides in Washington Territory. She is partly owned here, and partly there; and the law does not in terms authorize the assessment here of a vessel registered and *partly* owned elsewhere.

There is no provision for the assessment of the interest owned here. Nothing less than the entire vessel is assessable, if she be assessable at all. And the assessor seems to have taken this view of it, for he assessed the vessel and not any interest in it less than the whole.

The Code does not in terms as we construe it require that a vessel, registered and owned as this one is found to be, and touching at a port in this State for the purpose of taking in and discharging cargo only, shall be assessed in this State.

And it only remains to be determined whether the Constitution of the State requires that said vessel should be assessed in this State. The constitutional requirement is that "all property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value." As is well understood, this does not mean that all property which may chance to be temporarily in the State, must be taxed. It means "in the State" in the sense of having its *situs* here. There is at all times "property in *this State*" of great value which is being transported through it, from one foreign state to another, which no one would claim could be taxed here. Nor will it be claimed that vessels wholly owned and registered elsewhere, and merely touching at a port in this State for the sole purpose of taking in and discharging cargo, could be taxed here.

In *Hays v. The P. M. S. S. Co.* 17 How. 596, the ships which it was attempted to assess in this State, were engaged in the business of transporting passengers between New York and San Francisco and each of said ships frequently remained in this State ten or twelve days continuously. The court said: "We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not properly abiding within its limits, so as to become incorporated with the other personal property of the State; they were but temporarily,

engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

In that case the owners all resided in New York, where the ships were registered. But that is an immaterial circumstance, because the right to assess and tax property in this State does not depend on the residence of the owner. It depends wholly upon the *situs* of the property. And property which has its *situs* outside of the jurisdiction of this State cannot be assessed and taxed here, although the owner may reside here.

In this case, as was said by Mr. Justice Campbell in his concurring opinion in *Hays v. P. M. S. S. Co. supra*, "The material fact is that the vessel was *in transitu*, having no *situs* in California, nor permanent connection with its internal commerce."

It has too often been held that the acts of an assessor in making an assessment are not judicial, to require any consideration of that point at this time.

Judgment and order affirmed.

McKINSTRY, J., concurred.

ROSS, J.—I concur for the reasons first and last stated in the opinion of MR. JUSTICE SHARPSTEIN.

MYRICK, McKEE, and THORNTON, JJ.—We concur in the judgment. The vessel was not plying in whole or in part in the waters of this State. If the vessel had been so plying doubtless the interest of Pope & Talbot therein could have been assessed; but the facts as agreed upon do not place the vessel or the interest of Pope & Talbot within section 3645, Political Code.

Rehearing denied.

[In Bank.—June 11, 1883.]

A. H. CHAPMAN ET AL., PETITIONERS, v. GEORGE STONEMAN, GOVERNOR, ETC., RESPONDENT.

PROHIBITION — POWER OF THE GOVERNOR TO INVESTIGATE THE CONDUCT OF PRISON DIRECTORS. — Under section one of article ten of the Constitution of the State, the governor has authority and jurisdiction to make an investigation into the conduct of the State board of prison directors with a view of removing them from office, and prohibition will not lie to arrest such an investigation.

APPLICATION for a writ of prohibition. The attorney-general on behalf of the people, filed with the governor specific charges of misconduct and neglect of duty on the part of the petitioners, composing the State board of prison directors, and asked their removal from office. The governor was proceeding to hear and determine the matter by a course of procedure similar to that provided for the trial of causes before the courts, and, after demurring to the charges on the ground of want of jurisdiction, the petitioners applied for a writ prohibiting the governor from proceeding further with the investigation.

C. B. Darwin, Wm. H. Sears, and A. L. Hart, for Petitioners.

Attorney-General Marshall, and George Flourney, for Respondent.

MYRICK, J.— This is an application for a writ prohibiting the governor of the State from proceeding with an investigation under the last clause of section 1, article x., of the Constitution.

We are of opinion that under the clause referred to the governor has authority and jurisdiction to proceed with the investigation sought to be arrested.

Application denied.

THORNTON, J., ROSS, J., and MCKINSTRY, J., concurred.

SHARPSTEIN, J.— I do not think that the proceedings which it is sought to have arrested are without or in excess of the jurisdiction of the governor, and I therefore concur in the denial of the writ of prohibition.

[In Bank.—June 11, 1883.]

EX PARTE BAYARD V. RAYE.

CRIMINAL LAW — HABEAS CORPUS — SENTENCE — ENTRY OF JUDGMENT. — The petitioner was convicted in the Police Court of the city of Sacramento of the offense of "attempted extortion." He was sentenced to imprisonment in the county jail for six months, and an entry was at once made in the minute or memorandum book kept by the clerk of the court, which showed the offense of which he was convicted, and the sentence of the court. The formal judgment was not entered on the judgment docket for more than twenty days thereafter. *Held*, on habeas corpus, that the defendant was not entitled to be discharged.

APPLICATION for a writ of habeas corpus.

The facts are stated in the opinion of the court.

Hall & Alexander, for Petitioner.

MCKEE, J.—From the return to the writ in this case, it appears that the prisoner was arrested, tried, and convicted in the Police Court of the city of Sacramento for the offense of "attempted extortion." Section 524 of the Penal Code declares that "every person who unsuccessfully attempts, by means of any verbal threat, such as is specified in section 519, to extort money or other property from another, is guilty of a misdemeanor." The offense with which the defendant in the case was charged was therefore one known to the law; it was a misdemeanor; and the court, having acquired jurisdiction of the person of the defendant, had jurisdiction of the case. So that the only question with which we have to deal is, whether, in the proceeding which resulted in the conviction and sentence of the defendant, the court kept within its jurisdiction.

Substantially the forms of law were complied with. The record shows that the defendant was properly charged with the commission of a public offense, that upon conviction the court, pursuant to section 1449 of the Penal Code, fixed February 6, 1883, as the time for pronouncing judgment, that on that day the defendant, being present with his attorney, moved in arrest of judgment and for a new trial, both of which were denied, and that the court "sentenced him to imprisonment for six months in the county jail."

The sentence was immediately entered in the minute or memo-

randum book, kept by the clerk of the court, from which a more formal judgment was afterward entered on the docket of the court. It is true the formal judgment was not entered on the judgment docket until the 26th of February, 1883, more than twenty days after the trial and conviction. But as the sentence which was entered on the minutes of the court on February 6, 1883, showed the offense of which the defendant had been convicted and the penalty imposed, it was, as a judgment, legally sufficient. It was not necessary that the entry of it on the minutes should recite the facts contained in the other papers constituting the record in the action. (*In re Ring*, 28 Cal. 248; *Ex parte Murray*, 43 Cal. 455; *People v. Forbes*, 22 Cal. 135.) It was sufficient that that was done subsequently, in the performance of the clerical duty of entering the judgment upon the docket. At any rate, the judgment pronounced on the 6th of February was not void. It showed that the defendant had been tried and convicted of an offense known to the law; namely, attempted extortion; and that the sentence passed on him was one which the court had jurisdiction to pronounce. (*Ex parte Gibson*, 31 Cal. 620.) And assuming that the judgment may have been voidable for want of adherence to some prescribed form of proceeding in the case, yet that was a matter reviewable only by appeal. Although erroneous, imprisonment under it would not be unlawful. It is only where the proceedings of an inferior court are void, either for want of jurisdiction or other cause, that imprisonment under a judgment rendered in them becomes unlawful and entitles a prisoner to be discharged on habeas corpus.

Writ dismissed and prisoner remanded.

THORNTON, J., and MYRICK, J., concurred.

ROSS, J.—I concur in the judgment. The entry made in the minutes of the Police Court on the 6th of February showed the offense of which the petitioner was convicted and the sentence of the court; and that was sufficient to constitute a valid judgment.

[Department One.— June 14, 1883.]

JOHN B. BOYD, RESPONDENT, v. O. M. SLAYBACK
ET AL., APPELLANTS.

EVIDENCE — PRESUMPTION — DEED. — No legal presumption of the delivery of a deed arises from the signing and acknowledgment. The party claiming under it must prove its delivery.

APPEAL.—The manner of this appeal disapproved.

APPEAL from a judgment of the Superior Court of San Diego County.

The action was brought against Robert Taggart, a minor, and against O. M. Slayback, as administrator of the estate of Mary B. Taggart, and as guardian of Robert Taggart, to quiet title to certain lands alleged to have been sold to the plaintiff by Mary B. Taggart. The plaintiff alleged that some time subsequent to the execution and delivery of the deeds to him, by which the lands were conveyed, they were left at the residence of Mrs. Taggart in a tin box, and that after her death it was discovered that the deeds had been abstracted. The defendant denied the execution and delivery. The deeds were not recorded.

The other facts appear in the opinion of the court.

Chase, Arnold & Hunsacker, and Graves & Chapman, for Appellants.

Brunson & Wells, M. A. Luce, and Will M. Smith, for Respondent.

PER CURIAM.—We cannot approve of the *manner* of this appeal. It is from a judgment of the 29th of June, 1882, and the notice of appeal is dated the *twenty-eighth* of June, 1882. To the proposed bill of exceptions, signed by attorneys for defendants, is subjoined: "Plaintiff also asks that the foregoing amendments be considered and allowed by the court." (Signed by plaintiff's attorneys.) Immediately below the signatures of plaintiff's attorneys follows a certificate of the judge as follows: "The foregoing amendments are allowed, and the proposed statement of defendants, *as so amended*, is hereby settled as correct." Respondent has not objected, however, that the state-

ment, as amended, does not appear to have been engrossed, nor that the "amendments" proposed and allowed have not been brought here.

We may add, there is nothing in the record, except her own admission, to show that O. M. Slayback was the *guardian* of the infant defendant, and nothing to show that the infant was ever served with summons.

The judgment must be reversed for error in the charge to the jury. The court below charged: "A grant, duly executed, is presumed to have been delivered; therefore, if you find from the evidence that Mrs. Taggart actually signed and acknowledged the deeds in question, the law will presume that they were duly delivered, and in order to defeat this presumption, the party disputing the delivery must show, by preponderance of proof, that there was no delivery."

This was error. A deed takes effect only from the time of its delivery. Without delivery of a deed it is void. No title will pass without delivery. (23 Cal. 528; 30 Cal. 208; 32 Cal. 610.) It is for the party claiming under a deed to prove its delivery. Sometimes slight evidence will be sufficient to support a finding of delivery, but no legal presumption of delivery arises from the mere fact that the instrument is "signed." The acknowledgment only proves that it was signed.

Judgment reversed and cause remanded for a new trial.

[Department One.—June 14, 1888.]

CHARLES H. MERRILL, APPELLANT, v. ISAIAH HURLBURT, RESPONDENT.

FRAUDULENT TRANSFER — VOID AS AGAINST ASSIGNEE IN INSOLVENCY. — A transfer of personal property without an immediate delivery and an actual and continued change of possession is void as against an assignee in insolvency of the vendor.

ID. — DELIVERY AND CONTINUED CHANGE OF POSSESSION. — The property purchased consisted of loose hay stored in a barn owned by the vendor. The plaintiff examined the hay at the time of the sale, and there was a verbal delivery. A keeper was left in charge of the hay. A portion of it was subsequently removed, but the part in controversy remained in the barn until it was attached by a creditor of the vendor. The period between the sale and attachment was about three months. The barn continued in the possession and under the control of the vendor. The court below found that there was

not an immediate delivery and an actual and continued change of possession. *Held*, that the finding was justified by the evidence.

PRACTICE ON APPEAL—MODIFICATION OF JUDGMENT—DE MINIMIS.—The evidence showed that the value of the property replevied did not exceed three hundred and sixty dollars, but the court found the value to be three hundred and seventy-five dollars. *Held*, that the judgment cannot be modified here so as to conform to the evidence, for it would then have no finding to support it; and further, that considering the amount involved the judgment ought not to be affirmed upon the maxim *de minimis*, etc.

APPEAL from a judgment of the Superior Court of the county of Colusa, and from an order refusing a new trial.

The action is replevin. The property in suit, alleged to be twenty-five tons of hay, more or less, was attached by a creditor of N. S. Merrill, brother of the plaintiff, but subsequently delivered by the sheriff to the defendant Hurlburt as assignee in insolvency of N. S. Merrill. The plaintiff claimed the property by virtue of a sale to him prior to Merrill's insolvency. The sale was attacked on the ground that there had been no delivery of the property with a continued change of possession. The plaintiff's testimony, the only evidence respecting the delivery and continued change of possession, showed that he had bought and paid for the property, and carried a portion of it away, but left the remainder in the vendor's barn, where it remained until it was attached. The hay was loose, in one body, in the barn. The plaintiff placed a man in charge of the property, but the barn continued in the possession and under the control of Merrill the vendor.

John T. Harrington, for Appellant, contended (1) that the finding of the court that there was not an immediate delivery, and actual and continued change of possession was not sustained by the evidence. That the rule, as established by the adjudicated cases, requires no more than that the purchaser must have that possession which places him in that relation to the property which owners usually have to the like kind of property. (Citing *Woods v. Bugbey*, 29 Cal. 472; *Lay v. Neville*, 25 Cal. 546; *Stevens v. Irwin*, 15 Cal. 507; *Cartwright v. Phoenix*, 7 Cal. 281; *Toquini v. Kyle*, The Reporter, vol. 15, p. 20.) (2) That the sale being valid between the parties, it is valid as against the defendant—the assignee in insolvency of the vendor

(Citing *Stewart v. Platt*, 101 U. S. 731; *Donaldson v. Farwell*, 93 U. S. 631; *Dugan v. Nichols*, 125 Mass. 43.) (3) That the finding that the value of the property is three hundred and seventy-five dollars is not supported by the evidence.

H. M. Albery, for Respondent, argued (1), That the evidence sustaining the finding as to the delivery and change of possession, and cited *Lawrence v. Burnham*, 4 Nev. 361; *Allen v. Massey*, 17 Wall. 351; *Hesthal v. Myles*, 53 Cal. 623; *Watson v. Rodgers*, 53 Cal. 403; *Gray v. Corey*, 48 Cal. 208; *Regli v. McClure*, 47 Cal. 612; *Woods v. Bugbey*, 29 Cal. 467; *Weil v. Paul*, 22 Cal. 494; *Malone v. Plato*, 22 Cal. 104; *Engles v. Marshall*, 19 Cal. 321; *Stevens v. Irwin*, 15 Cal. 503; *Bacon v. Scannell*, 9 Cal. 272; Civil Code, § 3440. (2), That the assignee in insolvency comes within the class of persons as against whom such sales are void as defined by § 3440 of the Civil Code. Citing in support of the principle, *Allen v. Massey*, 1 Dill. 40; *Kane v. Rice*, 10 Bank. Reg. 469; *Cragin v. Carmichael*, 2 Dill. 519; *In re Wynne*, 4 Bank. Reg. 23; *Bradshaw v. Klein*, 1 Bank. Reg. 542; *In re Metzger*, 2 Bank. Reg. 355; *Boone v. Hall*, 7 Bush, 66; *Pratt v. Curtis*, 5 Bank. Reg. 139; *Edmonston v. Hyde*, 7 Bank. Reg. 1; *In re Perrin*, 7 Bank. Reg. 283; and (3), that notwithstanding the evidence does not show that the value of the property is beyond three hundred and fifty-two dollars and fifty cents, the judgment should be modified and affirmed.

PER CURIAM.—Section 3440 of the Civil Code reads:—

“Every transfer of personal property, other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit

of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer."

The assignee in insolvency of the vendor was "a successor in interest" of his creditors, and also one "on whom his estate devolved in trust for the benefit of others than himself."

There was sufficient evidence to sustain the finding of the court that there was not an immediate delivery and actual and continued change of possession of the property.

But the finding that the value of the property described in the complaint is three hundred and seventy-five dollars is not sustained by the evidence. It is admitted by respondent that the undisputed evidence proved there were from twenty-three to twenty-four tons of hay, of the value of fifteen dollars a ton. If the judgment was, in case a return of the property could not be had, that defendant should have judgment for a greater sum than the court found the value to be, we could modify the judgment here, so as to make it accord with the findings. But the judgment must be based upon the findings, and we cannot change the judgment in such manner as that it shall not be supported by the findings. Considering the amount involved in the action we cannot say we ought to affirm the judgment upon the maxim *de minimis*, etc.

Judgment and order reversed, and cause remanded for a new trial.

Hearing in Bank denied.

[Department One.—June 14, 1883.]

WILLIAM H. HOLMES, APPELLANT, v. J. S. McCLEARY,
DEFENDANT.

APPEALABLE ORDER.—An order denying a motion to vacate an order denying a previous motion, and for a new trial as to the latter motion, is not an appealable order.

APPEAL from an order of the Superior Court of San Diego County denying a motion for an order on the sheriff directing the application of the proceeds of a sale of attached property, and from an order refusing a new trial of such motion.

LXIII. CAL.—82

On September 13th the sheriff attached the property of the defendant McCleary, in an action against him by one Valentine. The following day he levied another attachment on the same property, in an action by the appellant, "subject to a prior levy in favor of Valentine." The property was subsequently sold, and the proceeds being insufficient to pay more than Valentine's claim, the appellant moved the court to direct the sheriff to apply the proceeds to the satisfaction of his claim, on the ground that the attachment was void. The court denied the motion, and the appellant moved for a new trial, which was refused.

John R. Jones, for Appellant.

M. A. Luce, for Sheriff.

PER CURIAM.—The notice of appeal is as follows:—

"You will please take notice that the plaintiff in the above entitled action hereby appeals to the Supreme Court of the State from the judgment or order denying plaintiff's motion for an order on Joseph Coyne, sheriff, directing him to apply the proceeds of the property herein attached by him to the satisfaction of the plaintiff's judgment and costs therein, and entered in the said Superior Court, on the 30th day of October, 1882, in favor of said Joseph Coyne, sheriff, and against said plaintiff, and from the whole thereof. And also from the order denying said plaintiff's motion for a new trial, made and entered in the minutes of said court the 27th day of November, 1882."

The order of the 27th of November was not appealable, and the "statement" on motion for new trial cannot be considered here.

There remains only the notice of motion for, and the order of, October 30th, from which no error appears.

Order affirmed.

[Department One.— June 14, 1883.]

E. E. FREEMAN, APPELLANT, v. J. O. STEPHENSON,
RESPONDENT.

FINDING—SPECIAL ISSUES.—In an equity case where the court has submitted special issues to a jury, and finds upon the same issues differently from the jury, the finding of the court determines the fact.

APPEAL from a judgment of the Superior Court of the county of Sacramento, and from an order refusing a new trial.

The action was brought to enjoin the defendant from draining his lands in such a manner as to discharge the water on the lands of plaintiff, and for damages caused plaintiff thereby. Specific issues were submitted to a jury and findings were made by them. The court found differently upon the same issues.

The answers to the questions asked Moore and Ricketts tended to show that the acts complained of by the plaintiff produced benefits rather than injuries.

A. C. Freeman, and G. E. Bates, for Appellant.

A. P. Catlin, for Respondent.

PER CURIAM.—There was no error in overruling the objections to the questions put to the witnesses Moore and Ricketts. Both questions had a bearing upon the matter of *damages*.

In an equity case, where the court has taken the advice of a jury as to specific issues, and then, as here, finds on the same issues differently from the jury, the finding of the *court* determines the fact.

The findings show that by reason of drains on his own land, connecting natural depressions, the water which naturally runs from defendant's to plaintiff's land was somewhat increased in quantity, and flowed with a somewhat accelerated current, but that such drains did not cause any greater quantity of water to stand or remain on plaintiff's land than would have stood or remained had such drains not existed, and that the same had not caused any damage to plaintiff.

Judgment and order affirmed.

[Department One.— June 14, 1888.]

HENRY WATKINS, APPELLANT, v. E. DEGENER ET AL.,
RESPONDENTS.

VENUE — RESIDENCE OF DEFENDANT. — Where the action is not one of those mentioned in sections 392, 393 of the Code of Civil Procedure, and the defendant resides without the county where it has been commenced, it is the right of the defendant to have the place of trial changed, if at the time he appears and answers or demurs, he files an affidavit of merits and demands in writing, that the trial be had in the proper county.

ID. — AFFIDAVIT OF MERITS. — The affidavit read, "I have fully and fairly stated the case in this action to my attorney and counsel," etc. *Held*, sufficient.

APPEAL from an order of the Superior Court of Santa Barbara County changing the place of trial to the city and county of San Francisco.

Plaintiff, as a broker, brought this action to recover an unpaid balance of the purchase money advanced by him to purchase wheat for the defendants, and for his broker's fees.

The defendants demurred to the complaint, and at the same time filed an affidavit of merits and a written demand for a change of venue, and moved the court to transfer the cause to the Superior Court of the city and county of San Francisco.

The affidavit of merits showed that the defendant making the affidavit resided in the city and county of San Francisco, and the other in Marin County; that they were partners doing business in the city and county of San Francisco; that he had "fully and fairly stated the case in this action to his attorney and counsel," and that after such statement was advised by said counsel and verily believed that the defendants and each of them had a good and substantial defense to the action upon the merits.

A. A. Oglesby, for Appellant.

William J. Graves, for Respondent.

PER CURIAM.—When the action is not one of those mentioned in sections 392, 393 of the Code of Civil Procedure, and the defendant resides without the county where it has been commenced, it is the right of the defendant, upon satisfying the court of his residence, to have the place of trial changed, if, at the time he appears and answers, or demurs, he files an affidavit

of merits and demands in writing that the trial be had in the proper county. (Code Civ. Proc. § 396.)

The affidavit of merits was sufficient.

Order affirmed.

[Department One. — June 15, 1883.]

**F. E. J. CANNEY, APPELLANT, v. THE SOUTH PACIFIC
COAST RAILROAD COMPANY, RESPONDENT.**

CONTRACT — ACTION FOR SERVICES TO THIRD PERSONS — NOVATION. — The plaintiff, a physician, was, at the request of persons wounded by a railroad accident, attending them when the president of the railroad company told the wounded persons to employ whatever physician they chose, and that the company would pay the bills. This was not told them in the presence of the plaintiff, but was subsequently communicated to him. The plaintiff testified that he attended the wounded until their recovery in pursuance of the original calling, and admitted that no new promise about the services had been made to him. *Held*, in an action against the railroad company for the services performed, that no liability attached to it.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are sufficiently stated in the opinion of the court.

J. A. Barham, for Appellant, *Garber, Thornton & Bishop*, of counsel, cited *King v. Edminson*, 88 Ill. 257; Civil Code, § 2794; *Luce v. Zeile*, 53 Cal. 54; *Chase v. Day*, 17 Johns. 113; *Trenor v. C. P. R. R. Co.* 50 Cal. 222.

McClure & Dwinelle, for Respondent.

McKEE, J.— The action in this case was brought to recover the balance of an alleged indebtedness for services rendered by the plaintiff as a physician and surgeon, at the alleged special instance and request of the defendant. Part of the services, included in the statement of the cause of action, were rendered at the instance and request of the defendant and were paid. The contention is as to the services which were rendered to a number of persons who had been injured, on the 23d of May, 1880, by a railroad accident on the line of the defendant's road

in the county of Santa Cruz. It is for these that the plaintiff seeks to make the defendant liable.

But at the trial, the plaintiff was sworn as a witness in his own behalf, and he testified as follows: "On the morning of the 24th of May, 1880, I was called by the wife of one of the persons injured to treat her husband, and on that day I was called by eleven of said injured parties to treat them. I attended upon them, in pursuance of my original calling, from that time until they were all recovered. My services were reasonably worth eleven thousand dollars." According to that testimony the services were rendered by the plaintiff upon an employment between him and the persons injured. That contract fixed the rights and liabilities of the parties to it. The persons, for whose benefit and at whose instance and request the services were rendered, were bound to pay for them. No other or different contract could be implied. Of course, the parties to the contract might have wholly freed themselves from their rights and liabilities under it by a discharge of the contract. A contract may be discharged or put an end to at any time, by mutual consent, or by an alteration in its terms which, in effect, substitutes for it a new arrangement between the parties themselves or between one of them and a third party. (§ 1531, Civ. Code.) And it is claimed that, while the plaintiff was engaged in performing the services under his original employment, the defendant informed the plaintiff that the injured were allowed to select any physician they saw proper, and defendant would be responsible for the indebtedness.

Yet, as a witness, the plaintiff admitted that no new promise about the services had been made to him. The only thing upon which he relies is, that the president of the railroad company "said to the injured parties," after they had employed the plaintiff, "that they should employ whatever physician they saw proper and the defendant would pay the bills." But that was not said to the plaintiff, nor was he present when it was said. It appears that the parties to whom it was said communicated it to the plaintiff; but neither the promise to them, nor the communication of that promise to the plaintiff constituted a contract between the defendant and the plaintiff either as accessory, or by way of novation, to his original em-

ployment which he was engaged in performing. The plaintiff had no communication from or with the defendant upon the subject; there was therefore no mutuality or consent between them, and in law, however it might be in morals, no liability attached to the defendant for the services of the plaintiff to the persons who employed him.

It is not necessary to decide whether the promise made by the president of the company to the wounded constituted a contract between them, collectively or individually, and the company, which might be enforced for the benefit of the plaintiff. No such claim seems to have been made or transferred by any of them to the plaintiff, nor is the plaintiff's cause of action founded upon such a claim. *Trenor v. C. P. R. R. Company*, 50 Cal. 222, is not applicable to the case in hand. That, it is true, was also a case for the services of a physician and surgeon rendered to persons wounded by a railroad accident; but there was, in the case, some evidence tending to show that the services were rendered at the instance and request of the defendant, and the case was decided upon a conflict of evidence. But in the case in hand there was no conflict of evidence. The plaintiff in his testimony and on the trial, admitted, and his witnesses proved, that the services were rendered in pursuance of his original employment by those who were wounded and not otherwise. There was, therefore, no contract, express or implied, between the plaintiff and the defendant in relation to the services which are the subject of the suit, and as there is no prejudicial error in the record, the judgment and order are affirmed.

McKINSTY, J., and Ross, J., concurred.

[Department One. — June 15, 1883.]

D. P. CUMMINGS, RESPONDENT, v. THOMAS B.
HOWARD, APPELLANT.

FINDINGS — PRESUMPTION. — In the absence of written findings, the judgment being in favor of the plaintiff, all the facts alleged in the complaint will be presumed to have been found by the court below.

PLEADING — COMPLAINT. — An averment that the defendant promised and agreed to pay the plaintiff seven hundred and fifty dollars, if he, the plaintiff,

succeeded in defeating two certain actions designated in the complaint, is, unless demurred to, good as an averment that he promised to pay when the plaintiff succeeded.

DEMAND — INTEREST. — When money becomes due under a contract on the happening of a particular event, no special demand is necessary before the commencement of a suit. In such a case, interest is recoverable from the time the money becomes due. The contract being silent on the subject, the rate of interest is governed by the statute, and if the rate is subsequently increased by a change in the statute, such increased rate may be recovered from the time of the change. Past as well as future debts are equally subject to the power of the legislature to impose interest.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The action was brought to recover a sum of money with interest alleged to be due from the defendant to the plaintiff as a balance unpaid on a certain contract stated in the complaint. When the money became due, the rate of interest was *seven per cent per annum*, but the statute was afterwards changed, and the rate increased to *ten per cent per annum*. The court allowed *seven per cent* until the change in the statute, and *ten per cent* thereafter. The additional facts appear in the opinion of the court.

Jarboe & Harrison, for Appellant.

Wheaton & Scrivner, for Respondent.

PER CURIAM. — To sustain the judgment — there being no written findings — all the facts alleged in the complaint will be presumed to have been found by the Superior Court. It is alleged plaintiff made a deed of conveyance of the lands described, to defendant; that when the conveyance was made “doubts existed as to the entire validity of the title, on account” of the pendency of two actions against the property; that the defendant agreed to pay the balance of the purchase money if plaintiff succeeded in defeating the two actions, and in making a clear title; that plaintiff succeeded in defeating both said actions, recovering final judgment in one July 28, 1873, and the other March 22, 1875. The averment that “the defendant paid a small amount of money down, and further promised and agreed in writing to pay seven hundred and fifty dollars, if he, plaintiff, succeeded in defeating” the two actions, is, in the

absence of demurrer, good as an averment that defendant promised to pay the seven hundred and fifty dollars *when* plaintiff succeeded, etc.

The balance became due when final judgment was entered in the one of the two actions last determined. No special demand was necessary prior to the commencement of the present suit.

Plaintiff was entitled to recover interest at the rate of *ten per cent per annum* during the period of time the statute imposed *ten per centum*.

The legislature has power to impose on past indebtedness a rate of interest, or (in the absence of a specific contract as to interest) to increase the legal rate. Such a statute operates only on future rights. (*Dunne v. Mastick*, 50 Cal. 247.) A fresh demand and refusal would be a new assertion of a right, and would impose a new liability. So, in legal effect, is a neglect without a demand. (*Bullock v. Boyd*, 1 Hoff. Ch. 294.)

Judgment affirmed.

[Department One. — June 15, 1883.]

J. M. THOMPSON, APPELLANT, v. GEORGE W. WHITE,
RESPONDENT.

PRACTICE — INTERLOCUTORY DECREES. — There is nothing in the judicial system of this State to prevent the courts from making interlocutory decrees in equity cases, and such decrees are valid and binding until vacated by some appropriate proceeding. They cannot be set aside on the theory that the courts have no power to make them.

APPEAL from an order of the Superior Court of the city and county of San Francisco.

The facts appear in the opinion of the court.

D. L. Smoot, for Appellant.

The court had power to make the interlocutory decree. To burden a court with a case in equity requiring equity procedure, and yet forbid the use of the interlocutory decree, would be something of an anomaly in jurisprudence. In such an emer-

gency the *cause of action* would continue equitable, but the *case* would not.

Section 647, Code of Civil Procedure, gives the strongest sanction to the interlocutory determination when it speaks of "the *final* decision in an action or proceeding," and then of "an interlocutory order or decision *finally* determining the rights of the parties or some of them."

Interlocutory determinations are authorized by subd. 2 of section 585, Code of Civil Procedure.

Section 639, Code of Civil Procedure, authorizes interlocutory decrees or orders directing a referee to hear and decide the *whole* or *any part of the issues* or questions of fact involved; ordering an account necessary for the information of the court before judgment, or for carrying a previous judgment or order into effect; and directing the solution of any question of fact outside of the pleadings, which may arise at any stage of the action.

Section 187, Code of Civil Procedure, authorizes the interlocutory decree wherever it may be required, by declaring that with jurisdiction is conferred all the means necessary to carry it into effect; and "if the course of proceeding be not *specifically* pointed out by . . . the statute," then "and suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of" the Code. (See also *Loring v. Illsley*, 1 Cal. 27; *Gillman v. Contra Costa*, 8 Cal. 52; *Neall v. Hill*, 16 Cal. 146; *Packard v. Bird*, 40 Cal. 380; *Harris v. S. F. Sugar Ref. Co.* 41 Cal. 393; *Jones v. Clark*, 42 Cal. 180.)

M. A. Wheaton, for Respondent.

We base our defense of the action of the court below in setting aside the interlocutory decree upon the ground that such order was right and necessary.

Ross, J.— This action was brought for the enforcement of an alleged contract for the conveyance of certain interests in certain letters patent, for an accounting in respect to certain matters connected therewith, and to obtain such decree as the equities of the case demand. The cause came on for hearing before the late Nineteenth District Court, and after taking testimony, oral and

documentary, that court made certain findings of fact, and thereupon entered an interlocutory decree, to the effect that the defendant convey to the plaintiff the interests in question, upon the performance of certain conditions on the part of the plaintiff, and further directed the commissioner of the court to take testimony and report to the court upon certain other matters of fact. Testimony upon those questions was taken before the commissioner, who subsequently made his report to the Superior Court succeeding the Nineteenth District Court, and by the Superior Court certain exceptions which were taken to the report of the commissioner were overruled and the report confirmed. The judge who at this time presided in the Superior Court was succeeded by another, and before the latter a motion was made for the entry of a final decree in the cause. The learned judge to whom this motion was addressed, denied it, and instead, entered an order purporting to vacate and set aside the interlocutory decree entered by the Nineteenth District Court, the report of the commissioner and its confirmation, and, indeed, all proceedings taken in the cause subsequent to the filing of the defendant's answer, and restoring the action to the calendar for trial. The view taken by the judge below in thus ordering was, that under our system there cannot be, even in an equity case, any such thing as an interlocutory decree, and that therefore the interlocutory decree entered by the Nineteenth District Court was a nullity and all proceedings based thereon void.

In this there was error. It is not necessary to consider whether under the former Constitution, which gives to the District Courts existing under it jurisdiction, and under the present Constitution, which gives to the Superior Courts existing under it jurisdiction, "of cases in equity," it lay in the power of the legislature to deprive such courts of so essential a means for the proper disposition of cases in equity as the interlocutory decree; for it is a mistake to say the legislature has attempted to do anything of the kind. On the contrary, by section 187 of the Code of Civil Procedure, it is expressly declared that "when jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given, and in the exercise of this jurisdiction, if the course of proceeding be not

specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code," the object of which is declared by a preceding section to be the promotion of justice.

We see nothing in conflict with this in the fact that section 577 of the same Code defines a judgment to be "the final determination of the rights of the parties in an action or proceeding," and that, by section 1003, it is declared that "every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order." There is no magic in a name. An interlocutory decision of a court of equity, in an equity case, is as efficacious when called an order as when called a judgment or decree. Whether it be called an interlocutory decree or a decretal order, or simply an order, it is in substance the same. Sections 577 and 1003 of our Code were taken substantially from the New York Code of Procedure and the codifiers of that State thus explained their purpose in employing the phraseology they did: "To avoid the confusion incident to the use of the word 'judgment' in two senses, one as interlocutory and the other as final, we have thought it better to use it only in the latter sense, and to designate all other written directions of a court or judge as orders." (Report of Commissioners to legislature, February, 1848, 182.) But, in the purpose thus expressed, no intent is perceived to abolish the power of a court of equity to pronounce, what in equity practice was called, an interlocutory decree or decretal order, but only a provision to the effect that that which finally determined the rights of the parties should be called a *judgment*, and that every other direction of a court or judge made or entered in writing, should be denominated an *order*. In New York the legislature has returned to the phrase "interlocutory judgment" in place of "order," theretofore used in the Code (Bliss' Annotated Code, § 1200); but even while the designation was different, we think the substance of the thing was all the time the same.

And so here. We find in sections 577 and 1003 no prohibition of such intermediate determinations by the court as the exigencies of the case may demand, and no conflict between them and section 187, which, as has been seen, in terms provides that, in the exercise of the jurisdiction conferred by the Constitution

or any statute on any court or judicial officer, if the course of procedure be not specifically pointed out by the Code or statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the promotion of justice. Besides, the Code of Procedure makes express recognition of the interlocutory order or decision—section 647 providing, among other things, that “an interlocutory order or decision, finally determining the rights of the parties, or some of them,” shall be deemed to have been excepted to. And in the reports of the State are to be found numerous cases recognizing the power of the court to make such interlocutory determinations. A very late case is that of *Hinds v. Gage*, 56 Cal. 486; see also *Harris v. S. F. Sugar Ref. Co.* 41 Cal. 393; *Packard v. Bird*, 40 Cal. 380; *Jones v. Clark*, 42 Cal. 180; *McFadden v. McFadden*, 44 Cal. 306; *Gray v. Palmer*, 9 Cal. 635.

The findings and interlocutory determination made by the Nineteenth District Court were therefore not in excess of its power. Whether they were erroneous or not is not now for consideration. Not being nullities, they could only be vacated, if vacated at all, by an appropriate proceeding. “It is thoroughly settled in this State that the mode of reviewing the action of the court upon an issue of fact is the same, whether the case is at law or in equity—there must be a motion for a new trial.” (*Harris v. S. F. S. R. Co.*, *supra*.) Upon a proper motion of that nature, should the findings of fact be vacated, of course the legal conclusions drawn from them and embodied in the interlocutory decree would fall with them. That decision is also reviewable on appeal from the final judgment when one shall be entered, but there is no warrant for its vacation upon the theory that it was beyond the power of the court to make.

Order reversed and cause remanded for further proceedings not inconsistent with this opinion.

McKEE, J., and McKINSTRY, J., concurred.

Hearing in Bank denied.

[Department One. — June 15, 1883.]

JOHN HUNT, JR., EXECUTOR OF THE WILL OF GEORGE F. SHARP, DECEASED, APPELLANT, v. JOSEPH S. FRIEDMAN, RESPONDENT.

RESULTING TRUST. — A resulting trust must grow out of the facts existing at the time of the conveyance, and cannot arise from a mere parol agreement that the purchase shall be for the benefit of another.

DECLARATION OF TRUST. — The plaintiff sought to establish a declaration of trust, and relied upon the following document: "Received, San Francisco, May 27, 1880, of Wm. H. Sharp, Esq., three hundred and sixty-eight and fifty one-hundredth dollars, being his proportion of his tax and outside land assessment, to be paid by me to Alexander Austin, tax collector. The land known as the Fleischaker Tract." This receipt was signed by the defendant. *Held*, that the document does not on its face manifest or prove a trust, and that the evidence in the case does not show that it was the intention of the parties in executing it to declare one.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

McAllister & Bergin, for Appellant.

A trust resulted in favor of Sharp. (*Osborn v. Endicott*, 6 Cal. 153; *Friedlander v. Johnson*, 2 Woods, 675; *Malin v. Malin*, 1 Wend. 649; *White v. Sheldon*, 4 Nev. 287.)

The receipt is sufficient to constitute a declaration of trust. (*Sime v. Howard*, 4 Nev. 482; Brown on Statute of Frauds, § 104; *Gomez v. Tradesman's Bank*, 4 Sand. 108; *Tiffany & Bullard on Trusts*, 354; *Perry on Trusts*, § 82; *Wylie v. Coze*, 15 How. 415; *Lone v. Colman*, 8 Mon. B. 569; *Hoffman v. Vallejo*, 45 Cal. 572; *Seymour v. Freer*, 8 Wall. 213.)

Robinson, Olney & Byrne, and *E. J. Pringle*, for Respondent.

The receipt does not manifest and prove a trust. (*Perry on Trusts*, § 83; *Cook v. Barr*, 44 N. Y. 156; *Smith v. Matthews*, 3 De Gex, F. & J. 139; *Steere v. Steere*, 5 Johns. Ch. 1; *Carhart's Appeal*, 78 Pa. St. 100; *Johnson v. Granger*, 51 Tex. 44; *Barickman v. Kuykendall*, 6 Blackf. 21; *Kay v. Curd*, 6 Mon. B. 100; *Scarritt v. St. Johns M. E. Church*, 7 Mo. App. 178.)

No trust resulted in favor of Sharp. (1 Perry on Trust, 2d ed. § 133; *Remington v. Campbell*, 60 Ill. 516; *Case v. Codding*, 38 Cal. 191; *Coles v. Allen*, 64 Ala. 98; Lewin on Trusts, 5th ed. 132.)

McKEE, J.—On the 16th of January, 1872, J. S. Friedman, in an action wherein he was plaintiff, and Peter Donahue and others were defendants, recovered judgment for the possession of certain lands and premises in the city and county of San Francisco. The judgment was affirmed by the Supreme Court of the State on the 4th day of February, 1875, and ultimately by the Supreme Court of the United States by the dismissal of an appeal taken to that court (92 U. S. 723); after which Friedman was restored to the possession of the lands. On the 5th day of January, 1878, Friedman, in an action wherein he was plaintiff, and Alexander Austin was defendant, also recovered a money judgment, as compensation for some portion of the lands, recovered by the former judgment, which had been taken by the city of San Francisco for a public park, and the amount of the judgment was paid over to him on the 22d of January, 1878.

In the lands and moneys recovered by these judgments, W. H. Sharp claimed to be the equitable owner of an undivided one third interest, which he transferred to George H. Sharp, the testator of the appellant who brought this action to have Friedman declared a trustee of such interest for his benefit, upon the grounds, as urged upon the argument of the case on appeal, that a resulting trust for the benefit of W. H. Sharp arose out of the transaction, between him and Friedman, by which the latter purchased and acquired the title to the lands, and that he afterwards executed a declaration of trust for the benefit of the former.

But the only allegations of trust specified in the complaint are: "That during the several periods of time hereinbefore alleged said defendant Friedman held, and still holds in trust for plaintiff, the legal title for the interest of the plaintiff and his predecessor in the several parcels of land; that on May 27, 1870, defendant Friedman did duly execute and acknowledge in writing that W. H. Sharp was the equitable owner and entitled

to an undivided one third part in and to the same." This is but a statement of an express trust. Yet, under these allegations, evidence was given of the purchase by Friedman, and of the arrangement between himself and W. H. Sharp for the prosecution of litigation for recovery of the lands.

The defendant testified that he purchased and acquired title to the lands in his own name for himself alone, that the purchase was not made for the benefit of himself and Sharp, nor did Sharp contribute, or agree to contribute, either money or services for the purchase; that after he had purchased the lands with his own money, and obtained his deed, he consulted with Sharp as to the validity of the title and the prosecution of a suit to recover possession of the lands, and retained Sharp to bring suit for possession, and prosecute it to a successful issue, for which he agreed to give him an undivided one third interest in the recovery. Under that agreement Sharp brought the action, and conducted the litigation in which he recovered a judgment in December, 1869; but that judgment was set aside in March, 1871, and Friedman, having become dissatisfied with Sharp for delay in the prosecution of the suit, employed other attorneys. After that Sharp took no active part in the litigation. The other attorneys prosecuted the suit to final recovery.

Between the testimony of Friedman and that of W. H. Sharp there is a substantial conflict. But the court found that "the plaintiff never did have, by himself or tenants, or those through whom he claims, any possession or occupation of said premises, or any part thereof, as tenant in common or otherwise, and there is no evidence that plaintiff or any person under whom he claims, ever had any interest in said premises, or any part thereof, either legal or equitable.

"4. The defendant Friedman, on the 21st day of January, 1878, received the sum of \$48,865.72 for and on account of his interest in the land described in the pleadings herein taken for a public park, but there is no evidence to show that plaintiff ever had any interest in said money or the land so taken for a park, or that the action against Alexander Austin mentioned in the amended complaint, was in any respect for plaintiff's benefit." And we cannot say that the court erred in basing its findings of fact upon the evidence given by the defendant.

Upon that evidence it is clear that the lands were not acquired by the services of plaintiff and the money of the defendant. The latter purchased with his own money, for himself, and not under any agreement with Sharp at the time of purchasing, or taking his deed, and there was no resulting trust in the acquisition of the property for the benefit of Sharp; nor did any arise out of the subsequent arrangement between himself and Sharp as to the prosecution of litigation for the recovery of the land. A resulting trust must grow out of the facts existing at the time of the conveyance, and cannot grow out of a mere parol agreement that the purchase shall be for the benefit of another. (*Roberts v. Ware*, 40 Cal. 634; *Steere v. Steere*, 5 Johns. Ch. 1; *Robertson v. Robertson*, 9 Watts, 32.)

The document relied on as a declaration of trust is as follows:—

“Rec’d, San Francisco, May 27, 1870, of Wm. H. Sharp, Esq., three hundred and sixty-eight 50-100 dollars, being his proportion of his tax and outside land assessment, to be paid by me to Alexander Austin, tax collector. The land known as the Fleischaker Tract. JOS. S. FRIEDMAN.”

Admitting that no particular phraseology is necessary for the purpose of raising a trust, yet the intention to declare one must be clear. Now the document merely relates to a tract of land known as the Fleischaker tract, and to the receipt of a sum of money by Friedman from Sharp for the purpose of paying the latter's proportion of the “tax and outside land assessment” upon the tract. It is a coincident circumstance that the lands in controversy were parts of the Fleischaker tract, and that the receiptor had a suit pending for the recovery of these lands, which the person from whom he obtained the money was then prosecuting for their recovery. But at the same time it was admitted that Sharp had other interests in the same general tract. And all the circumstances in connection with the receipt tended to show that the transaction related to Sharp's individual interests in the tract, and not to those claimed and recovered by Friedman in his suit.

Besides, the evidence showed that the original agreement, between Sharp and Friedman, for the prosecution of the suit, had been, before the execution of the receipt, suspended by

an agreement to pay Sharp five thousand dollars, instead of an interest in the lands, for his services. And as the services were rendered upon that agreement, it could not be made to serve as the basis for an equitable interest in the lands.

On its face the document itself does not manifest and prove a trust. By it no lands are described, no interest is conveyed, nor does the evidence in the case show that it was the intention of the parties, in executing the document, to recognize on the part of Friedman that Sharp had any interest in the lands which Friedman was attempting to recover.

Judgment and order affirmed.

Ross, J., and McKINSTRY, J., concurred.

Hearing in Bank denied.

[Department One. — June 15, 1883.]

C. D. HAVEN, RESPONDENT, v. F. M. HAWS, APPELLANT.

PRE-EMPTION SETTLEMENT. — A qualified pre-emptor, intending at the time of settlement to take the whole of a quarter section of land, can initiate a valid claim to the whole, by performing acts of settlement on one half, while the other one half is enclosed and cultivated by another person before and at the time the attempt begins.

APPEAL from a judgment of the Superior Court of San Bernardino County.

The action was for the recovery of the possession of the west half of a certain quarter section of land. The plaintiff held a certificate of purchase from the United States which grew out of a contest between one Osborne who held a soldier's certificate and had located the same land, and the plaintiff and the defendant who had each filed a declaratory statement to pre-empt. The Secretary of the Interior decided the contest in favor of the plaintiff herein.

The defendant by way of cross-complaint set up the proceedings, findings, and decisions of the Secretary of the Interior, from which it appears that the defendant, before and at the time the plaintiff made a settlement on the east half of the land and

filed his declaratory statement for the whole, was in the actual occupation and possession of the west half, and that the plaintiff had never performed acts of settlement upon the west half; and claimed that the decision was erroneous in law. The plaintiff demurred to the cross-complaint and the demurrer was sustained. The case was then tried and the court found in favor of the defendant on the ground of adverse possession. The defendant appealed to review the order sustaining the demurrer to the cross-complaint.

Satterwhite & Curtis, for Appellant, argued that the Secretary of the Interior *erred in matter of law*, and that the State courts should review the decision, citing the cases discussed in the opinion.

C. W. C. Rowell, for Respondent, argued that the demurrer was properly sustained; that the decision of the Secretary of the Interior upon the question presented is final, and the State courts will not review such a decision, citing *Dilla v. Bohall*, 53 Cal. 709; *Powers v. Leith*, 53 Cal. 711.

PER CURIAM.—The question involved in this appeal, as stated by appellant's counsel, is as follows:—

“Can a qualified pre-emptor, intending at the time of settlement to take the whole of a quarter section, one hundred and sixty acres, initiate a valid claim to the whole by performing acts of settlement on one eighty, while the other eighty is enclosed and cultivated by another person, before and at the time the attempt begins?”

It is insisted by appellant that the officers of the land department of the United States erred in law, in holding that a qualified pre-emptor could, under the circumstances stated, initiate his claim and acquire title to the eighty acres so in possession of another person.

Appellant relies upon *Atherton v. Fowler*, 96 U. S. 519; *Hosmer v. Wallace*, 97 U. S. 575; and *Trenouth v. San Francisco*, 100 U. S. 251.

These cases do not sustain his position. In *Atherton v. Fowler*, it was held: No right of pre-emption can be established by a settlement and improvement upon a tract of public land where

the claimant *forcibly intruded* upon the possession of another. Such intrusion is a trespass and cannot initiate a right of pre-emption. The pre-emption laws cannot be made an apology for trespasses or acts of violence, but in the case before us there was no intrusion upon the actual or constructive possession of the appellant.

In *Hosmer v. Wallace* the defendant was a purchaser from a Mexican grantee. At the time when the plaintiff settled upon the land it was within the exterior limits of the grant, and was not "public land" within the meaning of the pre-emption laws. In 1862 the plaintiff was evicted by legal process. The Supreme Court of the United States held that the plaintiff acquired no right to pre-empt, by virtue of his occupation, prior to the date last mentioned. After that date it would seem that the plaintiff occupied a subdivision adjoining the exterior line of the Mexican grant and adjoining the tract in possession of the defendant — the purchaser from the Mexican grantee. By the Act of Congress of 1866, the defendant acquired the right to pre-empt the tract he had purchased—a right which he enforced in the land department. The plaintiff, as a pre-emption claimant, had not made entry, paid for the land, and obtained a patent certificate *before* the passage of the Act of 1866. It was held the plaintiff had acquired no vested right when that act was passed, and that it was competent for Congress, by that act, to give to the defendant the superior right of pre-emption; "to deal with the land as it chose." (*Frisbie v. Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77.)

Trenouth v. San Francisco, construed the act to quiet the title to certain lands within the corporate limits of San Francisco. (14 Stats. 4.)

In *Hosmer v. Duggan*, 56 Cal. 257, cited by appellant, as in *Hosmer v. Wallace*, *supra*, it is said that a possession of lands, without the exterior limits of a Mexican grant, did not create a valid pre-emption right, to lands *within* the exterior lines of the grant, in the actual possession of another — even though upon a subsequent survey by the government the land should be excluded from the grant. This language is to be interpreted in the light of the circumstances of the cases. In both, the person in possession of the land, within the exterior limits of the Mexi-

can grant, was a beneficiary under the Act of 1866, who had asserted his right of pre-emption under that act, and obtained his patent.

In *Davis v. Scott*, 56 Cal. 170, also cited by appellant, the defendant invaded the plaintiff's actual possession, ousted and withheld the possession from him. His acts of settlement were within the actual possession of another.

The cases in Lester referred to by appellant do not sustain the view of the law he insists upon. In the case of *Flickinger*, to which our attention is particularly called (1 Lester L. L. p. 397, No. 446), the Secretary of the Interior held that Flickinger was not entitled to land by him claimed, because it appeared he was not occupying for his own benefit, but as servant of another, and that he had another claim in the "Big Woods" at the time he was occupying the land then in controversy.

Judgment affirmed.

[Department One. — June 15, 1883.]

MARTIN KELLEY ET AL., APPELLANTS, v. THOMAS
DESMOND, SHERIFF, ETC., RESPONDENT.

EXECUTION — SALE WITHOUT NOTICE — AGGRIEVED PARTY. — A purchaser at an execution sale is not an "aggrieved party" within the meaning of section 693 of the Code of Civil Procedure, which prescribes a penalty for selling real property without notice, recoverable by the party aggrieved. (McKEE, J., and MCKINSTRY, J.)

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

J. C. Bates, for Appellant.

Clitus Barbour, for Respondent.

McKEE, J.— On the 20th of December, 1879, Margaret Kelley, wife of her co-plaintiff Martin, purchased, at execution sale, a tract of land which had been levied upon by the defend-

ant, as the sheriff of the city and county of San Francisco, under an execution regularly issued upon a valid judgment rendered November 22, 1879. In the complaint in the action, out of which the case arises, the pleader alleges that the interest of the execution debtor was of great value; that the purchaser paid to the sheriff the amount of her bid as the purchase money of the land; and that, after the payment, she discovered that the sale had been made without giving the notice prescribed by section 692 of the Code of Civil Procedure. But it does not appear that, upon that discovery, she took any steps to set aside the sale, or to have her purchase money returned to her. On the contrary, it does appear that she stood on her rights as a purchaser, and, after the time for redemption had passed, she demanded of the sheriff a deed to the land, but he refused to execute it.

Unquestionably, upon that refusal, she had her remedy. She might have resorted to a writ of mandamus to compel the execution and delivery of a deed, or she might have sued him in damages for a refusal to execute it. But instead of resorting to either of those remedies, the plaintiffs brought this action to recover the penalty prescribed by section 693, Code of Civil Procedure, for selling real property under execution, without notice. That section provides as follows:—

“An officer selling without the notice prescribed by section 692 forfeits five hundred dollars to the party aggrieved, in addition to his actual damages”; and the question arises, whether a purchaser at execution sale, without notice, is the “aggrieved party” within the meaning of the section.

We think he is not. Such a sale is either valid or invalid; it passes the title to the purchaser or it does not. If it be a nullity and passes no title, the purchaser sustains no injury, and no right of action for the forfeiture accrues. Such an action is not maintainable even by a party to the execution, unless he has been deprived of his property by a sale under it without notice (*Askew v. Ebberts*, 22 Cal. 265); and if he has been deprived of his property by reason of the fact that it has passed from him by the sale to a purchaser at the sale, then the latter is not injured, for he has obtained what he bought.

Now, the real property of an execution debtor, levied on to

satisfy the judgment upon which the execution issued, *does pass* to the purchaser at the sale, whether it was made with or without notice, unless the sale be void for want of authority to make it. If authorized, the purchaser is entitled, after the time for redemption expires, to his deed, and may compel its execution and delivery. The deed is conclusive evidence of the facts of the sale as recited in the deed (*Hihn v. Peck*, 30 Cal. 287; *Blood v. Light*, 38 Cal. 653; *Mayo v. Foley*, 40 Cal. 281); and it vests him with the title of the execution debtor. Proof of the execution of a deed, and of the judgment and execution are sufficient for recovery by him in ejectment against the debtor. The purchaser is therefore concerned only with the judgment, execution, and sale, as evidenced by his deed (*Cloud v. El Dorado Co.* 12 Cal. 133; *Blood v. Light*, *supra*); upon them his title depends, and it is not affected or impaired by any irregularities of the officer making the sale. (*Reeve v. Kennedy*, 43 Cal. 650; *Mayo v. Foley*, *supra*.) If notice of the sale has been defectively given, or has not been given at all, it does not prejudice the right which the purchaser has acquired. Questions, therefore, appertaining to the notice, as well as all others which merely relate to irregularities, are between the officer selling and the parties to the execution. (Rorer on Judicial Sales, § 716; *Blood v. Light*, *supra*.) They are the only parties aggrieved; and from any injury resulting from such irregularities they are the only parties entitled to the remedy given by section 693, *supra*. A purchaser to whom the sale passes the legal title of the execution debtor is not an aggrieved party, and is not entitled to sue for the penalty prescribed by the section.

We find nothing in *Sexton v. Nevers*, 20 Pick. 451, which is in conflict with this conclusion. That was an action on the case by a purchaser at execution sale, who was the plaintiff in execution, against an officer to recover damages for neglect of the officer to comply with the requisitions of the law in selling real property, in consequence of which the plaintiff had been deprived of the property. The acts or omissions of the officer were such as, under the laws of Massachusetts, rendered the sale wholly invalid, and nothing passed to the plaintiff by the officer's deed. Therefore the plaintiff was held entitled to maintain an action against the officer for the neglect of duty by

which he had been injured. But the case has no application to the question involved in the case before us.

Judgment affirmed.

McKINSTRY, J., concurred.

Ross, J., concurred in the judgment.

Hearing in Bank denied.

[Department Two. — June 15, 1883.]

MARY O. McCLELLAN, APPELLANT, v. JOHN G.
DOWNEY, RESPONDENT.

ADMINISTRATION — DECREE OF DISTRIBUTION CONCLUSIVE AS TO SURETY OF ADMINISTRATOR. — Where the decree settling the account of an administrator and making distribution of the estate shows that proof was made to the satisfaction of the court that notice was given as required by the statute, the surety of the administrator, in an action by a distributee to recover the sum distributed to him, cannot be heard to question the validity of the decree.

ID. — COMMUNITY PROPERTY MAY BE DISTRIBUTED BY THE DECREE IN THE HUSBAND'S ESTATE. — The husband died intestate. The property left by him was community property. Pending the administration of his estate, the wife died intestate. Her estate was administered upon and distributed without embracing her interest in the community property, but the decree distributing the husband's estate dealt with the entire community property, and distributed the wife's interest to her heirs. *Held*, that it was competent for the court to make such a decree, no creditor of hers objecting.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are sufficiently stated in the opinion of the court.

W. S. Stevens, for Appellant.

Bicknell & White and *Graves & Chapman*, for Respondent.

MYRICK, J. — This appeal comes before us on the judgment roll, embracing the pleadings, findings, and judgment. The action was brought by plaintiff, a distributee of the estate of her father, W. J. McClellan, against a surety on the bond of the administrator, to recover the amount of money distributed to

her by the decree of distribution made of the estate of her said father. The following are sufficient of the facts to explain the case:—

W. J. McClellan died intestate, leaving, him surviving, his wife, Susan A. E. McClellan, and six children, four of whom were the children of his marriage with the said Susan. The property left by him was community property. Susan died subsequent to her husband, intestate, leaving her four children above mentioned her only descendants, and her estate was administered upon and distributed, and the administration closed; but in the decree of distribution of her estate no mention was made of her interest in the estate of her husband. Afterwards, on the 16th of October, 1878, Lindley, the administrator of the estate of W. J. McClellan, presented his final account of his administration, which was filed in the court, and at the same time presented a petition for the distribution of the estate. On the 14th of January, 1879, the Probate Court made a decree, settling the account of the administrator and distributing the estate. This decree recited that the administrator had, on the 16th of October, 1878, rendered and presented for settlement and filed in the court his final account of the administration of the estate, and on the 29th of October, 1878, when the matter came on for hearing, proof was "made to the satisfaction of the court that notice of the settlement of said account and of the time and place of hearing of the same had been duly given by the clerk of this court, as required by law and the order of this court." The decree also recited that on the 16th of October, 1878, the administrator "filed his petition praying for an order of distribution of the residue of said estate among the persons entitled, it appearing to the court upon satisfactory proof that notice of the hearing of said petition had been duly given as required by law and the order of this court." The decree, after disallowing some items contained in the account, and charging the administrator with other items, stated the balance in the hands of the administrator, and accordingly settled the account; and then proceeded to distribute the estate, viz., five twenty-fourths to each of the four children of said W. J. and Susan A. E. McClellan, and two twenty-fourths to each of the two children of said W. J. — \$934.40 being the amount of

money distributed to Mary C., the plaintiff herein, and for the recovery of which amount this action was brought. In making this distribution the decree embraced as well the one half of the community property which went to the surviving widow, Susan, upon the death of her husband, and upon her death to her four children, as the other half of the community property which went to the six children of said W. J. — which accounts for the difference in the proportions as between the two classes of children.

On the trial of this case in the court below, the court found that on the 18th of October, 1878, the Probate Court made an order fixing Tuesday, October 29, 1878, as the day for hearing the account, and directed notice to be given to all persons interested in the estate of the time and place of hearing said final account and petition for distribution, by posting notices in at least three public places in the county for at least ten days before said day; that on the 18th of October, 1878, the clerk posted notices in at least three public places in said county, but notifying all persons interested in the estate to appear on the 28th of October, 1878, and stating in said notice that said 28th of October, 1878, was the day fixed for said hearing; and that no further notice was given. The court concluded that the decree of settlement and distribution was not duly given and made, but on the contrary, that the Probate Court had no jurisdiction over the parties; that as to the interest of the estate of Susan A. E. McClellan, it had no jurisdiction over the subject-matter for the purpose of making distribution thereof to the parties interested as heirs of her estate, and that said decree was wholly void; and thereupon the court rendered judgment for the defendant. From this judgment the plaintiff appealed. On this appeal two questions are presented:—

First. Can the defendant in this action, the surety of the administrator, be heard to question the validity of the decree settling the account of his principal, and making distribution? This question is answered by section 1638 of the Code of Civil Procedure, which reads: "The account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is conclu-

sive evidence of the fact." The duty was thus cast upon the Probate Court to ascertain if proper notice had been given before allowing the account, and it is directed that the decree shall show that proof thereof was made to the satisfaction of the court, and when so made and so shown, the recital thereof in the decree is made conclusive evidence of the fact, subject, of course, to review on appeal from the decree in a proper manner.

It did not, then, rest with the trial court in this action to hear evidence that the Probate Court had not due and legal proof that proper notice had been given, nor to find contrary to its recital. The decree of the Probate Court on this point was full and ample, as required by the statute, as well as to the settlement of the account as to the distribution, and is conclusive.

It may be remarked that no question is made as to the regularity of the proceedings for the issuance of letters of administration; therefore we may assume that the court had jurisdiction of the estate for purposes of administering upon it. A compliance with the statute in all subsequent proceedings is all that can be required; and many of the cases cited by respondent have no application.

Second. Was it competent for the Probate Court, in the matter of the estate of W. J. McClellan, to make distribution of the share of the community property belonging to the widow, to her heirs, she having died pending the administration of her husband's estate? The objects of administration are, to gather the property left by a decedent, pay the debts and expenses, and distribute the residue "among the persons who by law are entitled thereto." (§ 1665, Code Civ. Proc.) It cannot be said that the widow's share of the community property is for no purpose, the estate of the husband; for certain purposes, payment of debts, expenses of administration, family allowance, it is a portion of the estate, and is not relieved from administration until these objects are accomplished. If therefore the widow die pending administration, *no creditor of hers objecting*, we see no objection to the distribution of her share of the estate to her heirs, as being the persons entitled thereto. It would, perhaps, be more orderly to have her interest in the estate distributed in terms, in the administration of her estate, to her heirs, and that such heirs go with the decree to have distribution in the hus-

band's estate; or, to have distribution, if personal property, to her administrator for the purposes of administration; but such course would not materially change the relation of the parties here — it appears that her estate was administered upon, and we may presume there are no creditors unpaid, and that the Probate Court had proof that she left no heirs other than those mentioned in the decree. The notice given was notice to all persons to come in and show cause.

On the question of fraud alleged in the answer, the findings are against the defendant. From the views above expressed there would not seem to have been alleged sufficient facts to show fraud.

Judgment reversed and cause remanded with instructions to render judgment for plaintiff for \$934.40 with interest thereon at the legal rate from January 14th, 1879, to the date of the judgment.

SHARPSTEIN, J., and THORNTON, J., concurred.

Hearing in Bank denied.

[In Bank. — June 15, 1883.]

THE CITY AND COUNTY OF SAN FRANCISCO,
APPELLANT, v. SPRING VALLEY WATER WORKS,
RESPONDENT.

TAXATION — ASSESSMENT OF "CAPITAL" AND "CAPITAL STOCK" OF CORPORATION. — Where, prior to the adoption of the Constitution of 1879, all the tangible property of a corporation had been assessed, and the taxes paid thereon, and the corporation did not own, or have in its possession, or under its control, any of the shares of its capital stock, the same being owned and held by third persons, it is not liable for taxes assessed upon "capital," or upon "capital stock."

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was brought to recover State and city and county taxes for the fiscal year 1877-78 upon an assessment of "cap-

ital " six million dollars; and for the fiscal year 1878-79 upon an assessment of " capital stock " six million dollars.

The case was tried upon an agreed statement of facts, sufficiently set forth in the opinion.

John P. Bell, and *Louis H. Sharp*, for the Appellant, argued that " capital " and " capital stock " meant the property, real and personal, tangible and intangible, of the corporation, and that the admission in the agreed statement of facts that the defendant corporation did not own or have in its possession, or under its control, any of the *shares of the capital stock* is not an admission that the defendant did not own, possess or control its capital or its capital stock; that the capital or capital stock of a corporation and the shares of capital stock are distinct things. (Citing *Burrall v. Bushwick R. R. Co.* 75 N. Y. 211; *Farrington v. Tennessee*, 95 U. S. 686; *Burroughs on Taxation*, 143; *Minot v. P. W. & B. R. R. Co.* 5 Corp. Cases (18 Wall. 206), 37; *State v. Hood*, 15 Rich. 181; *People v. Commissioners, etc.* 23 N. Y. 192, 219; *St. Charles St. R. R. Co. v. Board of Assessors*, 31 La. An. 853, 854; *N. O. & C. R. R. Co. v. Board of Assessors*, 32 La. An. 19; *Bank Tax Cases*, 2 Wall. 200; *Pacific Hotel Co. v. Lieb*, 83 Ill. 610; *Porter v. Rockford R. I. & St. L. R. R.* 76 Ill. 561; *State Railway Tax Cases*, 92 U. S. 603; *Nicholos v. N. Haven & Northampton Co.* 42 Conn. 103, 122, 123, 125; *New Haven v. City Bank*, 31 Conn. 106; *State v. Cumberland & Penn. R. R. Co.* 40 Md. 51.) And they contended further that the admission in the agreed statement that all the *tangible*, real, and personal property of every kind held or owned by the defendant was assessed, was not an admission that its *intangible* property—its franchise—was assessed; that the existence of intangible property is well settled, citing *San Jose Gas Light Co. v. January*, 57 Cal. 614; *Burke v. Badlam*, 57 Cal. 594; *Spring Valley W. W. v. Schottler*, 62 Cal. 100.

Fox & Kellogg, and *F. G. Newlands*, for Respondent, argued that the assessment for " capital " was void, because, (1) it embraced all kinds of property, real and personal, without separately stating or separately valuing them, and (2) because

it created and produced double taxation by assessing and taxing under this head all the property that the company possessed, having already once assessed it for the same year in another form and under other headings or titles; and that the assessment of capital stock was void under the rule in the case of *People v. National Gold Bank*, 51 Cal. 508.

McKINSTRY, J.—By the revenue law of 1861 (Stats. 1861, p. 420), all property was taxable; and by its fifth section the term “personal property” was declared to include “the capital stock of all corporations.” The sixteenth section of the Act of 1861 provided: “The owner or holder of any stock . . . in any incorporated company or association, the entire capital of which is invested in property which is assessed, or the capital of which is assessed, shall not be assessed individually for his stock in such company or association. The thirteenth section required that the assessor should list and assess all property to the person, firm, corporation, association or company “owning or having possession, charge, or control of the same.”

In *People v. National Gold Bank*, 51 Cal. 509, it had been found by the District Court that the capital stock of the defendant was three hundred thousand dollars, divided into shares of one hundred dollars each; that such shares were owned by persons other than defendant. It was held by the Supreme Court that the defendant could be held liable for the taxes sued for only on the theory that a corporation was liable, under the provisions of the Revenue Act of 1861, for taxes assessed upon its capital stock—that is to say, the “capital stock” regarded as the aggregate of the stock issued by the corporation. That the revenue act referred to did not provide that a corporation should be so liable, or be assessed therefor; but on the contrary, the provisions of the thirteenth section of the act required that the assessor should list and assess all property to the person, firm, corporation, or association “owning or having the possession, charge, or control thereof.” That the provision of the thirteenth (sixteenth) section providing that the owner or holder of any stock in any corporation, the entire capital of which was assessed, or invested in property which was assessed, should not be assessed for his stock, was in effect a provision that

when the capital was not so assessed, the stock should be assessed to the owner thereof; that the provision of the thirteenth section, that the president of a corporation should furnish a statement of all the property "owned, claimed by, or in possession or control of the corporation," "tended strongly to show that the corporation should be assessed only for property owned, claimed by, or in possession or control of the corporation"; that the defendant, "not being the *owner* of the capital stock, the same having been issued to, and being held by other persons," was not liable for the taxes assessed upon the same.

It is urged by appellant that it would only have been necessary to decide that, under the act of Congress, the National Bank was not liable to taxation on its capital stock — citing *Bank Tax Cases*, 2 Wall. 200 — but that this plain and decisive fact was ignored by the counsel who argued the case, and by the court in deciding it. The report of the case shows that counsel did cite the *Bank Tax Cases* to the point that the legislature had not the power to levy a tax on the capital stock of national banks, not owned by the bank. *People v. National Gold Bank* was decided upon the letter of the revenue act of the State of 1861. The construction placed upon that act determined the case. The Act of 1861 was relied upon by counsel for the people, and the judgment of the Supreme Court was made to rest, and could properly be made to rest upon its provisions. The decision in *People v. National Gold Bank* is therefore an authoritative exposition of the provisions of the Revenue Act of 1861.

There were provisions of the Political Code, as the same read in the years 1876, 1877, and 1878, like those in the Revenue Act of 1861, referred to in *People v. National Gold Bank*.

Section 3628 directed the assessor to assess all property of the persons who "own, claim, have possession or control thereof."

Section 3640 read: "The owner or holder of any stock in any firm or corporation, the entire capital or property whereof is assessed, must not be assessed individually for his stock in such firm or corporation."

Section 3629 required of the assessor that he exact from each person a statement in writing of "all property belonging to, or claimed by, or in the possession of, or under the control or

management of any corporation of which such person is president," etc.

It will be observed that the present action is based upon assessments levied before the adoption of the present Constitution.

In *People v. National Gold Bank* it affirmatively appeared that the shares of the capital stock of the bank were all owned by persons other than the bank. When the present action was here before (54 Cal. 571) it was held that the demurrer to the complaint had been improperly sustained by the Superior Court. The complaint is a special statutory complaint, and, in such case, the rule that averments are to be taken more strongly against the pleader has no application. When the plaintiff adopts the form of the statute he states every fact necessary to a recovery. Hence it was properly said it did not appear but that the defendant did own the capital stock assessed to it. But, by the agreed statement of facts, it now appears that the defendant *did not* on the first Monday of March, 1877, or on the first Monday of March, 1878, or at any time during the fiscal years 1877-78, 1878-79, own, or have in its possession, or under its control, any of the shares of the capital stock of defendant, but that all the shares of capital stock of said defendant were, on such dates, and throughout such fiscal years, owned and held by persons other than the defendant. And it further appears in the *agreed statement*, that "all the tangible real and personal property of every kind, held by or belonging to the defendant, in the city and county or elsewhere, was assessed to said defendant" for the fiscal years 1877-78 and 1878-79 for city and county and State purposes, and such assessments were fully paid.

It follows that *People v. National Gold Bank, supra*, is decisive of this case.

Judgment and order affirmed.

ROSS, J., MYRICK, J., SHARPSTEIN, J., and MCKEE, J., concurred.

THORNTON, J., concurred in the judgment, and stated the grounds of his concurrence in the following opinion filed July 21, 1883:—

In concurring in the judgment of this court affirming the

judgments and orders in the causes above entitled, I said that I would at a future day state the grounds of my concurrence. I now proceed to do so.

The assessments on which these actions were brought were for the fiscal years 1876-77, 1877-78, and 1878-79. The assessment for the first fiscal year just mentioned was upon "capital", *eo nomine*. That assessment was counted on in the case numbered 8,213. The assessment for the year 1877-78 was also on "capital," and that for the last year mentioned was on "capital stock." These were counted on in the case numbered 8,212.

We find nothing in the assessments or in the cases which favors the idea that these words "capital" and "capital stock" are used in the assessments in other sense than their ordinary and popular one. The words "capital" and "capital stock" have long had a recognized popular meaning. They have been used so long in relation to forms of association for conducting business of various kinds, in connection with the commerce, trade, and manufactures of the world, that it would be surprising if they had not acquired a meaning definite and well understood by all men of ordinary intelligence. And it so happens that this meaning corresponds with the definitions of learned text-writers and jurists, and decided cases. Cases may be found in which *capital stock* is treated of with a different signification, but this signification is impressed on the words by a statute. The words in these cases have then a peculiar meaning impressed on them by legislative enactment, which the courts administering the laws giving those definitions are bound to regard and cannot depart from, there being no constitutional impediment inhibiting the State, by its legislature, from imposing this definition on the words.

What is this ordinary and popular meaning? In the case of an individual, say a merchant, it is the fund of money or the property on which he does business. In the case of a voluntary association of persons for conducting a business, as, for instance, a partnership, it means the fund of money or property controlled by one or more of the associates employed as a basis of a business, on which and with which the business is to be commenced and carried on. (See Burrill's Dict., word "capital"; Abbott's Law Dict., word "capital"; Webster's Dict., word "capital";

Worcester's Dict., same word; Imperial Dict., words "capital" and "stock.") It is called *capital* from the Latin *caput*, a head, because it is the chief thing — the *head*, beginning and basis of an undertaking or enterprise. (See Burrill's Law Dict., word "capital.") *Stock* has substantially the same meaning. (See the word in the dictionaries above quoted.) *Capital* and *capital stock*, in ordinary parlance, when applied to combinations or associations for transacting business, have the same meaning, the former being an abbreviated form of the latter. Such abbreviations have been common through all time. Especially is this the case in our time-saving and labor-saving era. Hence, when one in these days speaks of the *capital* of a partnership or corporation or joint-stock company, we readily understand him as referring to the *capital stock* of such associations. (See *N. O. C. G. L. Co. v. Board of Assessors*, 31 La. An. 477.)

The cases in which definitions of these words are given are numerous. In *Bailey v. Clark*, 21 Wall. 286, the question arose as to the meaning of "capital" in a revenue act of the federal government, and the definition thereof is clearly given by the court, speaking by Field, J. After stating that the term is not used in the act in any technical sense, but in its natural and ordinary signification, the learned justice observes as follows: "When used with respect to the property of a corporation or association, it has a settled meaning; it applies only to the property or means contributed by the stockholders as the fund or basis for the business or enterprise for which the corporation or association was formed. . . . And when used with respect to the property of individuals in any particular business, the term has substantially the same import; it then means the property taken from other investments or uses, and set apart for and invested in the special business, and in the increase, proceeds, or earnings of which property, beyond the expenditures incurred in its use, consist of the profits made in the business." (21 Wall. 286; see *Railroad Companies v. Gaines*, 97 U. S. 707; *Farrington v. Tennessee*, 95 U. S. 686, and cases cited in this case, where the distinction between capital stock and shares of the capital stock is clearly defined.)

In *Burrall v. Bushwick R. R. Co.* 75 N. Y. 216, substantially the same definition is given. The court there said:

"The capital stock is that money or property which is put into a single corporation by those who, by subscription therefor, become members of the corporate body. (See *People v. Home Ins. Co.* 29 Cal. 545; *Martin v. Zellerbach*, 38 Cal. 308, 309.)

In the second section of the Act of April 14, 1853, entitled, "An act to provide for the formation of corporations for certain purposes" (Stats. 1853, p. 87), the requisites of the certificate of incorporation are prescribed. Among these are the amount of the capital stock of the corporation, and the number of shares of which the stock shall consist. Under this statute the respondent corporation was formed. (See Act of 1858, p. 218; *Spring Valley W. W. v. Schottler*, 62 Cal. 100.) Capital stock is referred to in sections thirteen and fourteen of the Act of 1853 above mentioned. We have an adjudication of its meaning in the thirteenth section in *Martin v. Zellerbach*, 38 Cal. 308, according with the definitions above given. There cannot be any doubt as to the meaning of the same expression in the second and fourteenth sections — that they mean the same as in section thirteen. We see no reason why "capital stock" in the assessments in these cases does not have the same significance as in these sections.

Reference might be made to many other cases. A great many will be found collected in Winfield's Adjudged Words and Phrases, under words "capital stock," and "stock," and Lawson's Concordance under words "capital," and "capital stock," and "stock." I have examined many of them, and in none of them have I found the words "capital" and "capital stock," when used in their natural and ordinary signification, having any other meaning than that above designated. I think I can safely say from the examination made that there is no case where any other meaning is attached to the words referred to, where there is nothing in the context showing that they are used with some other meaning, except the case of *The People v. The National Gold Bank of D. O. Mills & Co.* 51 Cal. 508, referred to in the opinion of my associates. The ruling in the case just cited, holding capital stock to mean shares, is a departure from all the other cases, as there was nothing in the assessment and nothing in the statute (see Act of May 17, 1861, Stats. of 1861, p. 419) qualifying or changing the meaning of

the words employed in them respectively. By the terms of the act (see fifth section referred to in the opinion) *personal property*, when used therein, is to include *inter alia* "the capital stock of all corporations, companies, associations, firms, or individuals doing business or having an office in the State." Nothing here changes the meaning of capital stock from its natural and ordinary sense. On the contrary, taking it in connection with the words used along with it in the section, it is evident that it is used with that meaning. The words referred to are "*companies, associations, firms, or individuals.*" The capital stock means the same thing here, as regards corporations, that it does when spoken of companies, associations, firms, or individuals. On the rule *noscitur a sociis*, the signification indicated is the natural and ordinary one.

The thirteenth section of this Act of 1861 is also referred to, in which it is provided that the president, etc., of the corporation shall furnish under oath "a statement of all the real estate and personal property within the county, owned, claimed by or in possession, or under the control of such corporation." It is said there is no provision that he shall furnish a statement of the capital stock of such company. The capital stock of the company is the property of the company. (*Burrall v. Bushwick R. R. Co.* 75 N. Y. 216.) In that case, to the definition of capital stock as a corporate fund above quoted, is added this: "That fund becomes the property of the corporate body." (See *Farrington v. Tennessee*, 95 U. S. 686; *Barry v. Merchants' Exchange Co.* 1 Sand. Ch. 305, 306; *Bailey v. Clark*, 21 Wall. 286; *Gashwiler v. Willis*, 33 Cal. 11.) In the cases cited from 75 N. Y. and 95 U. S. the well-known difference between the shares of capital stock, and the capital stock is pointed out. The capital stock is as much owned by the corporation as the capital stock of a firm is owned by the firm. The corporation owns the capital *in trust* for the stockholders; the owners of the shares are *cestuis que trust*. The president is, by the requirements of the statute, to make a statement of all the property of the corporation. This requisition is made because the property of the corporation may exceed the capital stock, as is clearly shown in *Barry v. Merchants' Exchange Co.* 1 Sand. Ch. above quoted. (See pp. 306, 307.) See also thirteenth section of Act

of 1853, under which the respondent corporation was formed, by which the trustees representing the corporation are forbidden to divide, withdraw, or in any way pay the stockholders or any of them any part of the capital stock of the company. (Stats. 1853, p. 89.)

I see no reason to hold that capital stock either in the Act of 1861 or the assessment in *People v. National Bank etc.*, above cited from 51 Cal., had any other signification than its ordinary one above given. A contrary ruling is opposed to principle and decided cases. Under these circumstances, with high regard for the court making the decision, I do not think the case should be followed.

Indeed, I think the case was practically disregarded in the cases under consideration when they were before this court on demurrer to the complaint. (See *San Francisco v. Spring Valley Water Works*, 54 Cal. 575, and another case with same title, 54 Cal. 603.)

I conclude from the foregoing that the assessment of the capital and capital stock of the corporation embraced all of its property of every kind which could be denominated the corporate fund paid in, or property furnished by the subscribers or stockholders for carrying on the business of the concern. In whatever shape it may exist, this assessment includes it. It makes no difference that the capital-stock fund was originally money. Whatever the money is invested in takes the place of the money, and becomes a part of the capital stock. This is so self-evident that it needs no citation of authority to sustain it, but the cases sustaining it are numerous. (See *New Haven v. City Bank*, 31 Conn. 109; *Bligh v. Brent*, 2 Younge & C. 294-5.)

It is admitted in both cases that all the tangible real and personal property of every kind, including money on hand or on deposit, held by or belonging to the defendant in this State, was assessed to defendant for the fiscal years above mentioned, and that the taxes were fully paid. According to the views above expressed, the assessments under consideration include all the property just mentioned, and embrace the capital stock, and may be more than the capital stock. (See *Bank Tax Case*, 2 Wall. 200; *Bank of Commerce v. N. Y. City*, 2 Black, 620.)

To allow then a recovery in these cases would be to require

the defendant to pay taxes twice on the same property for the same years, which is opposed to all law and should not be permitted.

It has been stated in a former part of this opinion that the words "capital" and "capital stock" have been impressed by legislation with a meaning different from its popular, natural, and ordinary one. Such is the case, in the cases cited by counsel for appellant from the Louisiana and Illinois reports, as an examination of them will show.

The Illinois cases cited are: *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561; *Pacific Hotel Co. v. Lieb*, 83 Ill. 610; *C. B. & Q. R. R. Co. v. Sides*, 88 Ill. 324; *Danville Manufacturing Co. v. Parks*, 88 Ill. 464; *Quincy Bridge Co. v. Adams Co.* 88 Ill. 621; *O. & M. R. R. Co. v. Weber*, 96 Ill. 448; *C. P. & S. W. R. Co. v. Raymond et al.* 97 Ill. 212; to which might be added *Republic Life Insurance Co. v. Pollak*, 75 Ill. 292; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; and *Huck v. Chicago & Alton Railroad Co.* 86 Ill. 352.

The cases cited from Louisiana are *City of New Orleans v. Mechanics' & T. Insurance Co.* 30 La. An. Part. 2, 876-8; *New Orleans Gas Light Co. v. Board of Assessors*, 31 La. An. 475; *City of New Orleans v. Canal B. Co.* 32 La. An. 160, *State v. Louisiana Sav. Bk. & S. D. Co.* 32 La. An. 1136.

The Illinois cases relate to the system of revenue of the State of Illinois, mainly to the Revenue Act of 1872, and the rules and regulations made by authority of that act, having the force of a statute, and the meaning attributed to the words "capital stock" is that imposed on them by the statute and the rules and regulations. In the case of *O. & M. R. R. Co. v. Weber*, 96 Ill., above cited, the meaning is stated as follows: "The term 'capital stock' means all the property and rights of the corporation of every kind and nature wherever located." (96 Ill. 448.) This meaning is attributed to "capital stock" in all these cases; a meaning broad enough to include franchise as part of the property of the corporation. Indeed the statute requires the capital stock of all companies and associations to be so valued as to include franchise. (See 3d section of Act of March 30, 1872, the text of which will be found in 92 U. S. 578; see, also, *Porter v. Rockford, R. I. & St. L. R. Co.*, cited above,

where it is distinctly held.) A lucid exposition of the system of taxation under the laws of Illinois will be found in the opinion of the Supreme Court of the United States, drawn up by Justice Miller in *State Railroad Tax Cases*, 92 U. S. 575, approving the early cases in Illinois, among which is mentioned *Porter's case*, above cited. (92 U. S. 617.) The opinion in this case also shows that the broad meaning attributed to capital stock in the cases above referred to is derived as above stated. In the report of this case will be found the rules and regulations above referred to.

It will be seen, from an examination of the Louisiana cases, that the value of the capital or capital stock is to be ascertained from the market price of the stock or any other manner. This is so declared by statute. (*N. O. City Gas L. Co. v. Board of Assessors*, 31 La. An. 477, where the statute is referred to.) When so ascertained it includes franchise. (See page last cited, *Comm. v. Hamilton Mfg. Co.* 12 Allen, 298-304; *Nichols v. New Haven, etc. Co.* 42 Conn. 122.) From this value is to be deducted the value of the real and personal estate separately assessed; the remainder is the value of the capital stock to be assessed, and may be designated in the assessment as capital stock. (See case just cited, *State v. La. Sav. Bk. and S. D. Co.* 32 La. An. 1138; and *City of N. O. v. N. O. Canal and Banking Co.* 29 La. An. 851.) These cases are interpretations of the revenue laws of Louisiana, and the courts of that State, in administering its laws, have held capital stock to have the signification above indicated.

But it is said capital stock includes franchise, and the cases just above mentioned are cited on behalf of appellant to sustain this position. We have already stated what the meaning of capital stock is when used in its ordinary legal acceptation, and it is so used, we think, in the assessments in these cases, and there is nothing in the statute under which these assessments were made giving any other meaning to these words. The definition given in a previous part of this opinion is sustained by the authorities. The meaning given to capital stock by the courts of Illinois and Louisiana in the cases above cited includes franchises, and such meaning is, as we have shown, derived from the construction of the laws respecting revenue systems of those States. *Gordon v. Appeal Tax Court*, 3 How. 133, 150. is a

direct authority that the franchise is different property from the capital stock, though they are both the property of the corporation. (See also *Bligh v. Brent*, 2 Younge & C. 294.)

But it is further argued that the capital stock, or some portion of it, may have been in a franchise, and as the action of the assessor must be held regular and lawful until the contrary is shown, the assessments ought to be sustained on the ground that the assessor assessed such property, and it is not made to appear that the respondent did not own such property when the assessments were made. If the respondent had purchased such a franchise, it can scarcely be conceived as existing unconnected with property, and in assessing such property, the value of the franchise would be taken into account in estimating its value. No allusion is here made to the acquisition of the rights or franchises of one corporation by another. In such a case there is usually a consolidation or amalgamation, another corporation is formed, and the franchise of such new being is to be assessed in the mode most common, by taking the aggregate value of the shares of the capital stock, and deducting from such aggregate the assessed value of the tangible property of the corporation. (As an instance, see the case of consolidation of the two cases referred to in *N. O. City Gas Light Co. v. Board of Assessors*, 31 La. An. 476, above cited.) So if, in the case of the admitted assessment of the tangible property of the corporation in this case the value of any right in the nature of a franchise entered into such property, it should be presumed that it was taken into account by the assessor in ascertaining the value of such property and was included in the assessments sued on.

If the assessor intended to include the franchise or faculty of being a corporation in the assessments, it was an easy matter to signify such intention by designating it as "franchise" or using some other words which on a fair interpretation would evince such intention, as in *N. O. C. G. L. Co. v. Board of Assessors*, cited above, where the assessment was of "capital and other values" (31 La. An. 475); and in some such mode the assessment of such franchise should be made.

In coming to the conclusion herein reached, I lay out of view entirely the fact admitted in the cases, that the shares of the capital stock had been sold to other persons, and were not the prop-

not within the limits of the survey of 1874, or within the patent.

It will be seen from the preceding recapitulation that there was no finding upon the issue above stated.

The cause must therefore go back for a new trial that there may be a finding on the issue mentioned. We find no other error in the record.

Judgment and order reversed and cause remanded for a new trial.

[Department One. — June 16, 1883.]

HENRY PIERCE, RESPONDENT, v. J. W. WHITING
ET AL., APPELLANTS.

ATTACHMENT — UNDERTAKING TO RELEASE PROPERTY — RECITALS. — An undertaking was given to obtain the release of personal property from attachment. The undertaking recited the commencement of the attachment suit, and that certain property of the defendant therein had been seized by the sheriff under the attachment. The only property attached was a vessel known as the *Startled Fawn*, and on the giving of the undertaking the property was released. *Held*, that the recitals in the undertaking were conclusive as between the parties, and that the sureties were precluded from showing that the property did not belong to the defendant in the attachment suit.

ID. — DEMAND — PLEADING. — The undertaking stipulated that in case of the recovery of a judgment by the plaintiff in the attachment suit, the defendant should surrender the property on demand to be applied in payment of the judgment, or that in default thereof he and his sureties would on demand pay to the plaintiff the value of the property not exceeding a specified sum. The only demand alleged in the complaint was a demand on the principal for the amount of the payment, and for the redelivery of the property. *Held*, that in order to maintain an action against the sureties on the undertaking, a demand upon them and their principal for the payment of the value of the property was also necessary, and that the complaint was fatally defective in failing to allege such a demand.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are sufficiently stated in the opinion of the court.

J. C. Bates, for Appellant.

A demand on the sureties was necessary. (Chitty on Pleadings, 15 Am. Ed. vol. 1, p. 331; *Morgan v. Menzies*, 60 Cal. 341; *Williamson v. Blattan*, 9 Cal. 500; *Bush v. Stevens*, 24

Wend. 257; *Nelson v. Bostwick*, 5 Hill, 37; *Douglass v. Rathbone*, 5 Hill, 143; *Smith v. Jewell*, 14 Gray, 223; *Kinkead v. Shreve*, 17 Cal. 275; *Palmer v. Vance*, 13 Cal. 558; *Baker v. Fuller*, 21 Pick. 322; *Hogins v. Arnold*, 15 Pick. 268; *Barnes v. Parker*, 8 Met. 134; *Southwick v. First Nat. Bank of Memphis*, 84 N. Y. 428; *Munger v. Albany City National Bank*, 85 N. Y. 583; *Kettle v. Lipe*, 6 Barb. 469; *Gillett v. Balcom*, 6 Barb. 873.)

Surety may show defendant did not own property. (*Bauer v. Antoine*, 22 La. An. 145; *Smith v. Jewell*, 14 Gray, 223; *Koeniger v. Creed*, 58 Ind. 554.)

George A. Nourse, for Respondent.

The recitals in the undertaking as to the ownership of the property attached concludes the sureties. (*Smith v. Fargo*, 57 Cal. 157; *McMillan v. Dana*, 18 Cal. 339; *Bowers v. Beck*, 2 Nev. 150; *Drake on Attachment*, § 339; *Decker v. Judson*, 16 N. Y. 439.)

No demand of the sureties was necessary. (*Halleck v. Moss*, 22 Cal. 266; *Ziel v. Dukes*, 12 Cal. 479; *Wenman v. Mohawh Ins. Co.* 13 Wend. 268; *Robinson v. Williams*, 8 Met. 451-56; *Metrovich v. Jovovich*, 58 Cal. 341.)

McKEE, J.—This suit is founded upon an undertaking, given in an attachment suit brought by the plaintiff against Frederick A. Hyde. The undertaking was given for the release from attachment of the yacht *Startled Fawn*, which had been seized, by the attachment issued in the case, as the property of the said Hyde, to secure payment of any judgment which might be recovered in the action against him. By the undertaking, the defendants promised that in case the plaintiff recovered judgment against Hyde in the action, he would, on demand, redeliver the property so released from the attachment, to the proper officer to be applied to the payment of the judgment; or that, in default thereof, he and the sureties would, on demand, pay to the plaintiff the full value of the property released, not exceeding the sum of two thousand five hundred dollars.

In the attachment suit judgment was recovered against Hyde.

The judgment remained unsatisfied, and an execution was regularly issued upon it and placed in the hands of the proper officer, for collection according to law. The officer, with the execution in hand, demanded of Hyde payment of the judgment and a redelivery of the yacht to be applied to the satisfaction of the judgment. But the judgment was not paid, nor was the yacht redelivered, and hence this suit upon the undertaking.

The plaintiff had judgment, from which the defendants appeal; and it is contended, first, that the judgment is erroneous, because the court on the trial of the case excluded evidence, which they offered, to prove that the yacht, when it was attached, was not the property of Hyde.

But their undertaking recites the bringing of the attachment suit; the issuance of the writ of attachment therein against the defendant Hyde, and the attachment of his property, namely, the yacht called the *Startled Fawn*, and that upon the execution of the undertaking in accordance with the provisions of sections 554 and 555 of the Code of Civil Procedure, the property was released by order of the court from the attachment. These recitals are as between the parties to the undertaking conclusive evidence of the facts recited. (Sub. 2, § 1962, Code Civ. Proc.; *Palmer v. Vance*, 13 Cal. 558; *Smith v. Fargo*, 57 Cal. 157; *Bowers v. Beck*, 2 Nev. 150; *Drake on Attachment*, § 339.) There was, therefore, no error in excluding the evidence.

But it is contended, secondly, that the action itself was not maintainable against the defendants, because the complaint failed to show or aver any demand on them to pay the value of the property released from the attachment.

Demand and refusal by the principal to pay the amount of the judgment, and to redeliver the property released from the attachment, to be applied to the satisfaction of the judgment, are averred and found. But the defendants did not bind themselves to pay the judgment, nor are they sued for its non-payment; they are sued for a breach of their obligation to pay the value of the property which their principal refused to deliver. In default of redelivery they were bound to pay the value of the property, but only according to the terms of their contract. By those terms the rights and remedies of the parties are to be determined; for the law binds a party to a contract only accord-

ing to its terms. Now the terms are that in case of default by their principal to deliver the property, to be applied to the satisfaction of the judgment against him, he, and they, as sureties for him, will pay the value of the property on demand. This is not an independent promise to pay an indebtedness of their own, or a certain sum of money to another. If it were, no demand would be necessary as preliminary to payment. The rule is that where a person promises, without qualification, to pay money to another, either generally or on demand, the money becomes due simultaneously with the promise, and in default of payment suit may be maintained against the promisor without a demand in fact. (*Quimby v. Lyon*, 63 Cal. 394; *Thompson v. Ketcham*, 8 Johns. 189; *Bank of Columbia v. Hagner*, 1 Peters, 455.) But it is otherwise where the duty to pay does not arise until after demand, or where there is a promise by sureties to pay a collateral sum on demand. In such cases there must be a demand in fact before suit is brought. The rule in those cases is thus stated by Mr. Addison, in his work on Contracts: "Where by the expressed terms of a contract the duty to pay money, or to tender some particular service is not to arise until after demand has been made, there is no cause of action until demand has been made. Thus where a man covenants or agrees to pay the debt of some third party, on demand, or to deliver up a bond to be canceled on request, there the demand or request is a condition precedent to the existence of any cause of action."

The case of *Sicklemore v. Thistleton*, 6 Maule & S. 9, illustrates the rule as to promise for payment of money to a third person. In that case the plaintiff declared upon a lease in which the defendant had, as surety for the tenant, covenanted "that the tenant should at all times during his term, well and truly pay or cause to be paid to the plaintiff the rents as they became due, according to the terms of the lease, and that in case the tenant should neglect to pay the rent for forty days, defendant shall pay on demand." Speaking of the covenant of the surety, Lord Ellenborough said: "I own that I cannot help thinking this is a qualified covenant, and that the stipulation, that if the lessee shall neglect to pay for forty days, the surety shall pay on demand does, in reasonable construction,

pervade and restrain the former covenant. According to the authority of *Browning v. Wright*, 2 Bos. & P. 13, covenants ought to be construed with due regard to the intention of the parties, as it is to be collected from the whole context of the instrument, so as to make one entire and consistent construction of the whole. And it appears to me that that would not be a consistent or just construction of this instrument, which would have the effect of making the defendant, who is only a surety, liable in the first instance, without notice, immediately upon the rent becoming due." And Bayley, J., said: "It is not possible that the latter clause, as it regards the surety, is a qualification of the former. Covenants must necessarily be construed all together in order to attain their true meaning. The meaning of these covenants is, that the defendant does not become chargeable *eo instanti* the rent becomes due, but only after forty days non-payment and after demand made."

It is a well-settled rule of law, says the Supreme Court of Kentucky, that wherever one party is required to do an act upon the demand of another, performance or an offer to perform must be within a reasonable time after demand; that is, "so much time as is necessary to do conveniently what the contract requires to be done." And this of course depends upon the nature of the act to be done, and the relative situation and circumstances of the parties. When the contract is for the payment of money on demand, it has been held that a failure to comply, *immediately*, with the demand, affords a ground of action. (*Blackwell v. Fosters*, 1 Met. Ky. 88.) A demand before suit was therefore essential to fix the liability of the defendants upon their undertaking. They promised upon the express condition that demand should be made upon them and their principal for the payment of the value of the property released in case of his failure to redeliver it. The complaint was, therefore, defective in not containing an averment of demand. So in *Morgan v. Menzies*, 60 Cal. 341, where an action was brought on an attachment bond conditioned for the payment to the defendant, in the attachment suit, in case he recovered judgment, of all costs and damages sustained by reason of the attachment, not exceeding a certain sum of money, this court held that the complaint was insufficient, on the grounds that there were no averments in the

complaint that payment had not been made, or that a demand had been made.

Metrovich v. Jovovich, 58 Cal. 341, is not analogous to the case in hand. In that case demand of the property released was made of the defendants, and the principal question involved was, whether the terms of their undertaking were complied with by an offer to return or by a return of a portion of the property attached. Nor does *Halleck v. Moss*, 22 Cal. 266, conflict with the views herein expressed. That was an action upon an indemnity against loss in a sale of stock, in which the promisor, by an independent agreement, undertook to pay to plaintiff, on demand, any deficiency resulting from a sale of the stock, and the Supreme Court held that as the promisor had notice of the sale and of the deficiency, his promise to pay was absolute and no demand was necessary. His promise was not collateral to a third person. The relation of principal and surety did not exist between the parties to the indemnity. "We cannot," say the court, "see anything in the contract which gives him the rights of a surety. We might inquire whose liability to pay does he guarantee, or for whom is he surety. The contract is solely his own." The difference between that case and the case in hand lies in the fact that in that there was a duty to pay and no actual demand was necessary. The bringing of the suit was sufficient. In this the promise to pay a collateral sum on demand was in the nature of a penalty, and not as a precedent duty, and therefore a demand was necessary before action brought. For the demand is part and parcel of the contract, and must be proved, and no cause of action arises until a demand be made.

If there is any principle of law well settled, it is that the liability of sureties is not to be extended beyond the terms of their contract. To the extent and in the manner and under the circumstances pointed out in their obligation they are bound, and no further; they are entitled to stand on its precise terms. (*People v. Buster*, 11 Cal. 215; *People v. Breyfogle*, 17 Cal. 504; *Tarpey v. Shillinberger*, 10 Cal. 391; *Smith v. United States*, 2 Wall. 234; *Miller v. Stewart*, 9 Wheat. 703.)

Judgment reversed and cause remanded, with direction to the court below to sustain the demurrer.

ROSS, J., and MCKINSTY, J., concurred.

[In Bank. — June 20, 1883.]

THE PEOPLE, RESPONDENT, v. WONG AH TEAK,
APPELLANT.

CRIMINAL LAW — JUSTIFIABLE HOMICIDE. — A person who has sought a combat for the purpose of taking advantage of another, may afterwards endeavor to decline any further struggle, and if he really and in good faith does so before killing the person with whom he sought the combat, he may justify the killing on the same grounds as he might if he had not originally sought the combat for such purpose.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Attorney-General, for Respondent.

James Maguire, for Appellant.

SHARPSTEIN, J.— The court, in charging the jury as to what would constitute justifiable homicide, said: "Homicide is justifiable when committed in necessary self-defense, but to justify a person in killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other is absolutely necessary, and it must appear also that the person killed was the assailant. It must appear also that the deceased person was the assailant, or that the person killing had really and in good faith endeavored to decline any further struggle before the mortal blow was given. A bare fear of the commission of any of the offenses or injuries which I have just spoken of as justifying a homicide is not sufficient to justify it, but the circumstances must be sufficient to excite the fears of a reasonable person, and the person killing must have acted under the influence of such fears alone, *without any mixture of malice, and without having sought the combat himself, for the purpose of taking an advantage of the person killed.*"

If such be the law it follows that one who had sought a combat with another for the purpose of taking an advantage of him, could never be justified in killing the person with whom he

sought such combat for such purpose, although he "really and in good faith endeavored to decline any further struggle before the mortal blow was given."

But such is not the law. A person who has sought a combat for the purpose of taking advantage of another, may afterwards endeavor to decline any further struggle, and, if he really and in good faith does so before killing the person with whom he sought such combat for such purpose, he may justify the killing on the same grounds as he might, if he had not originally sought such combat for such purpose. An instruction to the contrary would be erroneous in any case.

Judgment and order reversed and cause remanded for new trial.

THORNTON, J., ROSS, J., and MCKINSTAY, J., concurred.

McKEE, J.—I dissent. Conceding that the closing portion of the last instruction to the jury be erroneous, yet I think it is error without injury; because there was nothing in the evidence, as it appears in the record, which tended to prove that the defendant sought a combat with the deceased for the purpose of taking an advantage of him, or that the homicide was committed in a combat between the defendant and the deceased; that portion of the instruction was therefore irrelevant to the evidence in the case. Besides, the instruction itself was qualified by the other parts of the charge of the court, in such a manner that the jury could not have been misled by the objectionable part of the instruction.

MYRICK, J., concurred in the dissenting opinion of Mr. Justice McKee.

[In Bank. — June 22, 1883.]

J. B. SOUTHARD, RESPONDENT, v. JOHN McBROWN
ET AL., APPELLANTS.

EXECUTION — LEVY UPON JUDGMENT — PRIOR ASSIGNMENT. — No rights are acquired under an execution sale of a judgment which had been assigned for value prior to the levy, notwithstanding the assignment had not been filed, and no notice of it given to the purchaser.

LXIII. CAL.—85.

APPEAL from an order of the Superior Court of the city and county of San Francisco refusing to direct the satisfaction of a judgment.

The facts are sufficiently stated in the opinion of MR. JUSTICE MYRICK.

James A. Waymire, for Appellants.

J. M. Seawell, for Respondent.

MYRICK, J.—The plaintiff Southard recovered a judgment in a District Court against the defendant, McBrown, for \$3,000 damages and \$256.50 costs. The plaintiff assigned the judgment for value, and by intermediate assignments Benson became the owner also for value. The assignments, however, were not filed, nor did McBrown have notice thereof. McBrown had a judgment against Southard in another District Court for \$22 costs. Upon this latter judgment McBrown obtained a writ of execution, upon which the sheriff assumed to make a levy and sale of the \$3,356.50 judgment, upon which sale McBrown was the purchaser for the amount of his judgment against Southard. McBrown then made application to the court in which the judgment against him had been obtained, for an order that satisfaction of that judgment be entered, upon the ground that it had been satisfied in fact by the sale upon execution to him. This application was refused, and from the order of refusal an appeal was taken.

Southard claims that the judgment of \$22 against him was void, because the cost bill (the judgment being for costs only) was not filed within five days after the rendition of the judgment. From the view we take of the case, it is unnecessary to pass upon this question.

Even if it be granted that a judgment is the subject of sale under execution, and if it be granted that a sale would be good if made for value before notice of assignment, McBrown was not a purchaser for value; he parted with nothing; he, the holder of the \$22 judgment, bid in the larger judgment for his judgment. But it was said in *Fore v. Manlove*, 18 Cal. 437, "If a judgment be the subject of levy and sale, the purchaser would only take as

The case was heard on the judgment roll. A copy of the policy in question was attached to the complaint, and referred to in the findings of the court. By the terms of the policy it was made and accepted subject to the by-laws and regulations of the association then or thereafter existing. Certain by-laws and regulations were set forth in the policy, and the record does not show that any others were ever adopted. The portions of the policy bearing upon the question decided are alluded to in the opinion of the court.

Pillsbury & Titus, and *A. W. Thompson*, for Appellant, cited *Lycoming Fire Ins. Co. v. Rought*, 97 Pa. St. 415; *Southern Mut. Ins. Co. v. Taylor*, 10 Ins. Law Jour. 208; *Hummel & Co.'s Appeal*, 78 Pa. St. 320; *Columbia Ins. Co. v. Buckley*, 83 Pa. St. 293; *Washington Mut. Fire Ins. Co. v. Rosenberger*, 84 Pa. St. 373; *Crawford Co. Mut. Fire Ins. Co. v. Cochran*, 88 Pa. St. 230.

W. S. Goodfellow, for Respondent.

The policy provides for cancellation at the discretion of the secretary in case of delinquency on the part of the insured. The non-payment does not of itself work a forfeiture.

In all the cases cited by appellant there was an express condition in the policy rendering it null and void if any assessments remained unpaid for thirty days after notice and demand.

McKEE, J.—The only question in the case is whether the non-payment of an assessment levied against a member of a mutual insurance company for his proportion of losses and expenses incurred by the company, on the plan of insurance upon which the policy was issued, operates to forfeit or suspend the policy.

It is said in *Lycoming Fire Insurance Company v. Rought*, 97 Pa. St. 415: "If a member of a mutual insurance company is in default in the payment of an assessment on his policy after due notice, according to the by-laws and rules of the company, the protecting power of the policy is suspended until the assessment is paid. No recovery can be had for a loss sustained during the continuance of such default."

But in that case the contract was made with reference to a by-law of the company which provided that whenever an assessment shall have been made upon the premium notes, and the same is not paid within thirty days after having been demanded by the company, the policy of insurance given upon such notes shall be null and void until said assessment shall be paid. The time for payment was, therefore, fixed by the contract, and by notice of the assessment and the demand for payment, and the contract itself provided for a forfeiture or suspension of the policy until payment.

The case in hand differs from that in this: there was no time fixed for the payment of the assessment, either by the by-laws of the company or in the notice of the assessment and demand of payment. The liability of the plaintiff to pay the assessment was therefore the result of an obligation arising from an independent contract, which was enforceable against him according to law, and there was nothing in the terms of the policy which declared a forfeiture or suspension of the policy in case of non-payment. On the contrary, while the policy provided that "all persons insuring shall be ratably assessed, and are bound to pay their proportion of all losses and expenses happening to and accruing in or to said association," it also provided for the cancellation of the policy by the secretary of the company whenever he deemed advisable for non-conformance to the rules and regulations of the association. That discretion was never exercised. There is no claim that the policy was ever cancelled for non-payment of the assessment.

The court found "that no notification or intimation was at any time given by defendant to plaintiff that the assessment was to be paid by or within any particular time; and that the plaintiff has never, at any time, refused to pay it."

It follows that the non-payment of the assessment will not defeat plaintiff's right to recover. The performance or non-performance of an act does not involve a forfeiture of a policy of insurance unless it be so provided by the terms of the policy.

Judgment affirmed.

ROSS, J., and MCKINSTY, J., concurred.

[Department One. — June 23, 1883.]

ADOLPHE BERSON ET AL., RESPONDENTS, v. MATTHEW
NUNAN, APPELLANT.

CHATTEL MORTGAGE — ATTACHMENT. — Property covered by a chattel mortgage duly executed and recorded cannot be attached without payment of the mortgage debt, or a deposit of the amount with the county clerk or treasurer payable to the order of the mortgagee, as required by section 2969 of the Civil Code.

ID. — CHANGE OF POSSESSION. — The validity of such a mortgage does not depend upon a change in the possession of the property. The title passes to the mortgagee subject to the conditions expressed in the mortgage, and can only be divested by a performance of these conditions. The recording of the mortgage operates as notice to creditors and subsequent purchasers, and is the equivalent of an immediate delivery and continued change of possession.

REPLEVIN — FORM OF JUDGMENT. — A judgment in replevin must be in the form prescribed by section 667 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are sufficiently stated in the opinion of the court.

Lloyd & Wood, for Appellant.

The judgment is not in the form prescribed by the Code of Civil Procedure, section 667.

There was no actual or continued change of possession upon the sale to plaintiffs. (Civil Code, § 3440; *Edwards v. Sonoma Co. Bk.* 59 Cal. 149; *Watson v. Rodgers*, 53 Cal. 401; *Hesthal v. Myles*, 53 Cal. 623.)

Chas. P. Goff, for Respondents.

The mortgage debt should have been paid before the levy. (Civil Code, § 2969.)

The mortgage vested the legal title in the mortgagee. (*Heyland v. Badger*, 35 Cal. 404; *Stringer v. Davis*, 35 Cal. 25; 2 Hilliard on Mortgages, 2d ed. § 277.)

MCKEE, J.— This was an action of replevin brought by the plaintiffs to recover certain household furniture which had been seized by the defendant as sheriff of the city and county of San Francisco, under an execution issued in favor of C. H. Voight against Maria Trendle. The seizure was made on the 3d of

November, 1879. At the time, the furniture was in the actual possession of the execution debtor, who was using it in the business of keeping a boarding and lodging house; but she had purchased the furniture from the plaintiffs and had given her promissory note, secured by a chattel mortgage upon the furniture, for an unpaid balance of the purchase money. The mortgage was verified and acknowledged as required by sections 2956, 2957, Civil Code, and was recorded on the 29th of January, 1878, as required by section 2959, Civil Code.

Subsequently to the recording of the mortgage, namely, in April, 1879, the mortgagor also made a formal bill of sale to the plaintiffs of her interest in the furniture; but by an instrument in writing, executed by the plaintiffs and delivered simultaneously with the execution and delivery of the bill of sale, the plaintiffs acknowledged that the bill of sale was intended as security to them for payment of the rent of the house, in which the execution debtor was carrying on the business of keeping a boarding and lodging house.

These transactions were binding between the parties. The title to the furniture passed to the plaintiffs. Under the chattel mortgage it continued vested in them, until it was reinvested by the performance of the mortgage conditions. (*Heyland v. Badger*, 35 Cal. 404; *Hackett v. Manlove*, 14 Cal. 85.) But the equitable interest of the mortgagor in the property was subject to the disposal of the mortgagor according to law, or to levy on execution sale according to law. Section 2969, Civil Code, provides as follows: "Before personal property mortgaged can be attached or levied upon, the officer must pay to the mortgagee the amount of the mortgage debt and interest, or must deposit the same with the county clerk or treasurer, payable to the order of the mortgagee." By the record of the mortgage the officer had notice of the mortgage debt before making the levy, and after he had levied upon the property, the plaintiffs gave him actual notice of their mortgage claim, and the amount due upon it, and that they also claimed the property by the bill of sale. Yet the defendant neither paid nor deposited the amount of the mortgage debt and interest as required by the Code. The act of the officer in levying upon the property, by the execution in his hands was, therefore, wrongful.

It is contended, however, "that no actual or continued change of possession took place upon the sale from Maria Trendle to plaintiffs."

But a transfer of property by chattel mortgage, executed with the formalities of law and recorded, passes the title, although conditional and defeasible, whether the property be or be not delivered. The rights of the parties to the mortgage are fixed by the Code; they are purely statutory rights, and as the Code declares that such a mortgage is not void as to creditors or subsequent purchasers, for want of an actual and continued change of possession (§ 2957, Civ. Code) the title of the mortgagee is not affected for want of it. (*Heyland v. Badger, supra.*)

The object to be attained by requiring the recording of mortgages of personal property is the same as that in providing for the registration of mortgages of real estate. The same general principles are alike applicable in each case. The design is to give notice to the public of all existing encumbrances upon real or personal estate by mortgage. (*Griffith v. Douglas*, 73 Me. 534.)

The recording of the mortgage is therefore made by the Code the equivalent of an immediate delivery and continued change of possession, and creditors and subsequent purchasers or encumbrancers are bound by the notice which it imports. By and under it, the mortgagee is, in law, in possession of the chattels, and an officer having an attachment or execution against the mortgagor, is not authorized to levy upon them without first paying the mortgage debt. (§§ 2969, 2970, Civ. Code; *Moore v. Murdock*, 26 Cal. 515; *Swanston v. Sublette*, 1 Cal. 124.)

Plaintiffs were therefore entitled to judgment, and upon the admissions made at the trial as to the value of the property, and the waiver by them in open court of findings, judgment was rendered in their favor against the defendant for a return of the property, which, in fact, had already been returned to them, or its value and costs. But the judgment as entered was not in the alternative form required by section 667, of the Code of Civil Procedure, and for that reason it must be reversed.

Order denying motion for a new trial affirmed. Judgment

reversed and cause remanded with direction to enter judgment in proper form.

Ross, J., and McKINSTRY, J., concurred.

[Department One. — June 23, 1883.]

R. T. BUELL, APPELLANT, v. HENRY L. DODGE,
RESPONDENT.

CHANGE OF VENUE — AFFIDAVIT OF MERITS. — In the affidavit upon which the defendant moved for an order changing the place of trial, he says that he has fully and fairly stated "the case" in his action to E. S. Pillsbury, one of his counsel, and that after such statement he is advised by his said counsel, and verily believes that he has a good and substantial defense on the merits. *Held*, sufficient as an affidavit of merits.

APPEAL from an order of the Superior Court of Santa Barbara County changing the place of trial to the city and county of San Francisco.

The facts appear sufficiently in the opinion of the court.

R. H. Taylor, A. Craig, and W. C. Stratton, for Appellant, cited *Nickerson v. California Raisin Co.* 61 Cal. 268.

Pillsbury & Titus, and Chas. Fernald, for Respondent, cited *Butler v. Mitchell*, 17 Wis. 52, 61; *Waite's Practice*, vol. 3, p. 49; *Whittaker's Practice*, (3d ed.) vol. 2, p. 336; *Rickards v. Swetzer*, 3 How. Pr. 412, 414; *Jordan v. Garrison*, 6 How. Pr. 6, 9.

McKEE, J.—On moving for an order to change the place of trial in this case, defendant filed an affidavit in which he affirmed that he had stated "the case," to his counsel, who advised him that he had a meritorious defense to the same. Objection was made that the affidavit was insufficient as an affidavit of merits, because it did not appear from it that the defendant had stated to his counsel the facts of the case."

In *Nickerson v. The California Raisin Company*, 61 Cal. 268, the party moved on an affidavit which contained the statement that he had fully and fairly stated *his defense* in the action. That

was held to be insufficient, and we said: An affidavit of merits "must show that the defendant has fully and fairly stated *the facts of the case* to his counsel, before the advice of the latter could amount to a *prima facie* showing of merits on defendant's behalf." Upon that as the correct rule of law it is contended that the affidavit in this case was insufficient, and that the order changing the place of trial was erroneous.

But a statement of the "case" is the equivalent of the statement of the facts of the case. "Case" is defined to be a question contested before a court of justice in an action or suit at law or in equity. (*Bouv. Law Dic. "Case."*) The primary meaning of the word, says the Supreme Court of New York, according to lexicographers, is *cause*. When applied to legal proceedings it imports a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice. In this, its generic sense, the word includes all cases special or otherwise. (*Kundolf v. Thalheimer*, 12 N. Y. 596.) When, therefore, the defendant averred in his affidavit that he had made a statement of the case, for the purpose of obtaining the advice of his counsel, the expression necessarily imports that he had made a statement of the facts out of which the case had arisen.

The affidavit was sufficient.

Order affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

[Department One. — June 23, 1882.]

JAMES JOHNSTON ET AL., APPELLANTS, v. THE SAN FRANCISCO SAVINGS UNION, RESPONDENT.

FORECLOSURE — COMMUNITY PROPERTY — PARTIES. — The children of a deceased mother are tenants in common of the legal title with their father to the community property, with power in the father to convey or mortgage the whole estate so far as is necessary to provide for the debts of the community; and in an action for the foreclosure of a mortgage executed by the father subsequent to the death of the mother, they are necessary parties.

ID. — JURISDICTION — INFANTS — SUMMONS. — Where such children are infants and are made parties defendant, they must be served with the summons. Until this is done the court has no jurisdiction of them, and the appointment of a guardian *ad litem* is void.

Id. — Nor does the court acquire jurisdiction of such infants where, after the trial, they petition to intervene and have a guardian *ad litem* appointed, and thereafter file an "amended answer" by a guardian appointed upon such petition.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

W. H. Tompkins, and Calhoun Benham, for Appellants.

The decree is void because the plaintiffs were not parties to the foreclosure suit.

1. The complaint did not make them parties by name.

2. They were not made parties by service of process under fictitious names.

3. The answer filed in their names was not an appearance. (7 Leigh, 225; 37 Cal. 348; 6 Cal. 415; 42 Cal. 578; 50 Cal. 588; 50 Cal. 578.)

4. There was no proof of the signatures to the petition for leave to intervene. (*Galpin v. Page*, 18 Wall. 350; *In re McKibbin*, 12 Bank. Reg. 101; 9 Cal. 315; 9 Ark. 432; 20 Cal. 687; 9 Cal. 616; 4 Cold. 129; 12 Cal. 490; *Shriver's Lessee v. Lyman*, 2 How. 43.)

5. The minors never availed themselves of the leave to intervene in the foreclosure suit. No one signed the amended answer on their behalf, and that answer is the only pleading filed in their names after the leave to intervene was granted. (See amended answer, Trans. fol. 275.)

6. That amended answer did not make the minors parties. It was not an appearance for them.

7. The petition for leave to intervene was *ultra vires* of the minors. (Civ. Code, § 42; 43 Miss. 129, 257; 38 Ill. 150; 2 How. 60.)

8. The record does not show or raise any legal presumption that the guardian *ad litem* ever had notice of his appointment or ever assented to it.

A. & H. Campbell, and Fox & Kellogg, for Respondent.

The minor plaintiffs, John F. Johnston and Francis T. Johnston, were properly before the court in *San Francisco Savings*

Union v. Johnston et al. A guardian may be appointed in any case where the court or judge deems it expedient. (Code Civ. Proc. § 372.)

Both were over the age of fourteen years, and by their application claimed an interest in the action. (Code Civ. Proc. § 373.)

And as intervenors they became *plaintiffs*, demanding relief against both the original plaintiff and two of the defendants. (Code Civ. Proc. §§ 387, 373.)

The title of their plea does not establish its character. Their plea was made and filed "as a ground of affirmative relief," and upon their application, stating "that they desire to intervene therein."

The facts set out will determine its character. (*Holmes v. Richet*, 56 Cal. 311.)

The intervention and the answer of defendants raised the issue of title, and having raised it, they cannot complain that the court determined it. (*Odd Fellows Sav. Bank v. Noonan*, 11 Pac. C. L. J. 149.)

Treating the minors as defendants, the guardian *ad litem* was properly appointed. They were over the age of fourteen years, and the appointment was made on their application. For the purpose of such an application, the service of the summons was not required. (Code Civ. Proc. § 373.)

PER CURIAM.—Plaintiffs herein — who are the appellants — brought the action to quiet their title to an undivided portion of certain lands. The Superior Court entered a decree that the *defendant's* title be forever quieted as against plaintiffs, and all persons claiming under them, and that each of the plaintiffs, and all persons claiming under them, be barred and foreclosed from ever hereafter asserting any claim, etc. The plaintiffs are the children and heirs at law of James Johnston, senior, and Petra, his wife, both deceased. Petra died April 30, 1861, and James, senior, October 3, 1879. After the death of Petra, James, senior, borrowed certain moneys of the present defendant, to secure the payment of which he executed a mortgage upon the lands described in the complaint, which had been acquired during the existence of the marriage.

In the lifetime of the surviving husband, the present defendant commenced an action to foreclose the mortgage, and for the sale of all the lands to pay the mortgage debt. In that action certain proceedings were had which resulted in a decree directing a sale, upon which an order of sale issued; the lands were sold, and the plaintiff in that action, defendant in this, became the purchaser of the lands and received a deed therefor. When the action to foreclose was brought, and decree entered, two of the present plaintiffs — John F. and Francis T. Johnston — were infants.

The question whether the persons last named are bound by the decree of foreclosure must depend upon the *petition* filed in the foreclosure suit, purporting to be the petition of John F. Johnston and Francis T. Johnston for the appointment of their brother, James Johnston, junior, their *guardian ad litem*; the alleged written *consent* of the latter; the order of court appointing him guardian, etc.; the *stipulation* of May 28, 1877, and the amended answer of May 28, 1877. It is manifest that neither any unauthorized appearance by attorneys assuming to appear for the infants, nor any stipulation between the plaintiff in the foreclosure suit and the adult defendants therein, made before a guardian was appointed, could affect the rights of the infants.

On the 17th day of February, 1877, after the action to foreclose the mortgage had been tried, there was filed, in said action, a paper-writing which reads as follows:—

“The petition of John F. Johnston and Francis T. Johnston respectfully represents:—

“That they are minors and above fourteen years old; that they have an interest in the above entitled action; that they desire to intervene therein; that they respectfully request of the judge of this honorable court that he will appoint their brother, James Johnston, their guardian *ad litem* in said action to appear and represent their interests therein.

“JOHN FRANCIS JOHNSTON,

“FRANCIS THOMAS JOHNSTON.

“Dated San Mateo, February 16, 1877.”

Accompanying, or indorsed on which, was the following:—

“I hereby consent to act as guardian *ad litem* for my brothers,

John F. Johnston and Francis T. Johnston, in the foregoing entitled action.

“JAMES JOHNSTON, JR.

“Dated San Mateo, February 16, 1877.”

May 17, 1877, the district judge made this order:—

“John Francis Johnston and Francis Thomas Johnston, minors over the age of fourteen years, having heretofore, to wit, on February 17, 1877, filed in said action their petition and application for leave to intervene in said action and for an order appointing their brother, James Johnston, junior, their guardian *ad litem* in said action—to appear and represent them therein; and said James Johnston, junior, having filed in said action his written consent to such appointment: Now, on motion of Sol. A. Sharp, Esq., of counsel for said minors, it is ordered that said John Francis Johnston and Francis Thomas Johnston be and they are hereby allowed to intervene and file their intervention in said action, and said James Johnston, junior, is hereby appointed guardian *ad litem* in said action for said minors; and it is further ordered that such intervention be filed within five days from the date hereof.

“Dated April 30, 1877.

“(Signed) WM. P. DANGERFIELD, District Judge.”

[Indorsed.]

“Order allowing J. F. Johnston and F. T. Johnston, minors, to intervene and appointing their guardian *ad litem*.

“Filed May 17, 1877.”

May 28, 1877, the following stipulation was filed:—

“It is mutually stipulated and agreed by and between the parties to this cause, their counsel and attorneys respectively, as follows:—

“*First*—That defendants, James Johnston, Jr., John F. Johnston and Francis T. Johnston (the two last by their guardian), shall file as of this date their amended answer and cross-complaint in this cause. That the verification of said answer and cross-complaint is waived.

“*Second*—That the defense of the Statute of Limitations in said answer be deemed denied, and that the answer of the plaintiff to the original cross-complaint be and is hereby taken as the answer of the plaintiff to the amended complaint.

"*Third* — That the answer of Parker Nicholson to the original cross-complaint of James Johnston, Jr., John F. Johnston and Francis T. Johnston, be taken as his answer to the amended cross-complaint this day filed.

"*Fourth* — That this case be submitted to the court for trial and decision on the testimony heretofore taken, on Wednesday next, either party to offer such additional testimony as they may be advised.

"Dated this 28th day of May, 1877.

"CAMPBELL, FOX & CAMPBELL,

"H. C. CAMPBELL,

"Attorneys for Plaintiff.

"C. N. Fox,

"Attorney for defendant Parker Nicholson.

"SOL. A. SHARP,

"W. H. TOMPKINS,

"Attorneys for James Johnston, James Johnston, Jr., John F. Johnston and Francis T. Johnston (by guardian)."

On the same day an "amended answer," purporting to be the amended answer of "James Johnston, Jr., sued herein by the fictitious name of John Doe, John F. Johnston, sued herein by the fictitious name of Richard Roe, and Francis T. Johnston, sued herein by the fictitious name of John White," was filed. This amended answer had been verified by a *third* "James Johnston," on the 23d of February, 1877, nearly three months before the pretended appointment of a guardian *ad litem*, the verification stating that "said James Johnston, Jr., and guardian *ad litem* is absent from the city and county." Further verification was waived by the stipulation.

In *Cook v. Norman*, 50 Cal. 633, it was held that under the Act of 1850, "concerning husband and wife," it was competent for the surviving husband to convey the estate belonging to the late community, the purpose of such conveyance being to satisfy the debts, with the payment of which the community property was charged; and further, that a purchaser "in good faith" from the surviving husband was not bound to show, to support his title as against the children of the community, that the sale of the premises was, in point of fact, necessary to provide for the payment of the community debts.

Even if it be admitted that the rule which forbids the adjudication in a suit to foreclose a mortgage of a title *adverse* to that of the mortgagor is not jurisdictional, and that, if the holder of such adverse title has his day in court, and his title is held to be subject to the lien of the mortgage, he cannot afterwards attack the decree *collaterally*, he is certainly not bound by the decree, unless the court had acquired jurisdiction of his person and title. In the view we take of this case it is not necessary to decide whether the title of the infants was *adverse* to that of the surviving husband.

Assuming, for the purposes of this case, that, in the suit to foreclose the mortgage made upon the lands of the late community by the surviving husband, the burden was not cast upon the mortgagee of alleging or proving that the money paid was necessary to provide for the payment of community debts, but that it was for the children, by way of defense, to prove that the mortgagee had notice that there were no community debts, or that the debts were of less amount, the present plaintiffs were not only proper but necessary parties to the foreclosure suit. The last clause of section 726 of the Code of Civil Procedure has no bearing upon the question. The children of James and Petra Johnston were not holding an unrecorded conveyance from the mortgagor, nor were they persons having a mere lien upon the property mortgaged. On the death of their mother they became owners of one half the community property subject to the community debts, and liable, perhaps, to become subject to the debts by their father *substituted* for the community debts. If their father had power to mortgage their interest in the lands to raise money to pay off prior debts of the former community, it was upon the theory that the law made him their agent for that purpose. As to the legal title of an undivided moiety of the lands, descent was cast upon them on the death of their mother. The object of the suit was to sell and transfer their title as well as that of their father. They had an interest to protect it; to deny the existence of the mortgage, or to reduce the amount alleged to be secured by it; to prove that there were no community debts, or that they were less than the advance made by the mortgagee, and that the mortgagee had notice of the facts with reference to such indebtedness; that their father

had exceeded his limited authority, and that the mortgagee knew it was not a mortgage in "good faith." As they were necessary parties to the foreclosure suit, the decree therein was void with respect to one half the lands mortgaged, unless the court acquired jurisdiction of the infants. They and their father were tenants in common in the legal title, with power in the latter to convey or mortgage the estate of the former, so far as was necessary, to provide for the debts of the community. He mortgaged their interest with his own, if the mortgagee had no notice that the community was not indebted. The mortgage created a lien on the lands of the children, if the necessity existed which authorized him to execute it, or, in any event, if the mortgagee was innocent.

Whether, however, the title of the children was *adverse* to that of the father, within the meaning of the rule to which we have adverted, or the mortgage is to be treated as executed by the children, in case the mortgagee advanced its money in "good faith," they are not bound by the decree, unless the court had jurisdiction over them and their property.

The action to foreclose the mortgage was entitled, "The San Francisco Savings Union, plaintiff, v. James Johnston (Senior), Parker Nicholson, Michael Kane, John Doe, Richard Roe, John White, John Brown, John Green, John Black, John Blue, and John Yellow, the last eight named of whom are sued by fictitious names for the reason that plaintiff does not know their true names, defendants."

None of the present plaintiffs were made defendants in the foreclosure suit by name, nor was any one of them served with summons therein. The present plaintiff, James Johnston, Jr., was of full age when that suit was brought, voluntarily appeared therein, and it may be admitted is bound by the judgment. But, as we have seen, the others of the present plaintiffs were infants. There appears in the judgment roll in the action to foreclose a writing purporting to be "the joint and several answers" of "James Johnston, Jr., sued herein by the fictitious name of John Doe, John F. Johnston, sued herein by the fictitious name of Richard Roe, and Francis T. Johnston, sued herein by the fictitious name of John White." The writing is signed, "Sol. A. Sharp, Walter Tompkins, attorneys for defend-

ants James Johnston, Jr., et al." It is plain that, as we have said, this paper, filed long before there was any attempt to appoint a guardian, and which does not purport to be by a guardian, gave no jurisdiction of the infants. The amended answer, filed after the attempted appointment of guardian, purporting to be the answer of "James Johnston, Jr., sued herein by the fictitious name of John Doe, John F. Johnston, sued herein by the fictitious name of Richard Roe, and Francis T. Johnston, sued herein by the fictitious name of John White, by their guardian *ad litem* James Johnston, Jr.," is almost a literal copy of the former answer, with the exception that after the names of the defendants are inserted the words "by their guardian *ad litem* James Johnston, Jr." The amended answer is what it purports to be, amended answer by persons averring themselves to be *defendants*, sued by certain fictitious names. The person who assumed thus to amend a former answer, or to answer for infant defendants, was never legally appointed their guardian. If the order appointing him can be construed an attempt to make him guardian *ad litem* for infant defendants, it was void, simply because the infants had never been served with summons. (Code Civ. Proc. § 373.) The court acquires jurisdiction of the persons of infant defendants so as to authorize the appointment of a guardian *ad litem* for them only by service of summons upon the infants. Even the stipulation between the attorneys for the plaintiff in the foreclosure suit and the alleged guardian did not provide for the filing by him of a *complaint in intervention*, but for the filing of "an answer and cross-complaint." True the judge's order of May 17, 1877, made on motion of "Sol. A. Sharp, of counsel for said *minors*," was to the effect "that the said John F. and Francis T. Johnston be allowed to intervene and file their *intervention* in said action, and said James Johnston, Jr., is hereby appointed guardian *ad litem* in said action." Even if the order of the *judge* be considered an order of the *court*, and the order permitting intervention *after* the trial (Code Civ. Proc. § 387) be treated as only erroneous, and not in excess of jurisdiction, and if it be assumed that infants seeking to intervene can be said to be *plaintiffs*, for whom a guardian can be appointed under the first subdivision of section 373 of the Code of Civil

Procedure, no complaint in intervention was in fact filed. The court did not acquire jurisdiction by styling an "amended answer" "a complaint by intervenors." Counsel in the foreclosure suit, discovering after trial of the case that they had failed to make the infants parties, adopted means—the best, perhaps, at their command—to secure a judgment which should conclude the infants. But there are no means of avoiding the provision of the Code which requires service of summons upon infant defendants. If it be true that they were necessary parties to the action, by reason of the law as laid down in *Cook v. Norman, supra*, they, in their capacity of defendants, could have made the defense set forth in the "amended answer and cross-complaint," had they been brought within the jurisdiction.

But the judgment in the mortgage suit only purports to bar the infants as defendants. The judgment recites—"This cause coming on regularly to be heard . . . upon the *pleadings* of the respective parties, the minor *defendants*, John F. Johnston and Francis T. Johnston, appearing and being represented by James Johnson, Jr., their guardian *ad litem*, duly appointed, and Sol. A. Sharp, Esq., and Walter Tompkins, Esq., their attorneys," etc. In a subsequent place the present plaintiffs are mentioned as "intervenors," and after providing for a sale of the mortgaged premises, etc., the decree proceeds to order and adjudge: "That the *defendants* and all persons claiming or to claim from or under them or any of them . . . be forever barred and foreclosed of and from all equity of redemption and claim of in and to said portion or portions of said mortgaged premises," etc. The infants were not both defendants and intervenors. If they were defendants they were not barred, because they had not been served with summons. If intervenors, the decree does not bar them by its terms. It will not do to say that the mere *name* given them in different portions of the roll is entirely immaterial. The court was dealing with the rights of *infants*, over whom it could acquire jurisdiction only after strict compliance with the statute.

Judgment reversed and cause remanded for a new trial.

Hearing in Bank denied.

[Department One. — June 23, 1883.]

NICHOLA FERREA, RESPONDENT, v. ANTHONY
CHABOT ET AL., APPELLANTS.

JUDGMENT — EVIDENCE — DAMAGES. — In an action to recover damages for the breach of an agreement to supply water to irrigate a tract of land owned by the plaintiff, which, together with an adjoining tract purchased by him after the making of the agreement, was demised to a third person under a lease containing a covenant on the part of the plaintiff to supply the same quantity of water to run all the year round for the irrigation of both tracts, a judgment for damages in favor of the tenant against the plaintiff for a breach of the covenant caused by the breach of the agreement, is not admissible in evidence to prove the damages resulting from the breach of the latter, the covenant being different from the agreement as to the quantity of land to be irrigated, and the time during which the water should be supplied. A judgment can only be used as evidence in relation to matters directly determined by it. The provisions of our Code as to the effect of judgments are merely declaratory of the common-law rule on the subject.

PENDENCY OF ACTION — NOTICE. — Verbal notice of an action, the judgment in which may bind the person notified, though not a party to the record, held to be sufficient.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was brought to abate a nuisance as well as for the damages resulting from the breach of the agreement in question, but the judgment rendered was for damages only. The defendant Chabot, who made the agreement with the plaintiff, and acquired thereby certain rights and privileges in consideration of his promise to supply water, subsequently assigned the agreement to his co-defendant, "The Vallejo City Water Company." The evidence shows that both defendants had verbal notice of the action between the plaintiff and his tenant in time to defend the same.

The case was ably argued by the counsel for the respective parties, but the opinion of the court is so full and complete upon the points decided, it is unnecessary to give the arguments of counsel or the authorities cited by them.

Garber, Thornton & Bishop, and Rhodes & Barstow, for Appellants.

B. S. Brooks, for Respondent.

McKEE, J.—On the 3d of February, 1870, the plaintiff and defendant entered into the following contract:—

“Whereas, Anthony Chabot is about to construct a reservoir on the Sulphur Spring Creek, about three miles northerly from Vallejo, in Sonoma County, California, and lay down pipes to lead the waters into the city of Vallejo; and, whereas Nicola Ferrea owns a certain piece of land on the said Sulphur Spring Creek, at a point below where said reservoir is about to be constructed by the said Anthony Chabot. Now, therefore, this indenture witnesseth that the said Ferrea, as party of the first part, in consideration of the payment to him of three hundred dollars, and of the performance, by the said Anthony Chabot, the party of the second part, of the conditions and covenants hereinafter named, has agreed to, and doth hereby, give, grant, sell, and convey unto the said party of the second part, his heirs and assigns forever, the right of way to lay pipes from the reservoir aforesaid, of the said party of the second part, in a westerly direction through the northern portion of the land of said party of the first part, as now designated by a stake; and also allow the said party of the second part the privilege of building a dam on the Sulphur Spring Creek, and within the premises of the said party of the second part, and construct a reservoir therein, and gather and preserve all the water coming down said creek, and its tributaries and all other sources, subject, however, to the following agreements and conditions, to be kept and performed by the said party of the second part, and which form part of the consideration herein, to wit:—

“First. In laying down his pipes, the said party of the second part agrees to keep them free from obstructing the cultivation of the soil of said party of the first part.

“Second. The said party of the second part agrees to supply the said party of the first part water for irrigation of his premises, said water to be delivered on the premises of said party of the first part, through a four-inch pipe, and as high on the said premises as it will naturally flow; and also to supply the said party of the first part with the necessary water for family use in his dwelling-house, through a service pipe from the main pipe; and also to supply said party of the first part with the necessary water for stock and family use on the premises now

owned by him, and formerly known as the Riordan Ranch, the cost of pipes and the laying of them to be at the cost of said party of the second part."

The "piece of land" owned by Ferrea, on the creek at a point below where the reservoir was about to be constructed, consisted of a tract of land, containing twenty-five acres, which was known as the "Italian Garden." There Ferrea resided, and, at the time of the agreement, the garden constituted the "premises" on which Chabot covenanted to supply Ferrea with water, for family use in his dwelling-house, and for the irrigation of said premises. The agreement was recorded, and thereafter Chabot constructed his reservoir, laid his pipes, and had the work completed and in operation by October 1, 1871.

Adjoining these premises of Ferrea lay a tract of twenty-four acres of land, which Ferrea was not the owner of at the date of the agreement; but after the execution of the agreement — some time in August, 1870 — he purchased that twenty-four-acre tract and added it to the garden tract; and being the owner and in possession of both tracts, containing forty-nine acres, he demised them, on the 17th of October, 1870, to Benedetti Passalaqua, for the term of six years from November, 1870, for a rent reserved of one hundred and twenty-five dollars per month; and, by the lease, covenanted to supply the lessee with water, to run the year round, through a four-inch pipe for the irrigation of said forty-nine acres; that in case of a failure of the water to run during any portion of said time he would be responsible for all damages occasioned thereby. Passalaqua entered into possession under the lease, and has since kept and maintained possession; but he refused to pay the rent reserved by the lease, because of a failure to supply the water necessary for the irrigation of the leased premises; and for the damages sustained by him by reason of that failure he brought suit on the 21st of June, 1871, against Ferrea, in which he recovered judgment on the 8th of February, 1875, against Ferrea for seven thousand dollars and costs; and in a subsequent suit in equity between the same parties the damages recovered in that action at law were, by decree of the court in equity, set off against the rent reserved in the lease.

That judgment for seven thousand dollars and costs was

offered and admitted in evidence on the trial of this case, over the objections of the defendants; and it appears to have been the only evidence of the damages alleged to have been sustained by the plaintiff by reason of the breach of the covenants contained in the agreement of the 3d of February, 1870.

The admission of the judgment in evidence against the defendants is one of the assignments of error.

By the Code a judicial record is made conclusive or *prima facie* as evidence between parties and privies. Section 1908 declares "that every domestic judgment, and final order is, in respect to the matter directly adjudged, conclusive between the parties, and their successors in interest by title subsequent to the commencement of the action or proceeding, litigating for the same thing, under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding." And section 1909 declares that all other judicial orders of a court or judge of this State are, in respect to the matter directly determined, *prima facie* between the same parties and privies. Sections 1910 and 1912 declare that "the parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either"; and "whenever, pursuant to the preceding sections, a party is bound by a record, and such party stands in the relation of a surety for another, the latter is also bound from the time that he has notice of the action or proceeding and an opportunity, at the surety's request, to join in the defense." But it is also declared (§ 1911) that "that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto." Whether, therefore, the record admitted in evidence was conclusive, or *prima facie* only, it was, if admissible at all against the defendants, confined to that which appears upon its face to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto. These sections of the Code are merely declaratory of the common-law rule, that the judgment of a court of competent jurisdiction,

directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter directly in question in another court.

Nominally the parties to the two suits were not the same, but it is claimed that in law they were the same, because the parties in this suit, as to the supply of water, which was the subject-matter involved in both suits, stood toward each other in such a relation that it was the duty of the defendants, when Passalacqua sued Ferrea for a breach of his covenant, to have defended the suit, upon receiving notice thereof and having an opportunity to make a defense; and having had notice they were bound by the judgment.

In fact, as found by the court, "the defendants had notice of the suits brought by Passalacqua, and took upon themselves the management, charge, and control of the defense of said suits." But it is contended that the finding is based on evidence of a verbal notice, and that the notice necessary to bind a person by a judgment to which he was not made a party must be in writing. But in *Miner v. Clark*, 15 Wend. 125, the court say: "The object of the notice is to inform the grantor that a suit has been brought against the grantee. The grantor is supposed to be better able to defend such a suit, and by his covenant he undertakes to warrant and defend the grantee against the claim of all persons. A parol notice gives information to the grantor quite as well as a written one, and as there is no technical rule requiring such a notice to be in writing, no writing is necessary; and if we regard the reason and propriety of the case, we come to the conclusion that the grantor must defend or not at his peril after notice." That case was referred to in *Peabody v. Phelps*, 11 Cal. 226. It is true, in that case there was no notice, written or verbal. But in *Sampson v. Ohleyer*, 22 Cal. 204, and *Wheelock v. Warschauer*, 34 Cal. 265, verbal notice, by a tenant to his landlord, of a suit brought for recovery of the land, was held sufficient to bind the latter by any recovery in the suit.

Assuming, then, that such a relation existed between the parties to this suit as bound them by the judgment in that, and that the defendants were concluded from questioning the matter determined therein, the question remains, did the matter determined include the damages sustained by the plaintiff herein by

reason of the breach of the covenants for which he has sued the defendants? We think it did not. That judgment was founded on a different contract from the one which was in controversy in this case. In this, the covenant was to supply Ferrea with water, through a service pipe from the main pipe, for family use, and through a four-inch pipe raised as high on the premises known as the "Italian Garden," as the water would naturally flow, for the irrigation of those premises. The covenant was intended for the use and enjoyment of those premises in the manner and for the purpose intended by the parties at the time of the execution of the agreement; it extended only to those premises, and did not include or operate upon the twenty-four acres of land of which Ferrea was not the owner. But the subsequent demise to Passalacqua was of the "Italian Garden," and "the twenty-four acres adjoining and confining with the said garden . . . making in all forty-nine acres of land, with four inches of running water for all year round until the expiration of the lease;" and if the water should fail to run during said period of time or any portion thereof, Ferrea bound himself to be responsible and liable for all damages sustained. And the breach assigned in the Passalacqua suit was that Ferrea had broken his covenant in failing to supply Passalacqua with the stream of water for the purpose of irrigation upon said demised lands during the term for which said lands were demised; and the recovery was for loss sustained on the forty-nine acres.

Assuming, therefore, that the supply of water was the same in both suits, yet the covenants were not the same, and the causes of action were different. In this, the cause of action was to recover damages sustained by reason of the failure to supply water for irrigating twenty-five acres of land. In that, the cause of action was to recover for the loss sustained by reason of the failure to supply the same quantity of water for the irrigation of forty-nine acres; and the recovery was of the damages assessed on that basis. But that did not include, as a distinct fact, the damages sustained on twenty-five acres. The question of the damages done to the "premises" of Ferrea at the date of the covenant to him by Chabot, was not raised, tried, or determined in that action. It was raised, for the first time, in this case. It was, therefore, only an incidental or collateral fact to

the Passalacqua case; it was not a fact found or necessary to be found in that case. But the rule is well settled that a judgment is not evidence of any matter incidentally cognizable in the action in which it was rendered, or collateral to it, or inferable from it by argument, or which rests in evidence. When a judgment in one action, says the Supreme Court of the United States, is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action. (*Davis v. Brown*, 94 U. S. 423.) And in *Russell v. Place*, 94 U. S. 606, it is said: A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record the whole subject-matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To the same effect are *Cromwell v. County of Sac*, 94 U. S. 351; *Garwood v. Garwood*, 29 Cal 515; *Fulton v. Hanlow*, 20 Cal. 450; *Nims v. Vaughn*, 40 Mich 356; *Jacobson v. Miller*, 41 Mich. 90.

The judgment roll in *Passalacqua v. Ferrea* was, therefore, inadmissible as evidence to prove the averment of damage; and as there is no evidence in support of the finding that the plaintiff sustained \$10,000 damages, by reason of the breach of the covenants of the defendant Chabot, the judgment must be reversed.

Judgment and order reversed, and cause remanded for a new trial.

Ross, J., and McKINSTRY, J., concurred.

Hearing in Bank denied.

[Department One. — June 27, 1883.]

R. E. COLE ET AL., RESPONDENTS, v. HENRY D. BACON
ET AL., HENRY D. BACON, APPELLANT.

PRINCIPAL AND AGENT — JOINT AGREEMENT CREATING AN AGENCY.— When several persons enter into a joint agreement appointing an agent to sell property, and some of them refuse to unite in an action against the agent to recover money received by him on a sale of the property pursuant to the agreement, the fact that they have so dealt with the agent as to preclude them from maintaining such an action does not deprive the others of the right to sue for their proportionate share of the money.

GENERAL FINDING -- CONFLICTING EVIDENCE.— On the trial of this action, special findings were waived, and the court found generally in favor of the plaintiffs, and rendered judgment accordingly. On motion for a new trial, the finding was attacked as being contrary to the evidence in certain particulars, but the evidence was substantially conflicting. *Held*, that the finding implied the existence of every fact necessary to support the judgment, and that in view of the conflict in the evidence, the finding could not be disturbed.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was brought to recover of the defendant Bacon certain money alleged to have been received by him in the capacity of agent, and fraudulently appropriated to his own use. It was averred in the complaint that Bacon and eleven other persons had subscribed for the capital stock of a corporation known as the Terminal Railroad Company, each subscribing for one-twelfth of the stock, and being desirous to dispose of the interests thus acquired by them, they agreed between themselves that the same should be sold jointly, and Bacon was appointed by the other subscribers as their agent to carry out the agreement; that he subsequently effected a sale for the sum of two hundred and fifty thousand dollars, which was paid to him by the purchasers, but instead of accounting for the sum actually received, he falsely represented to the others that the price obtained was only forty-seven thousand seven hundred dollars, and induced them to settle with him on the basis of such representation. This is sufficient to show the nature of the action, and a more particular statement of the facts set forth in the complaint is unnecessary. Seven of the subscribers alleged to have been defrauded refused to join in the action as plaintiffs, and were

made defendants, the plaintiffs being two of the subscribers and the personal representatives of two others deceased.

Bacon filed an answer denying the allegations of fraud contained in the complaint, and averring that the transaction with the other subscribers was a purchase by him of their respective interests, and that the sale afterwards made was on his own account.

The other defendants also answered repudiating the alleged fraud in respect to themselves, and sustaining the answer of Bacon as to his position in the premises.

The instrument of the 14th of April, 1871, referred to in the opinion of the court, was a transfer to the purchasers in pursuance of the sale made by Bacon. This instrument did not state the consideration for the sale, and the complaint alleged that the parties who signed it in connection with Bacon did so at his request. Both of the answers, after stating the purchase by Bacon from the other subscribers, averred that no transfer had been made by the latter to the former in pursuance of such purchase, and that the instrument was signed by all the subscribers in order to avoid the necessity of two transfers instead of one.

The additional facts, so far as they are required to explain the decision, appear in the opinion of the court.

Voluminous briefs were filed by the respective counsel, but in view of the grounds of the decision, it would be useless to give the arguments without an analysis of the evidence, which is impracticable.

Wilson & Wilson, and McAllister & Bergin, for Appellant.

Garber, Thornton & Bishop, and H. E. Highton, for Respondents.

PER CURIAM.—The instrument of the 14th day of April, 1871, signed by all of the subscribers to the capital stock of the "Terminal Railroad Company," except the defendant Bacon, operated to transfer to Stanford, Huntington and Hopkins all of the stock of such subscribers.

If it be admitted that the relations of the defendant Bacon and the other subscribers are not to be ascertained by reference to the resolutions of the directors of the corporation, but

depended upon subsequent contracts between him and the stockholders, the plaintiffs acquired rights against him from their actual contracts with him, as evidenced by the writing and otherwise. If the sale was by each of the plaintiffs to defendant Bacon of his portion of the shares of the stock, and the instrument was executed to Stanford, Huntington and Hopkins, as a matter of convenience, and to avoid the necessity of a transfer first to Bacon and then by him to *his* vendees, the mere form of the transaction did not change its real character. But the persons who subscribed the instrument of the 14th of April, 1871, had the right to pool their stock, and to dispose of it in the aggregate, and the instrument purports to be a bill of sale or assignment of all their stock, executed by them jointly. That defendant negotiated the sale to Stanford, Huntington and Hopkins, in some capacity, is admitted. There is evidence in the transcript that he acted for them, as their agent or broker, and not for himself. Assuming the testimony of plaintiffs to be true — and in view of the judgment of the court below we must assume their testimony to be true — to the effect that they individually signed the instrument, with the understanding that it should take effect only in case the other subscribers to the stock should sign it, and the others did sign it, the instrument (so far as plaintiffs and Bacon are concerned) constitutes a joint sale to Stanford, Huntington and Hopkins, whatever private arrangements might have been entered into between defendant Bacon and others of the subscribers to the instrument.

As between the plaintiffs and defendant Bacon, the court may have found that the latter was the agent for them, and of the other subscribers, authorized to make joint sale of the stock of the corporation held by them and the other subscribers, and that he did in fact make such sale, because there was evidence tending to prove that he induced plaintiffs to believe such was the actual relation between them. The question is not whether plaintiffs could assert, as against the other subscribers to the instrument, that there was a joint sale, but whether they can assert this against the defendant Bacon. He — assuming plaintiffs' testimony to be true — had no understanding with plaintiffs, severally, that they should sell their stock to *him*. On the contrary it was distinctly understood that they, with the other

parties in interest, should sell all their stock for a named sum to Stanford, Huntington and Hopkins; such sale to be evidenced by the signatures of all to the instrument so often referred to. There was nothing in the writing itself to indicate a different arrangement; on the contrary it purported to be a sale by all to the three persons mentioned. Under the circumstances the contract between plaintiffs and the defendant Bacon must be construed to have been what the former understood it to be, and what he must have known they understood it to be. They could not be deprived of their rights under it by means of agreements, unknown to them, between Bacon and others of those who executed the agreement of April 14th, which was executed by the others as it was agreed by plaintiffs and Bacon it should be executed. As between plaintiffs and Bacon, the legal effect of the arrangement was that he, as agent for them, and the others, for whom he asserted he had, or would, secure authority to act, should make a joint sale of the stock. The sale made was made under such power, and, like every other similar agent, he was liable to account to his principals for the proceeds of the sale. If the other parties chose to waive their rights, or, rather, by reason of separate private agreements, lost the power to assert any rights as joint vendors, this did not operate to deprive the plaintiffs of the benefits of the only contracts *they* entered into.

Of course, the foregoing is based upon the assumption of the existence of facts such as are necessarily implied by the general findings and judgment of the Superior Court, since there was at least a substantial conflict in the evidence.

Judgment and order affirmed.

Hearing in Bank denied.

[Department One. — June 27, 1883.]

**A. S. HALLIDIE, APPELLANT, v. SUTTER STREET
RAILROAD COMPANY, RESPONDENT.**

CONTRACT — EXECUTORY SALE — PLEADING.— The plaintiff agreed for a stipulated price to manufacture a steel rope or cable suitable in all respects for the operation of defendant's street cars, and to deliver it to defendant for trial. If found suitable, defendant agreed to accept it, but if it proved unfit, it was to be returned to the plaintiff. After testing the rope, defendant refused to accept it, and returned it to the plaintiff, who took it back, and brought this action for goods sold and delivered. The court below found that defendant rejected the rope because of its unfitness for the purpose intended. *Held*, first, that the contract was executory, and that such an action would not lie. Second, that the return of the rope to plaintiff, and his acceptance of it, was a rescission of the contract by mutual consent.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Estee & Boalt, for Appellant.

Lloyd & Woods, for Respondent.

McKEE, J.— Action to recover three thousand eight hundred and eight dollars for eleven thousand four hundred feet of three-inch flexible steel rope, which the plaintiff claims to have sold and delivered to the defendant at its special instance and request. By the answer defendant denied a sale, and affirmed that the rope was made under a contract by which the plaintiff agreed, for a stipulated price, to manufacture in the best manner and of the best quality of steel wire, a steel rope or cable, which would be in all respects suitable for operating and running the cars of the Sutter Street Railroad up and down Sutter Street, between Sansome Street and Larkin Street, in the city and county of San Francisco, and, when manufactured, to deliver the same to defendant for trial; and if, after a fair trial of the rope, it was found to be suitable for the purposes of the road, the defendant agreed to accept the same, and to pay the plaintiff the price agreed upon; but if found unsuitable, the rope was to be returned to the plaintiff.

As shaped by the pleadings the case presented for consideration the question, whether the transaction between the parties was an executed or an executory sale. The plaintiff contends that it was a contract of sale with warranty. (§ 1770, Civ. Code.) If that was the nature of the transaction the title to the property passed to the defendant, and plaintiff had a cause of action for goods sold and delivered, but the defendant, in case of a breach of the subsidiary agreement of warranty, had the right to return the property, especially if a return had been stipulated, or to sue on the breach of warranty for damages. (*Perley v. Balch*, 23 Pick. 283; *Dorr v. Fisher*, 1 Cush. 271; *Bryant v. Isburgh*, 13 Gray, 607.)

If, however, defendant merely agreed to buy the rope on condition that it would be fit and suitable for the purpose of its road, and time was given to test it for that purpose, then the title to the rope did not pass until the rope was accepted. If accepted the sale was complete, and liability for the price agreed upon then attached; but if not accepted there was no sale, and the plaintiff's remedy was for a breach of the agreement. (*Brown v. Foster*, 113 Mass. 136.)

The difference between an actual bargain and sale, and a contract for sale of an article to be manufactured under an agreement to sell and buy is thus stated by Shaw, C. J., in *Mixer v. Howarth*, 21 Pick. 205: "When the contract is a contract of sale either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the statute (of Frauds) applies to the contract as well where it is to be executed at a future time as when it is to be executed immediately. But where it is an agreement with a workman to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article to be completed in future, it is not a sale until an actual or constructive delivery and acceptance." (See also *Spencer v. Cone*, 1 Met. 283; *Goddard v. Binney*, 115 Mass. 450; *Hight v. Ripley*, 19 Me. 137; *Ficket v. Swift*, 41 Me. 68.) And that is the rule formulated by section 1141, Civil Code: "Title is transferred by an executory agreement for the sale . . . of personal property only when the buyer has accepted the thing, or when the seller

has completed it and offered it to the buyer, with intent to transfer the title thereto in the manner prescribed by the chapter upon Offer of Performance." (See also § 1729, Civ. Code.)

Here, as found by the court, the rope was manufactured and delivered to the defendant in performance by the plaintiff of the contract set up in the defendant's answer. Upon delivery of the rope, the plaintiff had executed the contract on his part, but the contract was still executory on the part of the defendant. The defendant was under no obligation to perform unless it found the rope to be what was bargained for; for it was upon that condition the defendant promised to accept the rope and pay for it. But the court found that the rope was unsuitable for the purpose of the defendant's road; and that, because of its unfitness for that purpose, the defendant refused to accept it and returned it to the plaintiff, who took it back.

Although based on conflicting evidence as to the facts, yet the findings are sufficiently sustained by the evidence; and upon the facts found it is clear that the executory contract between the parties had never been performed. The defendant refused to accept, there was therefore no executed sale; the relation of vendor and vendee did not exist between the parties, and the plaintiff's cause of action, if any, was not for goods sold and delivered, but for a breach of the agreement, if the defendant was at fault in refusing to accept; or if the defendant had damaged the rope by a wrongful use of the same before it had been returned to the plaintiff, liability would attach for such damages.

But as the condition on which the rope had been made and delivered was not complied with, the defendant had the right to reject the rope (*Brown v. Foster, supra*), and rescind the contract; and when the rope was rejected by the defendant and returned to the plaintiff who took it back, there was, in fact, a rescission by mutual consent (§ 1689, Civ. Code), and as to the contract the parties were in *statu quo*.

Judgment and order affirmed.

McKINSTRY, J., and ROSS, J., concurred.

[Department Two. — June 27, 1883.]

**O. H. JOHNSON, PETITIONER, v. SUPERIOR COURT OF
THE CITY AND COUNTY OF SAN FRANCISCO,
RESPONDENT.**

CONTEMPT — POWER OF THE COURT. — A defendant in an action for a divorce cannot be denied the process provided by law for procuring the testimony of witnesses residing beyond the jurisdiction of the State, on the ground that he has not obeyed the order of the court requiring him to pay the plaintiff her costs and counsel fees.

Id. — SERVICE. — Before a party can be brought into contempt for not complying with an order of court, such order must be served upon him. The mere delivery to a person in another State of a certified copy of the order is not such a service as the law requires. (SHARPSTEIN, J., and MCKEE, J.)

APPLICATION for writ of mandate.

The facts are stated in the opinion of the court.

T. Z. Blakeman, for Petitioner.

John D. Whaley, for Respondent.

SHARPSTEIN, J.—Application for a writ of mandate. It appears by the petition for the writ that on the 28th of September, 1882, the wife of the petitioner commenced an action for divorce against him, and that, on the 2d of November, 1882, he, by his attorney, filed an answer to the complaint denying some of the material allegations thereof. On the 11th of November, 1882, the plaintiff's attorney in that action served upon the defendant's attorney therein notice of a motion to have the court allow the plaintiff therein a reasonable sum for expenses and counsel fees in said action. Said motion was heard on the 22d of November, 1882, and an order was then made that the defendant in said action pay to the plaintiff therein fifty dollars costs and fifty dollars counsel fees. A certified copy of said order was sent to the State of Missouri, and there delivered to the defendant in that action, who is the petitioner herein. He has never complied with said order. It is alleged in the petition that the petitioner has never at any time during any of the proceedings in said action, or during its pendency been within the State of California.

On the 23d of February, after serving due notice of his

motion, petitioner applied to said Superior Court in which said action was pending for an order directing a commission to issue to take the depositions of certain witnesses residing in Missouri, whose names were stated in said notice of motion. The court refused to order such commission to issue, on the ground that petitioner was in contempt for not obeying said order requiring him to pay plaintiff in said action her costs and counsel fees.

These are, in substance, the facts upon which the petitioner bases his application for a writ to compel said Superior Court to make the necessary order for the issuance of a commission to take the depositions of his said witnesses. The respondent demurs to the petition on the ground that it does not state facts sufficient to entitle the petitioner to the writ prayed for.

Ordinarily, a person sued has a right to defend, and the law has made provision for procuring the testimony of witnesses both within and without the jurisdiction of this State. Whether a defendant in an action for divorce can legally be denied the process which the law has provided for procuring the testimony of witnesses residing beyond the jurisdiction of this State, on the ground that he has not obeyed such an order as the one above mentioned, of which a certified copy was delivered to him in the State of Missouri, is the question which the record presents for adjudication.

Cases are not rare in which courts of equity have denied to parties in contempt, for disobedience of orders, all the rights to which said parties would otherwise be entitled; and even have gone so far as to strike out the answers of parties so in contempt. But "in this State the power of courts to punish for contempt has been regulated by statute. It is provided that, when one is adjudged guilty of contempt, he may be punished by a fine of not exceeding five hundred dollars, and by imprisonment for not exceeding five days, except when the contempt consists in the omission to perform an act which is yet in his power to perform, in which case he may be imprisoned until he have performed it." (*Galland v. Galland*, 44 Cal. 475.)

The Code states what shall constitute a contempt, and prescribes how a party committing it shall be punished; and it provides that "no statute, law, or rule is continued in force because it is consistent with the provisions of this Code on the same sub-

ject; but in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this State, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated." (Code Civ. Proc. § 18.)

In view of these provisions can it properly be held that a law or rule which authorized a punishment for contempt different from the punishment prescribed by the Code was not abrogated by the adoption of the Code? If so, what force and effect is to be given to the clause above quoted? The suggestion that a disobedient party, situated as the petitioner is, could not be punished in either of the modes prescribed by the Code, and would escape altogether unless he could be punished in some other way, is one for legislative rather than judicial consideration.

But there are other difficulties in the way of sustaining the action of the respondent herein. It does not appear that there was any service of the order which the petitioner failed to comply with, unless the delivery of a copy of it to him in the State of Missouri constituted a service. The six sections of the Code which immediately precede section 1016 provide several modes in which notices and papers may be served, but those provisions do not apply to the service "of any paper to bring a party into contempt." And where a party has an attorney in an action, service of papers to bring such party into contempt cannot be made upon such attorney. (Code Civ. Proc. § 1015.) Before a party can be brought into contempt for not complying with an order of court, such order must be served upon him, and the mere delivery to a person in Missouri of a certified copy of an order made by a court in this State, would not be a service upon him within the meaning of the law.

Finally, we do not think that the remedy adopted by the respondent to enforce a compliance with the order of the court is applicable to a divorce case. In this State "no divorce can be granted upon the default of the defendant." (Civ. Code, § 130.) The policy of the law, doubtless, is that a divorce shall not be granted until after a fair and full hearing of all the material and relevant testimony which either party may be ready or willing to introduce upon the issues raised by the pleadings. It cannot be granted "upon the uncorroborated

statement, admission, or testimony of the parties." But if the position of respondent be tenable, a divorce can be granted in a case in which a defendant is denied the privilege of introducing competent evidence to disprove all the material allegations of the complaint. And we are not advised that the petitioner, who has denied all the material allegations of the complaint filed against him, may not, if an opportunity is afforded him, fully establish his defense by competent proof. To deprive him of that opportunity in a divorce case, in which he is defendant, would, in our opinion, be to contravene the plain policy of the law.

Let the writ issue as prayed.

McKEE, J., concurred.

THORNTON, J.—I concur in the conclusion reached in the foregoing opinion on the last ground stated in it.

[In Bank. — June 27, 1883.]

**ERWIN DAVIS, PETITIONER, v. SUPERIOR COURT OF
THE CITY AND COUNTY OF SAN FRANCISCO,
RESPONDENT.**

CONSTITUTIONAL LAW — STATUTE — MANDAMUS. — On the authority of *Fraser v. Freelon*, 53 Cal. 644, held, that the constitutionality of the act creating the municipal court of appeals in San Francisco cannot be determined in a proceeding by mandamus, the present Supreme Court being governed, in regard to the construction and effect of the former Constitution, and the mode in which such questions may be presented, by the decisions of the Supreme Court created and existing under that instrument.

MUNICIPAL COURT OF APPEALS — TRANSFER OF CAUSES FROM COUNTY COURT — JURISDICTION. — The municipal court of appeals acquired jurisdiction of causes, pending in the county court, by operation of the statute creating the municipal court of appeals. An order transferring them was unnecessary.

APPLICATION for writ of mandate to compel the Superior Court to try an action, wherein the petitioner was a party, notwithstanding the same had been tried by the municipal court of appeals prior to the adoption of the present Constitution. The remaining facts are stated in the opinion of the court.

J. Howard Smith, for Petitioner.

The validity of a statute may be tested in an action between private parties. (*Sill v. Village of Corning*, 15 N. Y. 297; *Rabe v. Fyler*, 10 Smedes & M. 440; *Houston v. Royston*, 7 How. (Miss.) 543; *Mulligan v. Smith*, 59 Cal. 206; *Dawson v. Horan*, 51 Barb. 459; *Klokke v. Dodge*, 103 Ill. 125.)

Lloyd Baldwin, for Respondent.

PER CURIAM.—1. It is urged that the Act of April 1, 1878, creating the municipal court of appeals in San Francisco, was violative of the former Constitution. (Stats. 1877-78, p. 947.) Since the organization of the present Supreme Court it has been repeatedly held that we would follow, as authoritative, the construction placed upon any provision of the Constitution of 1849, by the highest judicial tribunal created by and under that Constitution. By parity of reasoning we are bound by the views of the former Supreme Court, with reference to the mode in which the invalidity of a legislative act, or its repugnancy to a clause of the then existing Constitution could be presented or insisted upon.

In *Fraser v. Freelon*, 53 Cal. 644, it was held that the invalidity of the statute in question could not be determined upon the return to a writ of *certiorari*. It was there said the "people" were interested in the question whether the statute prescribing the jurisdiction of the court was constitutional; that the question could only be decided in an appropriate form of action brought in the name of the people, or to which the people were made a party. It is manifest that every consideration which induced the former Supreme Court to refuse to inquire into the question of the constitutionality of the statute in a proceeding by writ of review, applies with redoubled force to the present, which is a proceeding by *mandamus*, by one of the parties to an action originally brought before the justices' court, to compel the Superior Court—as successor of the county court—to try the action, notwithstanding the same was transferred to the municipal court of appeals, and tried *de novo* in that court prior to the adoption of the present Constitution.

2. It is urged that the municipal court never acquired juris-

diction of the action transferred to it, because, although that action was pending in the county court before the creation of the municipal court, no special order was made by the former court transferring it to the latter. We find nothing in the act creating the municipal court (Stats. 1877-78, p. 947), which requires any such order, general or special. The twelfth section of that act provides: "Immediately after the organization of said court the clerk of the county court shall transmit to said municipal court of appeals all papers in civil cases of appeal then pending and undetermined," etc. The direction of the statute is to the county clerk, who is clerk of both courts.

Fraser v. Freelon, above referred to, has sometimes been supposed to hold that the order of the county court transmitting a cause pending when the municipal court was created was necessary to give the latter court jurisdiction. But such supposition is based upon an erroneous interpretation of the language of the opinion in *Fraser v. Freelon*. It is there said: "Section 12" (of the act to create the municipal court) "provides that the court may hear and determine civil appeal cases which are directed to be transferred to it from the county court. It does not appear from the transcript returned with the writ that the action in controversy was either transferred to it from the county court, or brought up on appeal to that court. . . . The transcript fails to show that the defendants in that action either *were served with process*, or that a *notice of appeal* was served by or upon them; and, therefore, the transcript does not show that the court acquired jurisdiction of the *defendants*."

The plain meaning of the language employed in *Fraser v. Freelon* is that by section twelve of the act referred to, the municipal court acquired jurisdiction of the causes directed, not by any order of the county court, but by the twelfth section of the statute, to be transferred to the municipal court. The transfer by the common clerk from one department of his office to another is not indicated by any record which would constitute a portion of the return to *certiorari*. Nevertheless, as the municipal court was an inferior court, the record required to be returned should show it had jurisdiction. Whether an appeal was taken first to the county court, and the case was thence transferred to the municipal court, or the appeal was taken

direct from the justices' court to the municipal court, the record, returned with the writ of review issued to the municipal court, should show service of the notice of appeal or waiver of such service by an appearance to the merits.

There is no pretense here that the action of which it is claimed the municipal court never acquired jurisdiction was not regularly appealed from the justices' court to the county court. The county court had jurisdiction, and the papers were before the municipal court when the case was there tried, as appears from the transcript.

Writ denied and proceedings dismissed.

McKEE, J., and THORNTON, J., dissented.

Petition for a rehearing denied.

[In Bank. — June 27, 1883.]

**JEROME MILLARD, RESPONDENT, v. YEE TEEN ET AL.,
RESPONDENTS.**

APPEAL — JURISDICTION — MUNICIPAL COURT OF APPEALS. — In an action pending on appeal in the county court of the city and county of San Francisco at the time of the passage of the act creating the municipal court of appeals, no order transferring the action to the latter court was required to give that court jurisdiction to hear and determine the same. The transfer was made by operation of the act itself.

ID. — UNDERTAKING ON APPEAL. — In such a case, the undertaking on appeal to the county court is as effectual to bind the sureties as if the action had not been transferred.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

Estee & Boalt, for Appellants, cited *Uridias v. Morrill*, 23 Cal. 473; *Fraser v. Freelon*, 53 Cal. 644; *Norwood v. Kenfield*, 34 Cal. 329; *Trobock v. Caro*, 60 Cal. 301.

L. Quint, for Respondent.

PER CURIAM. — Woon Ah Wah commenced an action in a

Justices' Court of the city and county of San Francisco against Woon Ah Chin and two others. Such proceedings were had therein that on the 21st of April, 1879, the plaintiff recovered a judgment against the defendants for \$295 damages and \$42 costs. On the same day the defendants gave notice of appeal, and filed an undertaking on appeal, in the sum of \$750, with Lee You and Ah Yung as sureties, which recited the judgment and the desire of the defendants of appealing therefrom to the county court of the city and county of San Francisco, and was conditioned, that if the defendants should pay the amount of said judgment and all costs, and obey any order the said county court might make, if the appeal be withdrawn or dismissed, or pay the amount of any judgment and all costs that might be recovered against the appellants in the said county court, etc. On the 30th of April, 1879, the said defendants filed another undertaking of the same import, with Yee Teen and Luey Sing as sureties. The case was subsequently, in September, 1879, tried in the municipal court of appeals, and judgment rendered in favor of the plaintiff and against the defendants for \$295 and costs. Payment of the amount of the judgment was demanded of the defendants and of the sureties, and payment was refused; thereupon this action was commenced in the Superior Court, on the undertaking, against the sureties, in which action judgment was rendered in favor of the plaintiff herein (assignee of the plaintiff in the former action) for \$444.13 and costs. It does not appear that any order was made for the transfer of the case, after being appealed, from the county court to the municipal court of appeals; it appears merely, that the case was appealed to the county court, that it by some means got into the municipal court of appeals, was there tried, and there judgment was rendered.

The appellants do not question the constitutionality of the Act of April 1, 1878, creating the municipal court of appeals but they contend that that court did not acquire jurisdiction of the appeal for the reason that there was no order made by the county court transferring the action to the municipal court of appeals for trial. In *Davis v. Superior Court*, *post*, it was held that no order was necessary; that the act itself operated such transfer.

It was urged that as the undertakings were to abide the judgment of the county court, as that court has rendered no judgment, the sureties have incurred no liability. The giving of the notice of appeal and the undertaking were means — processes — by and through the use of which the appellants were empowered to have a retrial of the case. The law provided for the appeal to be taken to the county court; being so taken, the other court had authority by the terms of the act creating it to hear the case and determine it; it was a hearing and determination on appeal that the defendants desired, and that hearing and determination, in a method provided by law, has been had.

The judgment is affirmed.

THORNTON, J., and McKEE, J., dissented.

[Department Two. — June 29, 1883.]

MARCUS UNGER, RESPONDENT, v. EMILY MOONEY
ET AL., APPELLANTS.

EJECTMENT — STATUTE OF LIMITATIONS — ADVERSE POSSESSION. — In order to make out an adverse possession sufficient to sustain a defense in ejectment under the Statute of Limitations, five elements are required. (1) there must be an actual occupation, open and notorious, not clandestine; (2) the possession must be hostile to the title of the plaintiff; (3) it must be held under a claim of title exclusive of any other right; (4) it must be continuous and uninterrupted for a period of five years before the commencement of the action; (5) payment of taxes as provided by section 325 of the Code of Civil Procedure.

ID. — TENANTS IN COMMON — OUSTER. — The possession of one tenant in common is the possession of his co-tenant. There is no element of hostility in such a possession. An actual adverse holding will not operate as an ouster, and set the Statute of Limitations in motion, until the tenant out of possession has notice of such holding. But if the hostile character of the possession is so openly manifested that his observation as a man reasonably careful of his interests would be sufficient to discover it, he will be deemed to have notice. Thus, where one of two tenants in common conveys to a third person by deed purporting to convey the whole land, and the deed is recorded by the grantee, who enters under it, such entry is hostile in its nature, and the mere fact of possession by a stranger is enough to put him on inquiry, and charge him with notice. So, the making of valuable improvements, paying the taxes upon the land, and receiving the rents and profits without accounting or offering to account, are circumstances indicating an adverse holding, and their effect upon the co-tenant is the same as if notice were directly communicated to him. The means of knowledge being furnished by the open and notorious character of the possession, he is chargeable with actual notice.

1D. — REQUESTING A DEED FROM THE CO-TENANT — EFFECT UPON THE CHARACTER OF THE POSSESSION. — If the possession of a tenant in common is adverse to his co-tenant, it will not lose its hostile character by the former tendering a quit-claim deed to the latter, and requesting him to sign it, there being no offer to purchase, nor any acknowledgment of the tenancy.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Mastick, Belcher & Mastick, and Roche & Desbeck, for Appellants.

1. A conveyance by one co-tenant, purporting to convey an estate in severalty, constitutes color of title, and when the grantee enters under the deed and claims title in himself, and to the exclusion of all other right, his entry is under color of title, and his possession is adverse to all the world, and will, if maintained for the statutory period, toll all other right, and will vest in him a perfect title. (*Prescott v. Nevers*, 4 Mason, 330; *Bradstreet v. Huntington*, 5 Peters, 442; *Clymer's Lessee v. Dawkins*, 3 How. 674, 689; *Ricard v. Williams*, 7 Wheat. 59, 120; *Thomas v. Pickering*, 13 Me. 337; *Higbee v. Rice*, 5 Mass. 352; *Marcy v. Marcy*, 6 Met. 371; *Rickard v. Rickard*, 13 Pick. 251; *Bigelow v. Jones*, 10 Pick. 161; *Parker v. Prop'rs etc.* 8 Met. 91; *Kittredge v. Prop'rs etc.* 17 Pick. 246; *Hodges v. Eddy*, 38 Vt. 327; *Forest v. Jackson*, 56 N. H. 357; *Clark v. Vaughan*, 3 Conn. 191; *Clapp v. Bromagham*, 9 Cowen, 530; *Bogardus v. Trinity Church*, 4 Paige, 178; *Jackson v. Smith*, 13 Johns. 406; *Foulke v. Bond*, 41 N. J. L. 527; *Culler v. Motzer*, 18 Serg. & R. 356; *Lodge v. Patterson*, 3 Watts, 74; *Mehaffy v. Dobbs*, 8 Watts, 363; *Law v. Patterson*, 1 Watts & S. 184, 191; *Frederick v. Gray*, 10 Serg. & R. 182; *Dikeman v. Parrish*, 8 Pa. St. 210, 225; *Caperton v. Gregory*, 11 Gratt. 508; *Black v. Lindsay*, Busb. 467; *Covington v. Stewart*, 77 N. C. 148; *Thomas v. Garvan*, 4 Dev. 223; *Cloud v. Webb*, 4 Dev. 290; *Gray v. Bates*, 3 Strob. 500; *Hart v. Bostwick*, 14 Fla. 177; *Horne v. Howell*, 46 Ga. 9; *Cain v. Furlow*, 47 Ga. 674; *Abercrombie v. Baldwin*, 15 Ala. 363; *Alexander v. Kennedy*, 19 Tex. 488, 496; *Abernathie v. Con. Virginia*

M. Co. 16 Nev. 260; *Ashley v. Rector*, 20 Ark. 359; *Weisinger v. Murphy*, 2 Howd. 674, 679; *Gillaspie v. Osburn*, 3 Marsh. A. K. 77; *Gill v. Fauntleroy's Heirs*, 8 Mon. B. 177, 186; *Warfield v. Lindell*, 30 Mo. 272; *Long v. Stapp*, 49 Mo. 506; *Nelson v. Davis*, 35 Ind. 474; *Goewey v. Urig*, 18 Ill. 238; *Hinkley v. Green*, 52 Ill. 223; *Sands v. Davis*, 40 Mich. 14; *Campau v. Dubois*, 39 Mich. 274; *Hovenden v. Lord Annesley*, 2 Schoales & L. 628; *Doe v. Prosser*, Cowp. 217; *Townsend & Pastor's Case*, 4 Leon. 52; *Reed v. Taylor*, 5 Barn. & Adol. 575.)

2. To constitute possession by one co-tenant adverse to the rights of his co-tenants, it must be taken and maintained under a claim of exclusive ownership, indicated and exhibited by open and notorious acts; and whenever it is so taken and maintained, the co-tenants are bound to take notice of the fact, and the statute will run against them whether they have actual notice or not. (*Lodge v. Patterson*, 3 Watts, 74; *Dikeman v. Parrish*, 6 Pa. St. 225; *Warfield v. Lindell*, 30 Mo. 272; *Same v. Same*, 38 Mo. 561; *Lapeyre v. Paul*, 47 Mo. 590; *Abercrombie v. Baldwin*, 15 Ala. 371; *Clymer's Lessee v. Dawkins*, 3 How. 674.)

3. One in possession of land and claiming to own it may buy in outstanding claims of title, without abandoning or impairing his own title, or even acknowledging the validity of the title so bought. (*Jackson v. Given*, 8 Johns. 137; *Jackson v. Smith*, 13 Johns. 406; *Northrop v. Wright*, 7 Hill, 476, 490; *Parker v. Proprietors etc.* 3 Met. 91, 102; *Caperton v. Gregory*, 11 Gratt. 505; *Lodge v. Patterson*, 3 Watts, 74; *Blight's Lessee v. Rochester*, 7 Wheat. 535, 548; *Cannon v. Stockmon*, 36 Cal. 535.)

Wm. H. Sharp, for Respondent.

1. The possession of one tenant in common is the possession of all the co-tenants. (*Colman v. Clements*, 23 Cal. 245; *Carpentier v. Webster*, 27 Cal. 524; *Miller v. Myers*, 46 Cal. 535; *Owen v. Morton*, 24 Cal. 373.)

2. Neither giving a deed of the whole land nor exclusive possession by one tenant in common is an ouster in this State. (*Seaton v. Son*, 32 Cal. 481; *Gates v. Salmon*, 35 Cal. 576; *Bornheimer v. Baldwin*, 42 Cal. 27; *Owen v. Morton*, 24 Cal. 387; *Carpentier v. Mendenhall*, 28 Cal. 484; *Williams v. Sub*

ton, 43 Cal. 65; *Aguirre v. Alexander*, 58 Cal. 28, 29; *Miller v. Myers*, 46 Cal. 535; *Packard v. Johnson*, 57 Cal. 180.)

8. Asking the co-tenant for a deed was a recognition of his title.

THORNTON, J.—This is an action to recover possession of an undivided half of a lot of land situate in the city and county of San Francisco, to which the Statute of Limitations was pleaded. The court held against the defendants on this plea, and judgment passed for plaintiff. The defendants moved for a new trial, which was denied. One of the grounds on which this motion was denied was the insufficiency of the evidence to sustain the finding on the issue joined on the plea of the statute above mentioned.

The findings of fact, so far as they are adverted to or necessary to be remarked on herein, are as follows:—

"1. That one Frederick S. Sproul, on the 1st day of December, in the year 1863, was the owner in fee and in possession of the lot of land described in the complaint in this action.

"2. That said Frederick S. Sproul and Phebe C., his wife, on the 27th day of February, in the year 1865, granted, bargained and sold said premises to James Brokaw and J. W. Metcalf, by deed duly recorded on the same day, who entered into the possession of said premises under said deed.

"3. That said Frederick S. Sproul, Phebe C. Sproul, his wife, and James Brokaw, on the 2d of January, in the year 1867, granted, bargained, and sold said premises to Thomas Mooney, who entered into the possession of said premises under said deed, and while he held the same paid the city, county, and State taxes levied thereon, added to the improvements thereon, and received the rents and profits thereof.

"4. That said Thomas Mooney, on the 15th day of December, in the year 1868, made a deed of gift of said premises to his wife, Emily Mooney, one of the defendants in this action, which deed was duly recorded on said last named day. That said defendant entered into possession of said premises under said deed, and has ever since held the possession thereof by herself or tenants, and received the rents and profits thereof, and paid the city, county, and State taxes imposed thereon.

"5. That said J. W. Metcalf, on the 13th day of November, in the year 1880, by deed duly acknowledged and recorded, granted, bargained and sold the undivided one half of the premises described in said complaint to the plaintiff.

"6. That the defendants, on the 4th day of March, in the year 1881, ousted the plaintiff, and denied his title to the premises described in said complaint, and in and to every part thereof."

The court, it will be observed, finds that the plaintiff was ousted or disseized on the 4th day of March, 1881. The denial of the title, also found, is either a mere evidential or probative fact, having no proper place in a finding of facts, or, if it has, is of the same purport with the fact of ouster previously found. In this latter view, it is a mere repetition of the finding of ouster, and need not be further noticed.

It is contended that the evidence shows that the disseizin or ouster of plaintiff by defendants was at a much earlier day; in fact, that the testimony establishes that the ouster occurred on the entry of Thomas Mooney under the deed executed to him on the 2d day of January, 1867 (see finding three), by Sproul and wife and Brokaw.

To set the Statute of Limitations in motion there must be a hostile possession, open and notorious or accompanied by such circumstances as are calculated to make it notorious. (*Grimm v. Curley*, 43 Cal. 251; *Thompson v. Pioche*, 44 Cal. 508.) This accords with the definition of disseizin, which Blackstone defines to be "a wrongful putting out of him who hath the freehold." (3 Blackst. Com. 169 — and so, Littleton and Coke.) The definition of the former is "where a man entereth into any lands or tenements where his entrance is not congeable and ousteth him who hath the freehold." (Co. Litt. 279.) Coke defines it as "the putting a man out of possession, and ever implieth a wrong." (Co. Litt. 153.) It must be with intent to usurp the place of the true owner, and put him out of possession. Lord Mansfield in *Taylor dem. Atkyns v. Horde*, said that disseizin at common law "signified some mode or other of turning the tenant out of his tenure, and usurping his place and feudal relation," from which it followed, that if the disseizor died seized, the descent to his heir gave him the right of pos-
ses-

sion and tolled or took away the true owner's entry. (*Taylor v. Horde*, 1 Burr. 60.) This was said of actual disseizins, or disseizins in spite of the owner, and not of disseizins at the election of the owner, which were allowed to the owner for the sake of the remedy by *assize of novel disseizin*. This actual disseizin is the species of ouster or dispossession by reference to which adverse possession is defined and illustrated. The last class of disseizins above mentioned need not be further noticed.

In fine, we think that the authorities justify our saying that every dispossession of the true owner, whether by force or fraud, by violent or peaceful means, and an open and notorious occupation under claim of title in the person who dispossesses, is a disseizin or ouster (disseizin is but a species of ouster, see 2 Blackst. Com.) sufficient to set in motion the Statute of Limitations and constitutes an adverse possession, which, when it continues for the period of time prescribed by statute, bars the owner of his right to recover.

Now, the possession of one tenant in common is the possession of his co-tenant. Such possession by one tenant has no element of hostility to the right of his co-tenant. The co-tenant out of possession is not informed by such possession that it has any adverse character. Such a possession under claim of title adverse to the co-tenant, but not manifested to him by the conduct of the possessor of a character to notify the co-tenant of its adverse nature, is not sufficient to set the statute in operation as between tenants in common. The co-tenant must, in some way, be notified of the adverse holding, in order to be prejudiced by it. This may be by actual notice, or by acts or declarations so open and notorious, that it may be inferred that the co-tenant had knowledge of them. This rule and the reason on which it is founded is well stated in *Miller v. Myers*, 46 Cal. 539, referring to the tenant out of possession in these words: "But until he has notice either actual or constructive, in some form, that the possession of his co-tenant has become hostile, it will be deemed in law to have been amicable, notwithstanding the tenant in possession may, in fact, have been holding adversely. If the rule were otherwise, the tenant out of possession might be disseized, and lose his remedy by the bar of the Statute of Limitations, without notice that the possession of his co-tenant had

become hostile. To avoid this injustice, the law deems the possession to have continued amicable until the tenant out of possession has in some method been notified that it has become hostile."

The adverse character of the possession must in every case be manifested to the owner. The owner must be notified, in some way, that the possession is hostile to his claim, or the statute does not operate on his right. (See remarks, in opinion, in *Thompson v. Pioche*, 44 Cal. 517, 518; *Trustees etc. Town of Fort Hamplon v. Kirk*, 84 N. Y. 220; *Culver v. Rhodes*, 87 N. Y. 354; *Abell v. Harris*, 11 Gill & J. 371, per Dorsey, J.) As was said in the case cited from 84 N. Y., per Andrews, J., "the object of the statute defining the acts essential to constitute an adverse possession is, that the real owner may, by unequivocal acts of the disseizor, have notice of the hostile claim and be thereby called upon to assert his legal title." Hence, an open and notorious occupation with hostile intent is a necessary constituent of an adverse possession. Neither a hostile intent without such occupation, nor such occupation without hostile intent, is sufficient. The case of tenants in common is no exception to this rule. The evidence required is of a different character, from the legal character of the tenure, tenants in common being seized *per my et per out* and the actual occupation of one tenant of the entire tract having no element of hostility to his co-tenant. Such occupation with user of the land for husbandry or of any kind is reconcilable with right, and in harmony with the legal aspects of the tenure. Hence there must be some conduct of the occupying tenant evidenced by acts or declarations, or both, in its nature and essence hostile to the title of the tenant out of possession, and imparting knowledge of such hostility to the latter, to affect his right. (*Portis v. Hill*, 3 Tex. 278.)

The important question here is, does the evidence show an ouster prior to the date at which it is found, and an adverse possession of sufficient duration to bar the plaintiff's action?

The facts found are set forth above, together with the further fact not proved, that Emily Mooney paid the taxes during the whole time she was in possession. We do not say this payment of taxes was proved, because the bill of exceptions shows that the offer was made to prove it, and it was ruled out, except as

to the fact of payment since March, 1878, when the proviso to section 325 of the Code of Civil Procedure went into operation. The payment of taxes, *it seems*, is, under the circumstances of this case, competent evidence along with the other facts admitted to show the character of the holding by the party in possession, that it was adverse and under claim of title. (*Keyser v. Evans*, 30 Pa. St. 509.)

The evidence shows the entry by Thomas Mooney under a deed executed to him by Sproul and wife, and Brokaw, conveying the whole premises, which deed was duly recorded soon after its execution. This is strong evidence of an *ouster* or *disseizin*. It bears the appearance of a declaration by the grantee that his entry under the deed is for himself exclusively and not for another, that he enters in his own exclusive right. In *Prescott v. Nevers*, 4 Mason, 330, Judge Story, in discussing the subject of the ouster of one tenant in common by another, used this language: "I take the principle of law to be clear, that where a person enters into land by a recorded deed, his entry and possession are referred to such title; and that he is deemed to have a seizin of the land co-extensive with the boundaries stated in his deed, where there is no open adverse possession of the land so described in any other person." This was said in 1827. Afterwards, at the January Term, 1845, of the Supreme Court of the United States, the same learned jurist delivering the opinion of the court in *Clymer's Lessee v. Dawkins*, 3 How. 690, expressed himself thus: "In the case of the *Lessee of Clarke v. Courtney*, 5 Peters, 319, 354, this court also held, that when a person enters into land under a deed or title, his possession (in the absence of all other qualifying or controlling circumstances) is construed to be co-extensive with his deed or title; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed *disseized* to the extent of the boundaries of such deed or title." The learned justice cites several other cases "affirming the same doctrine," viz: *Green v. Lister*, 8 Cranch, 229, 230; *Barr v. Gratz*, 4 Wheat. 213, 223; *The Society for Propagating the Gospel v. The Town of Pawlet*, 4 Peters, 480, 504, 506; *Blight's Lessee v. Rochester*, 7 Wheat. 535. See also, *Bradstreet v. Huntington*, 5 Peters, 439; *Clapp v. Bromagham*, 9 Cowen, 531, 532, 533;

Culler v. Motzer, 13 Serg. & R. 358; *Wright v. Saddler*, 20 N. Y. 329, 330; *Alexander v. Kennedy*, 19 Tex. 496.

In *Culler v. Motzer*, 13 Serg. & R. 358, it was held where the very point was in judgment that possession of land by a purchaser, under deed of an entire lot, is adverse to the rightful owner, though tenant in common with the grantor. There are numerous other cases to the same effect. (*Horne v. Howell*, 46 Ga. 9; *Cain v. Furlow*, 47 Ga. 674; *Gill v. Fauntleroy's Heirs*, 8 Mon. B. 186; *Long v. Stapp*, 49 Mo. 508; *Warfield v. Lindell*, 30 Mo. 282; S. C. 38 Mo. 578; *Lapeyre v. Paul*, 47 Mo. 590; *Gray v. Bates*, 3 Strob. 500; *Bogardus v. Trinity Church*, 4 Paige, 178; *Bigelow v. Jones*, 10 Pick. 162; *Goewey v. Urig*, 15 Ill. 242; *Hinkley v. Green*, 52 Ill. 230-233; *Townsend & Pastor's Case*, 4 Leon. 32; *Reed v. Taylor*, 5 Barn. & Adol. 575; *Parker v. The Proprietors etc.* 3 Met. 101; *Thomas v. Garvan*, 4 Dev. 223; *Cloud v. Webb*, 4 Dev. 290; *Hubbard v. Wood*, 1 Sneed, 286; *Weisinger v. Murphy*, 2 Head, 674; *Kinney v. Slattery*, 51 Iowa, 353; *Abernathie v. Con. Virginia Mining Co.* 16 Nev. 260; *Caperton v. Gregory*, 11 Gratt. 505.)

The deed to Mooney (its character is stated above) was recorded and Mooney entered under it into a lot within the city of San Francisco, described in the complaint as being twenty-three by ninety feet. The evidence on the part of the defendants, in regard to the adverse possession, is that of Mrs. Mooney, and is as follows: "I took possession of the property in December, 1868. When my husband made me a deed of gift of it, my husband and I lived there. At first, when he bought the property it was a four-roomed house. He and I lived there for about six or eight months, and then we let it to a newly married couple. When they left the house, my husband had it raised to a two-story house. My husband and myself ceased to live there in 1867. We lived there five or six months. The newly married couple lived there six or seven months. Mr. Wiel and family next lived there. They occupied the premises five or six years. The plaintiff was my next tenant. He remained there three or four years. I have always received the rents of the premises since the time the deed was made to me. Madison & Burke had charge of the place for me. I never accounted to any person for any portion of the

rents or profits. Nobody ever demanded an account of them from me until within the last two or three months. Nobody ever demanded of me to be let into possession of these premises until the demand of Mr. Unger. Mr. Mooney raised the house. It was four-roomed. He raised it to a two-story house, with modern improvements, and I have always kept it in repair, paid taxes, assessments, and everything. The lot is surrounded by a fence. The cost of raising the house and putting in the modern improvements must have been eighteen hundred or two thousand dollars. I offered to sell the property. I never acknowledged any claim to any portion of the property on the part of any one else. I have been in possession for a number of years. I have always received the rents and profits. I always thought it was mine, and I believe it is mine now. During all the years since that deed was given to me, I have leased the premises to tenants. Nobody but my tenants and myself has been in possession or occupation of these premises since the deed to me from my husband."

The above, with what has been before stated, is all the testimony on the issue of adverse possession, except one circumstance, which will be adverted to hereafter.

There are five elements required to make out an adverse possession sufficient to constitute a defense under the Statute of Limitations. (1) The possession must be by actual occupation, open and notorious, not clandestine. (*Thompson v. Pioche, supra*; Code Civ. Proc. §§ 323, 325.) (2) It must be hostile to the plaintiff's title. (Code Civ. Proc. §§ 321, 322, 323.) (3) It must be held under a claim of title, exclusive of any other right, as *one's own*. Code Civ. Proc. §§ 322, 323, 325; *Garrison v. McGlockley*, 38 Cal. 78; *Lowell v. Frost*, 44 Cal. 471; *Thompson v. Pioche, supra*.) (4) It must be continuous and uninterrupted for a period of five years prior to the commencement of the action. (Code Civ. Proc. §§ 322, 324; *San Francisco v. Fulde*, 37 Cal. 349; *City of San Jose v. Trimble*, 41 Cal. 536.) It may be added here that this period of five years need not be *next* before the commencement of the action. (*Cannon v. Stockmon*, 36 Cal. 535.) (5) Since the passage of the proviso to section 325 of the Code of Civil Procedure in 1878, payment of taxes. (*C. P. R. R. Co. v. Shackelford*, 63 Cal. 261.)

Each one of these elements is established by the evidence. (1) There was open and notorious occupation by Mrs. Mooney and her husband. Mrs. Mooney and her husband were in possession when the deed was made to the former in December 1868. They lived there for several months. Mrs. Mooney took possession in December, 1868. Her husband added to the house, raised it to a two-story house. Mrs. Mooney has let the house during this period to several tenants, and a tenant has occupied the house during nearly the whole period. She has made repairs on the house, improved it at a cost of from eighteen hundred dollars to two thousand dollars, received the rents of the property, paid taxes and assessments, has never accounted to any one, and no one ever demanded an account or to be let into possession until within a short time before the suit was brought. The deeds under which she claims, and herself and her husband entered, were recorded soon after made. Her acts of ownership, and those of her husband, were unequivocal and open to the observation of all, and during this period, Metcalf, the alleged tenant in common, lived near enough to the city to have reached it in less than twelve hours, and had full opportunity of observing the condition of the lot, the change of possession from Brokaw, his cotenant, so-called, or that a person other than Brokaw was in possession, its occupation by tenants, and of ascertaining all the above-mentioned facts, which facts a man ordinarily regardful of his interests would have made himself acquainted with. The possession of other persons than Brokaw was enough to put Metcalf on inquiry, according to the rule in *Fair v. Stevenot*, 29 Cal. 486. If he had inquired he would have discovered the hostile character of the possession. This means of notice constituted notice. (See *Smith v. Yule*, 31 Cal. 184; *Pell v. McElroy*, 36 Cal. 272.) (2) The hostility of the plaintiff's claim of title is evident from the above facts, for the character of the possession may be evidenced by acts as well as words. Independent of the entry of Mooney and wife under the deeds of the whole lot, such acts indicate the adverse character of the holding. With the deeds, we cannot see that there can be any doubt about it. Mrs. Mooney testified, she always thought it was her property, and never acknowledged any claim to any

portion of the property on the part of any one else. Her acts accord with and support this testimony. (3) The above facts show that Mrs. Mooney occupied and possessed the property under a claim of title exclusive of any other right; (4) and also that the evidence conclusively established that this adverse possession continued for a period sufficiently long, prior to action brought, say five years, to bar plaintiff's action; and (5) that she paid the taxes.

The evidence as to these points is all one way. The fact that she presented a deed to Metcalf and requested him to sign it does not rebut any of the deductions above made from the evidence. Metcalf and Mrs. Mooney alone testify as to this matter. Metcalf says she presented a deed and requested him to sign it; he does not state the character of the deed. But there is no evidence that she ever offered to buy anything. Mrs. Mooney says that the deed presented to Metcalf was a *quit-claim*. These facts do not sustain the conclusion that the case here made is within the decision of *Lovell v. Frost*, 44 Cal. 471; and *C. P. R. R. Co. v. Mead*, 63 Cal. 112.

There was no offer to purchase the property or to purchase anything, but the testimony shows that it was an effort by the defendant to get in an outstanding or adverse claim of title, called to her attention by an objection made to her title when she was negotiating a sale of the lot. This she had a right to do, and doing it was no recognition of the plaintiff's claim so as to do away with the effect of her hostile occupation. On the contrary, the facts proved point strongly to the conclusion that she asked for a deed which was rightfully her due from one who had no title; that Metcalf's name was inserted in the deed of Sproul and wife to himself and Brokaw as a merely nominal owner, to hold the title for the grantors of Thomas Mooney, Sproul and wife, and Brokaw.

This will explain the facts that though living in the neighborhood of the city of San Francisco during the whole time of Mrs. Mooney's occupation, he (Metcalf) paid no attention to the property, never asked for a portion of the rents, made no inquiry about the property, and had forgotten that he had any interest in it.

We are referred to the case of *Seaton v. Son*, 32 Cal. 487,

Whether the possession was adverse or not is certainly, in the case before us, a question of fact to be determined upon a view of all the circumstances appearing in the evidence. In *Taylor v. Horde*, 1 Burr. 60, Lord Mansfield said: "Disseizin is a fact to be found by the jury." That such is the general rule as to whether a possession was adverse or not to the owner's title, see the cases cited in note 2 to § 258 of Wood's Lim. of Actions. It is not necessary for us to overrule the case referred to, but we feel bound to say that in our opinion the ruling in it as to the deed to Brophy, and his entry and possession under it, is overborne by the weight and current of authority, and is not in accordance with the well-settled principles on which the question of adverse possession has been adjudged in nearly every case to which our attention has been called or which we have been able to find. The cases are cited above.

The finding as to the issue made by the Statute of Limitations in this case is scarcely in accordance with that definiteness and certainty which should characterize a finding of facts. (See sixth finding quoted above.) In finding an adverse possession it would be well to find the elements above given. If one of the elements is lacking, the adverse possession is not made out, and in finding such an issue for the plaintiff it is sufficient to negative the existence of any one of these elements.

Judgment and order reversed and cause remanded for a new trial.

MYRICK, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

[Department Two. — June 29, 1883.]

ODD FELLOWS MUTUAL AID ASSOCIATION OF
SAN FRANCISCO ET AL., APPELLANTS, v. WALLACE
T. JAMES ET AL., RESPONDENTS.

CORPORATION — MONEY LOST BY THEFT — LIABILITY OF OFFICER — The secretary of a corporation, whose duty it is to receive all moneys due the corporation, and pay the same over to the treasurer, must exercise reasonable diligence in paying over any moneys received by him, and if he fail to do so, and the moneys are stolen from him, he is liable therefor.

1D. — BOND — LIABILITY OF SURETIES. — The sureties on a bond given by the secretary to the corporation, conditioned for the faithful performance of his duties, are also liable for moneys stolen under such circumstances. The violation of duty on his part in failing to pay the moneys over constitutes a breach of the bond.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

J. F. Cowdery, for Appellant, cited *Boyden v. United States*, 13 Wall. 17; *Metcalf on Contracts*, 213; *The Harriman*, 9 Wall. 161; *Muzzy v. Shattuck*, 1 Denio, 233; *State v. Harper*, 6 Ohio St. 607; *United States v. Prescott*, 3 How. 578; *United States v. Dashiell*, 4 Wall. 182; *United States v. Keebler*, 9 Wall. 83; *Bevan's Receiver v. United States*, 13 Wall. 56.

R. Thompson, for Respondent, cited *Atlantic & N. C. R. R. Co. v. Cowles*, 69 N. C. 59; *Walker v. Brit. Guarantee Asso.* 18 Q. B. 276; *American Bank v. Adams*, 12 Pick. 303; *Minor v. Mech. Bank*, 1 Peters, 46; *Huntsville Bank v. Hill*, 1 Stewt. 201.

THORNTON, J.— This is an action upon a bond for five thousand dollars executed by the defendants to the plaintiff, with this stipulation, that whereas Wallace T. James has been elected secretary of the Odd Fellows Mutual Aid Association for the year commencing on the fifth day of February, 1878, and until his successor shall have been duly elected and qualified, now if the said James "shall in all respects fully, faithfully, well and truly perform all the duties of his said trust according to the constitution, by-laws, rules, and regulations of said association, and at the end of his official term surrender all books, papers, money, or sureties" (*sic*) belonging to or appertaining to his office, to such person or persons as said association may direct, then the bond was to be void, otherwise not.

The breach of the bond assigned in the complaint is the failure of James to pay over to the treasurer of said corporation the sum of \$1,455.25, moneys of the corporation received by him (James) as secretary, while he was in office as such, in the

year 1878, and before the 15th of August in that year, which payment to the treasurer it was his duty to make under the by-laws, rules, and regulations of the corporation. It is further averred that the corporation, by its treasurer, demanded of James the payment of the sum of money mentioned, which he refused to pay to him, and that it has never been paid. None of the allegations of the complaint are denied by the answer, except as hereinafter stated, but the defendants set up in defense that the corporation was conducting and carrying on its business in a building known as the Odd Fellows' Hall Building in the city of San Francisco, that James, as secretary, was required by the association to occupy and do the business of the corporation in its office during all the times mentioned in the complaint, that the corporation furnished its office with an iron safe for the purpose of safely keeping its books, papers, and moneys; that in the usual and ordinary manner of doing the business of the corporation, the secretary (James) was accustomed to and did receive the funds of the corporation as the same were paid in from time to time, and deposit them in the safe above mentioned; that it was the usual and ordinary way of conducting the said business for James, the secretary, to allow the said funds to remain in the safe until the treasurer of the corporation called to receive them, that James did receive the sum of money mentioned in the complaint, and, as was his usual custom and the custom of doing business, placed the same in the safe aforesaid; that after this money had been deposited in the safe and before the treasurer called for or made any demands for it or any part of it, some person or persons unknown, in the night time, broke open the safe, and stole and carried away the money, without the knowledge or consent of James, and without any neglect or default on his part. The defendants further aver that James, in all things and at all times, faithfully performed all the duties of his trust according to the constitution, by-laws, rules "*and usages of the said association*"; that at the time the treasurer made the demand on him he did not have the sum of money mentioned, and that it was not his duty to pay over this money, or any part of it, to the treasurer, or in any way reimburse the corporation "for the said loss or any part thereof."

We think it best to insert here the findings of the court below as to the facts of the case, which are as follows:—

“That the defendant’s made, executed, and delivered the bond attached to the complaint at the time alleged; that by the constitution, by-laws, rules, and regulations of said association mentioned in the condition of said bond, the secretary, Wallace T. James, was required to keep all the books of account of the association, to receive all the moneys of the association, giving his receipt for the same; to pay over all moneys in his possession belonging to the association to the treasurer, taking his receipt therefor; to write and send all notices and communications called for by the rules of the association to its members, to make a written report of the transactions and condition of the association at the annual meeting in each year, and at such other meetings as the board of directors or association should direct; that there was no other duties which the secretary was required to perform, and that the said bond was given for the performance of these duties, and these only; that there was no contract or undertaking whatever by which the said James undertook or agreed to be the insurer of moneys or goods in his charge, or received by him as secretary; but that his undertaking, with reference to the custody of the moneys received by him as secretary, was to keep them, under the direction of the association, and in the place and manner directed by the association; that said James was furnished by the association with an office, in which was a safe for the purposes of the transaction of business, and the custody of moneys and other valuables; that during the continuance of his term of office, the said James received money to the amount of \$1,455.25, and deposited the same in the said safe, furnished by the said association; that while in said safe, and during the night of August 6, 1877, the said office was broken into and said money stolen by some unknown person, without the knowledge, agency, or assent of said James.

“And the court finds as a fact that the said James was not guilty of any negligence in the custody or care of said money, but that he faithfully performed all the duties of his said office; that he failed to pay over said \$1,455.25, solely because the same was stolen from him as above found; that the said safe

and office was not a fit or proper place for the keeping of said money, but that it was the place provided by the association for the purpose, and that the fact that it was not a proper place for the keeping of said money was known to the association at all times previous to the robbery above mentioned."

Judgment passed for defendants following the conclusions of law arrived at by the court.

The court below treated the case as one for the custody and safe-keeping of moneys by the secretary, which it clearly is not, any further than this: that he was to keep the money for such reasonable time as was required for him to deposit it with the treasurer. There is no such contract on the part of the defendant. The contract of defendant as shown by the bond, which was admitted as set forth by the complaint and as found by the court, was to receive the moneys of the association and pay them over to the treasurer, taking his receipt for the same.

On a motion for a new trial the findings of the court were assailed on the ground that the evidence was insufficient in several specified particulars to justify the findings of the court. We shall notice the following of the particulars specified: First — That the undertaking of the secretary was to keep the money received by him as secretary under the direction of the association, in the place and manner directed by the association. Second — That the association furnished or provided James with a safe for the purpose of the custody of the money belonging to the association. Third—That the defendant James was not guilty of any negligence in the custody or care of the money sued for, and that he faithfully performed the duties of his office.

We are of opinion that the evidence establishes the contrary of that found by the court, as stated in the above particulars. There was nothing in the conduct of the board of directors, taking the testimony of the defendant James himself, which shows that it ever gave any directions as to his dealing with the moneys received by him as secretary other than that embodied in the by-laws of the corporation which were in evidence and are embodied in the statement. By these by-laws it was distinctly provided as to the moneys, that the secretary should "receive all moneys due the association, giving his receipt for the same," and pay over all such moneys "to the treasurer, tak-

ing his receipt therefor." This did not make him the custodian of the moneys. Any inference to the contrary is not justified by any evidence in the case. The impression which was attempted to be made by James in his testimony that any such direction was given other than that above stated, is based upon a remark of a director of the board, at one of its meetings, or on something said or done by the president. Conceding that the corporation could be bound in this way, the remarks stated by him and the acts of the president did not justify any inference that the board had ever attempted in any way to give the moneys any other direction than that prescribed by the by-laws above mentioned.

There is no evidence that the safe was furnished James by the association for keeping the money of the association. James himself gives no such testimony. He says: "There was a safe in the office furnished by the plaintiff's corporation. The safe belonged to the association. It was a Tilton & McFarland old combination safe. I was required to do the business of the association in that office." He nowhere says that he was required or directed to keep the money in the safe; on the contrary, the evidence, not in conflict with any facts which he states, shows that the board refused to hire a box in the Safe Deposit Building, in which he could deposit the money, and he was told not to keep the money in the safe. He testifies that he felt uneasy at night about the money, and in consequence of this uneasiness called the attention of the board to this safe. The evidence further shows that he was warned of the insecurity of the safe, and instructed by the board to deposit the money with the treasurer. The money stolen was accumulating a month or so before the larceny occurred.

If he was required to keep the money, if this was any part of his duty, the evidence establishes a clear case of negligence. The money was kept in an insecure place, to the knowledge of the secretary, a key to the combination lock of the safe was in the hands of another person not connected in any way with the association, and had been for some time, and the combination was allowed by him to remain unchanged, and the building had no watchman. Under the circumstances, if the duty to keep the money was devolved on him, he would have been justified,

and it would have been his duty to have sought a safe place of deposit, of which many could have been found in his neighborhood. But it was no part of his duty to become the custodian of the moneys of the association, but to pay them over to the treasurer under the by-laws above mentioned. The evidence shows that there was a treasurer, that his office was not more than five or six blocks distant from the office of the association, easily accessible, and thus a custodian was provided by the association, and his assumption of the office of custodian was entirely unnecessary. We see no evidence that any course of business was established by the board by which it should be inferred that the board required him to keep the money until called for by the treasurer. If any course other than that prescribed by the by-laws above referred to was pursued, it was pursued by the secretary of his own head without any direction either express or implied of the board of directors of the association.

It may be remarked here that the evidence in relation to the safety of the money in the safe and his calling the attention of the trustees to it, and the way of doing business while he was secretary in regard to the treasurer calling on him for the money, instead of his taking it to the treasurer, was objected to by the plaintiff on the ground substantially that it altered the contract between the parties; the objection was overruled and exceptions reserved. The objections should have been sustained, and the evidence ruled out. There was error in admitting it.

As this cause must go back for a new trial, the true intent of the contract of the parties should be defined for the direction of the court below on such new trial. The question has been fully argued orally and in the briefs of counsel, and it should be decided, that the litigation may sooner come to an end, thus saving time and expense to the parties.

The engagement of the defendant James, as shown by the bond, was in all respects "fully, faithfully, well and truly, to perform all the duties of his said trust according to the constitution, by-laws, rules, and regulations" of the association; and as we have stated above, his duty as to the moneys was to receive all the moneys of the association, giving his receipt for

them and pay them over to the treasurer, taking his receipt therefor. This is the proper meaning of the bond in regard to the moneys. He was no custodian or bailee of the moneys further than as set forth above. He was such bailee for such time as was requisite in the use of due and proper diligence under the circumstances to get the money to the treasurer and pay it over to him. James was a paid officer, receiving a salary of one hundred dollars a month, and his engagement as to diligence in the brief period that the money should remain in his possession was that of a good and trustworthy business man in attending to his own affairs. He engages to use this diligence in keeping the money and paying it over. The degree of diligence to be employed must have regard to the circumstances, of course.

In the case before us the moneys lost were allowed to accumulate for more than a month. It was the secretary's duty to pay over within a reasonable time. His diligence should have been spurred by the fact that this treasurer was the officially appointed custodian of the moneys, and he (the secretary) was not. Under the circumstances before us in this case, he was bound to pay over in our opinion on the day he received the money if practicable, at furthest on the day after he received it. This he did not do, but allowed the money to accumulate and it was stolen. This was a breach of his engagement under the bond, and rendered him and the other defendants liable. It may be that if, while keeping the money during the brief time he was allowed to keep it, and exercising proper care in keeping it, he had lost it by robbery accompanied by violence which overcame him, or if, while taking the money in the exercise of due and proper care to the treasurer, he was violently robbed of it, against his will and consent, he might be excused. Such was the case of *Walker v. British Guarantee Association*, 18 Q. B. 277, which was an action by the trustees of a building society under an act of parliament, against the sureties of one Jones the treasurer of the society, on a covenant whereby it was stipulated that Jones would faithfully discharge the duties of treasurer, duly obey the directions of the trustees in relation to such duty, and punctually account to the trustees for all moneys, etc., received by him as treasurer. One of the directions

of the society in regard to the treasurer's duties was that he should pay over the moneys to the bankers of the society within a given time. The breach assigned was that Jones did not pay over the money to the bankers or at all. The defendants pleaded four pleas. The fourth plea, which was the one on which the case turned and was decided, was that Jones had received the money, and before the time that he ought to have paid or could have paid it to the bankers of the society, he was, without any act or default or negligence or want of due and proper care on his part, robbed by violence of the money, by which he was prevented from paying. There was a verdict for the plaintiffs on three of the pleas, and on the fourth verdict passed for the defendant. There was a motion for judgment for plaintiffs *non obstante veredicto*, which brought up the sufficiency of the plea. The court denied the motion, and per Campbell, C. J., said: "The plea avers that, after he received the moneys, and before the time when he ought to have paid, or could have paid, the same to the bankers, he, without any default or negligence or want of due care on his part, was robbed by violence of the whole of the said moneys, by the same being feloniously and violently stolen and carried away from his person; and thereby he was unavoidably, and without any act or default of his, prevented from paying the said moneys to the bankers of the society. This plea (found to be true) alleges a loss of the moneys by *irresistible violence*; and the general doctrine is not denied, that, if the subject-matter bailed be lost by *vis major*, which we translate *irresistible violence*, the bailee is discharged."

The defense was here sustained on account of the diligence of the treasurer. He was doing his best to comply with his engagement and was prevented by the *vis major*. If he had been dilatory in taking the money to the bankers, it cannot be supposed that the court would have sustained his defense.

There is here nothing like robbery nor violence, nor inevitable accident, nor *vis major*, to excuse defendant, but a case where the money has been lost by the want of care and prudence on the part of James, which his contract bound him to use, and he and his sureties are liable. In the case of the act of God, or inevitable accident, or *casus* (as the civilians call the act of God

or inevitable accident), (Wharton on Negligence, §§ 114, 115, 116, 117, etc.), or *vis major*, the defendant is not excused when the injury or damage might have been avoided by the exercise of due care and prudence on the part of defendant as is illustrated in many cases. (See *Polack v. Pioche*, 35 Cal. 423; *Chidester v. Consol. Ditch Co.* 59 Cal. 202, 203; *Holladay v. Kennard*, 12 Wall. 254, case of common carrier; and *City of Philadelphia v. Gilmartin*, 71 Pa. St. 140; Wharton on Negligence, § 123.)

Judgment and order reversed, and cause remanded for a new trial.

MYRICK, J., and SHARPSTEIN, J., concurred.

[In Bank. — June 29, 1883.]

THE SOUTHERN PACIFIC RAILROAD COMPANY,
PETITIONER, v. THE SUPERIOR COURT OF LOS
ANGELES COUNTY, RESPONDENT.

PROHIBITION — REMOVAL OF CAUSE — JURISDICTION. — The filing of a petition and bond for the removal of a cause from the State court to the Circuit Court of the United States does not divest the State court of jurisdiction so far as to authorize a writ of prohibition to prevent it from proceeding to try the cause.

APPLICATION for a writ of prohibition. The facts are stated in the opinion of the court.

Glassell, Smith & Patton, for Petitioner.

Smith, Brown & Hutton, for Respondent.

SHARPSTEIN, J.— This is an application for a writ to prohibit said Superior Court from proceeding any further in the case of *The People of the State of California v. The Southern Pacific Railroad Company*, which was commenced in said Superior Court, and afterwards, as the plaintiff claims, removed to the Circuit Court of the United States for the District of California.

It appears by the record before us, that the plaintiff herein filed an answer in the action commenced against it in said Superior Court, and afterwards, but on the same day, filed a petition

and bond for the removal of said suit into said Circuit Court. And that afterwards a certified copy of the record and proceedings in the case and of the petition and bond for the removal of said suit to said Circuit Court were filed therein. No objection was or is made to the sufficiency of the bond.

In the petition for a removal it is alleged that the action is "of a civil nature at law, and arising under the Constitution and laws of the United States, and that the matter in dispute exceeds, exclusive of costs, the sum and value of five hundred dollars." This is followed by more specific allegations as to the questions involved in said action, from which it appears that it was brought to recover taxes alleged to be due from said Railroad Company to said State and county, which the petitioner alleges are illegal, because the assessment on which said taxes are based was made in accordance with section 10, of article xiii., of the Constitution of this State, which the petitioner insists violates the fourteenth amendment of the Constitution of the United States, by depriving it, the petitioner, of its property without due process of law.

The Superior Court made an order denying the petition. According to the opinion of Blatchford, J., in *Hatch v. The Chicago, Rock Island and Pacific Railroad Company*, 6 Blatchf. 105, 117, it would appear that this order was wholly superfluous. In that opinion this language occurs: "No order of the State court for the removal of the cause is necessary. The right of the defendant to a removal is not dependent on the question whether the State court does or does not make an order." And this seems to be in consonance with the doctrine that the determination by a State court that a petition for the removal of a suit to a federal court is sufficient or insufficient is of no practical moment. (Dillon on Removal of Causes, 70.)

But it does not follow from this that a federal court upon the mere filing in it of copies of the record of the State court and the petition and bond for removal, acquires jurisdiction of the suit in the full sense of that term. For notwithstanding the filing and entry of a copy of the record of the suit in the federal court, it is the duty of the court to dismiss or remand the case whenever it appears to its satisfaction that the "suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court." (Act of Con-

gress of March 3, 1875, § 5.) And unless this suit is one "arising under the Constitution or laws of the United States," the federal court could not by any known process acquire jurisdiction of it. And if not within federal, it certainly was within State, jurisdiction. And this must be so whether or not the power to determine the question of jurisdiction is vested exclusively in the federal court. The fact of filing in that court a copy of the record of the State court, together with copies of the petition and bond for the removal of the suit, does not determine the question of jurisdiction. For "if it shall appear to the satisfaction of said Circuit Court *at any time* after such suit has been . . . removed thereto, that such suit does not really and substantially involve a dispute or controversy, properly within the jurisdiction of said Circuit Court, . . . the said Circuit Court *shall proceed no further therein*, but shall dismiss the suit or remand it to the court from which it was removed." It will thus be seen that while section three of the Act of 1875 provides that after a petition and bond for a removal of a suit commenced in a State court have been filed therein, "it shall be the duty of the State court to accept said petition and bond, and *proceed no further in such suit*, section five declares that upon its appearing that the suit is not one of federal cognizance, "the Circuit Court *shall proceed no further therein*." And that court will not take cognizance of the suit unless it *affirmatively* appears by the record that the case is one within its jurisdiction. (*Trafton v. Nougues*, 4 Sawy. 178.)

So that when a suit is remanded to a State court by a federal court on the ground that the case is not one of federal cognizance, it is simply a recognition of the fact that the State court did not lose jurisdiction by reason of the attempt to remove the case from the State to the federal court. If the State court loses its jurisdiction it cannot be restored by a federal court. By reading sections three and five of the Act of 1875 together, they simply provide that after one of the parties to an action pending in a State court has taken the proper steps to remove it to a federal Court, the State court shall "proceed no further in such suit" until the same is remanded or dismissed by the federal court. The removal of the suit to a federal court stays the proceedings in the State court until the case is remanded or dismissed by the

federal court. In *Knapp v. Railroad Co.* 20 Wall. 117, the Supreme Court of the United States reversed the judgment, with instructions to the United States Circuit Court to remand the case to the State court "from whence it was improperly removed to the Circuit Court." It could not with propriety be said that the State court ever lost its jurisdiction of that case. It was a case within the jurisdiction of the State court and not within the jurisdiction of the federal court. The most that could fairly be claimed in such a case would be that while it was pending in the federal court the jurisdiction of the State court was in abeyance. In many of the cases it is said that upon the filing of a proper petition and bond in a State court for the removal of a suit pending therein every subsequent exercise of jurisdiction in the case by such court is null and void, and every step *coram non judice*. But Dillon, after saying that on the filing of such petition and bond "the *rightful* jurisdiction" of the State court "ceases *eo instanti*" and that a subsequent judgment of such court in the case would be *erroneous*, adds: "We do not say null and void. Such a judgment is perhaps valid unless reversed or set aside." (Dillon on Removal, etc., 67.) And the Supreme Court of Wisconsin held in a recent case that such a judgment was not null and void, but was valid until reversed or set aside. (*Johnson v. The Brewers' Fire Ins. Co.* 51 Wis. 570.)

It seems to us that this case is somewhat analogous to that of *The People v. Whitney*, 47 Cal. 584, in which an application for a writ of prohibition was based on the ground that after an appeal had been taken from an order of the district court denying a motion to change the place of trial, said district court was proceeding in the case as it might if no appeal had been pending in this court. The application was denied. The court said: "Conceding that the fact that the petitioner had taken an appeal to this court from the order of the court below, denying his motion to change the place of trial, entitled him to a continuance of the general cause in the court below, while such appeal was pending in this court, under section 946 of the Code of Civil Procedure, and within the rule laid down in *Pierson v. McCahill*, 23 Cal. 250, it does not follow that the court below has, by reason of the pendency of such appeal, lost jurisdiction of the case, or that a trial of the case pending the appeal would

be a proceeding without or in excess of the jurisdiction of the court below, in the sense of section 1162 of the Code of Civil Procedure, so as to authorize us to issue a writ of prohibition to that court."

In *Pierson v. McCahill*, *supra*, it was held that an appeal from an order denying a motion for a change of place of trial operated as a stay of all further proceedings in the case in the court below until such appeal was determined, and a judgment entered in the court below pending such appeal was reversed on the sole ground that it was error for that court to proceed in the case while an appeal from said order was pending in this court.

These two cases illustrate the difference between a stay of proceedings and a complete loss of jurisdiction. Proceedings had during a stay are erroneous only. Every step taken in a case after loss of jurisdiction is absolutely void. After an appeal a case may be remanded by the appellate court to the court below for further proceedings. And after a suit has been removed from a State to a federal court such suit may at any time be remanded to the court from which it was removed. Can it consistently be said that, in the case of an appeal, if there be a stay bond filed, the court below does not lose jurisdiction of the case so as to authorize the issuance of a writ of prohibition, but that, in case of removal of a suit from a State to a federal court, the former does lose jurisdiction so as to authorize the issuance of that writ?

In *Insurance Company v. Pechner*, 95 U. S. 183, it was held that where a State court had once acquired jurisdiction, it might proceed until it was judicially informed that its power over the cause had been *suspended*. In that case a State court had refused to *suspend* further proceedings, although a petition and bond for removal had been filed, and the Supreme Court of the United States affirmed the judgment of the court of appeals of New York, holding that as the petition did not state facts sufficient to entitle the petitioner to a removal, it was not even error for the State court to proceed to trial and judgment. "Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the case is suspended," is the language of the Supreme Court of the United States in that case. From which we infer that in the opinion

of that court a removal of a suit from a State to a federal court simply *suspends* the power of the former to further proceed in such suit until it is remanded or dismissed by the federal court.

It is quite clear that the filing of a petition and bond in a State court for a removal of a case pending therein to a federal court does not *ipso facto* confer jurisdiction upon the latter, and equally clear that the State court does not lose jurisdiction until it vests in the federal court. Conceding, then, that neither the State court in which an action is pending, nor this court, can determine whether the case is one which can be removed to a federal court, how can this court determine that the power of the State court over the cause has been suspended even? Because it is not even error for a State court to proceed in the trial of a case after a petition and bond for removal have been filed in it, unless such petition shows that the case is one of federal cognizance. (*Ins. Co. v. Pechner, supra.*) In "Removal Cases," 100 U. S. 457, the court said: "We fully recognize the principle heretofore asserted in many cases, that the State court is not required to let go its jurisdiction until a case is made which, upon its face shows that the petitioner can remove the cause as a matter of right."

In *Bell v. Dix*, 49 N. Y. 232, a petition and bond for the removal of a case from a State court of original jurisdiction to a federal court had been filed, and a motion made in the State court for a stay of proceedings, which was denied. From that order an appeal was taken to the Supreme Court, and from that court to the court of appeals, in both of which the order denying the stay was affirmed. In the opinion of the latter court it is said: "The order of the Supreme Court, or of this court, granting or refusing a stay, would be in effect but the expression of an opinion upon the question; as neither court has the power to decide the question either way, the decision would neither be authoritative nor final in the premises."

In *Ex parte Grimboll*, the Supreme Court of Alabama (8 Cent. Law J. 151) denied an application for a writ of prohibition to prevent a court of original jurisdiction from proceeding further in a cause after a petition and bond for its removal had been filed. The ground upon which the refusal in that case was

based was that it did not appear that the case was one which could properly be removed from a State to a federal court.

In the two cases last cited, the highest appellate courts of New York and Alabama, for different reasons, declined to interfere in cases in which inferior courts of those States were proceeding with the trials after petitions and bonds for removals had been filed.

But it seems to us quite clear that, if we can look into the petition for removal for the purpose of determining whether a case within federal cognizance is presented, the Superior Court in which the case is pending may do so, and if it can, its determination of the question, whether right or wrong, would neither be without nor in excess of its jurisdiction. If, on the other hand, neither the Superior Court nor this court can inquire into the sufficiency of a petition filed for the removal of a cause to a federal court, we do not see how the result reached in *Bell v. Dix, supra*, can be avoided. How this court can determine whether a Superior Court is proceeding without or in excess of its jurisdiction, unless we are permitted to inquire whether or not the case is one of federal cognizance, passes our comprehension. For, as before remarked, if it be not, a federal court cannot acquire jurisdiction of it. And if it takes jurisdiction of such a case, and proceeds to trial and judgment, the Supreme Court of the United States will reverse the judgment and remand the case to the State court "from whence it was *improperly* removed to such federal court." (*Knapp v. R. R. Co.* 20 Wall. 117.)

In a very recent case the Supreme Court of Texas affirmed a judgment in a case in which the court below proceeded to try a cause, notwithstanding the filing of a petition and bond for its removal to the federal court, holding that the State court had the power to inquire into the sufficiency of the petition, and if insufficient, it was not error to disregard it. After reviewing the decisions of the Supreme Court of the United States, the Supreme Court of Texas says: "These decisions all leave a discretion with the State court to at least pass upon the sufficiency of the case made by the petition. They do not require that it should surrender its jurisdiction until a petition complying with

the provisions of the statute is presented to the court." (*Texas and Pacific Railway Company v. McAllister*, 59 Tex. 349.)

In *Sheehy v. Holmes*, 55 Cal. 485, we did grant an application similar to the one now before us. But in that case no one appeared to resist the application, and it is quite evident that the case received but little attention in this court. We do not think under the circumstances that it should be followed.

Application denied.

McKEE, J., McKINSTRY, J., and ROSS, J., concurred.

MYRICK, J.—I concur in the judgment, for the reason that it does not appear to me that the Superior Court is acting in excess of its jurisdiction.

Petition for rehearing denied.

[In Bank. — June 29, 1888.]

THE PEOPLE, RESPONDENT, v. DENNIS BURNS,
APPELLANT.

CRIMINAL LAW — BURGLARY — SUFFICIENCY OF INFORMATION. — The defendant was accused of the crime of burglary. The information charged that he feloniously and burglariously entered a certain house with intent to commit a rape, but did not state under which set of circumstances, specified in section 261 of the Penal Code, the crime was committed. *Held*, that the information was sufficient.

Id. — CHARGE. — Where the court, in a charge to the jury, reads the whole of a section of the Code, a part only being relevant, the judgment will not be disturbed if it is not apparent that some substantial right of the accused was affected.

APPEAL from a judgment of the Superior Court of Colusa County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Carr & Hatch, for Appellant.

The information is not sufficient. (*People v. Nelson*, 58 Cal. 106; *Greer v. State*, 50 Ind. 267; *Commonwealth v. De Jardin*, 126 Mass. 46.)

The charge was erroneous. (*People v. Bird*, 8 Pac. C. L. J. 334; *Hanks v. Naglee*, 54 Cal. 51.)

Attorney-General, for Respondent.

The information is sufficient. (*People v. Shaber*, 32 Cal. 36; *Commonwealth v. Barney*, 10 Cush. 480.)

The charge was not prejudicial. (*People v. Cronin*, 34 Cal. 191; *People v. Girr*, 53 Cal. 629.)

MYRICK, J.—The defendant was accused by the district attorney of the crime of burglary, and the information charged that the accused committed the crime as follows: That he did feloniously and burglariously enter a certain house of one — [naming a woman], in which said house she, the said [woman named] did then and there reside, with intent then and there to commit a rape upon the said [woman named].

Section 261, Penal Code, defines the crime of rape as the act therein named accomplished under either of six sets of circumstances therein set forth. Objection was made to the information in that it did not state under which set of circumstances specified in this section the act was intended by the defendant to be accomplished. We think the information was sufficient. (*People v. Shaber*, 32 Cal. 36; *People v. Girr*, 53 Cal. 629.)

In the charge to the jury the court read subdivisions 3 and 4 of section 261, above mentioned, as applicable to the case on trial. Subdivision 3 and the first part of subdivision 4 did relate to the case; but there was no testimony to which the latter part of subdivision 4 would be applicable, in that there was no testimony that any intoxicating, narcotic, or anæsthetic substance was administered or attempted to be administered. The defendant alleges that it was error to read the latter part of this subdivision. The entry into the house in the night time, and the use of force and threats in endeavoring to accomplish the act, were in evidence; and upon that evidence the jury was justified in convicting the defendant. It is not apparent that the reading of the clause objected to affected any substantial right of the defendant. (§ 1258, Pen. Code.)

Judgment and order affirmed.

ROSS, J., MCKEE, J., SHARPSTEIN, J., and THORNTON, J., concurred.

[In Bank. — June 29, 1883.]

G. J. CARPENTER ET AL., RESPONDENTS, v. THE NATOMA
WATER AND MINING COMPANY, APPELLANT.

STATUTE OF LIMITATIONS — FORMER ACTION — JUDGMENT — EJECTMENT. — A judgment in ejectment does not create a new estate or vest a new title in the plaintiff so as to interrupt the running of the Statute of Limitations, where it has begun to run. An actual entry is necessary to stop the running of the statute.

APPEAL from a judgment of the Superior Court of El Dorado County.

The facts are stated in the opinion of Department Two, adopted by the court in Bank.

A. P. Catlin, for Appellant.

The suit and judgment in *Bugby v. Natoma Water Co.* did not interrupt the Statute of Limitations. (Freeman on Judgments, § 293; *Aslin v. Parkin*, 2 Burr. 666–668; *Yount v. Howell*, 14 Cal. 465; *Satterlee v. Bliss*, 36 Cal. 489)

G. J. Carpenter, for Respondent.

A judgment is the appropriate conclusion of an action, and it should and does conclude what it decides. It is conclusive of all antecedent defenses, including the bar of the statute. (*Burden v. Shannon*, 99 Mass. 200; *Emery v. Fowler*, 39 Me. 326; *Montgomery v. Hernandez & Co.* 12 Wheat. 129; *Vassault v. Leitz*, 31 Cal. 225; *Knowles v. Inches*, 12 Cal. 212; *People v. Frisbie*, 26 Cal. 135; *Sherman v. Dilley*, 3 Nev. 21; *Harris v. Harris*, 36 Barb. 88; *Case v. Beauregard*, 101 U. S. 688.)

PER CURIAM.— We concur in the views of Department Two with respect to this case. The result reached by the department is sustained by decisions in other States. (Wood on Limitations, 272; *Doe ex dem. Kennedy's Heirs v. Reynolds*, 27 Ala. 377; *Smith v. Hornback*, 4 Litt. 233; *Jackson v. Haviland*, 13 Johns. 228.)

Lord Mansfield, in *Aslin v. Parkin*, 2 Burr. 665, speaking of the effect of a judgment, recovered in ejectment, as evidence in an action for *mesne profits*, remarked: "This judgment only

concludes the parties as to the *subject-matter* of it. Therefore, *beyond the time laid in the demise*, it proves nothing at all; because, beyond that time, the plaintiff has alleged no title," etc.

The judgment in the common law ejectment determined the plaintiff to have the right of possession during the demise laid in the declaration. Under our laws, ejectment, so called, may be employed to try title, and if the issue is as to plaintiff's seizin in fee, or for a less estate, the judgment in his favor determines that he was seized in fee, or of the less estate, at the commencement of the action. But the judgment does not create a new estate, or vest a new title in the plaintiff, which interrupts the running of the Statute of Limitations, in case the same has begun to run. The running of the limitation can be interrupted only by an actual entry. The establishment of a *right*, in the lessor of plaintiff, to the possession for a term of years, did not, as the cases show, interrupt the running of the Statute of Limitations. There is no reason why the establishment of a right to a larger estate, by the judgment under our law, should interrupt the running of the statute. As an interruption of the statute, the judgment for the recovery of lands under our Code is no more effectual than a judgment in a common law ejectment.

Judgment reversed.

McKEE, J., dissented.

ROSS, J., expressed no opinion.

The opinion of Department Two is given below.

MORRISON, C. J.—Plaintiffs brought an action against the defendant for the recovery of certain land described in the complaint, and defendant interposed as a defense to the action, the plea of the Statute of Limitations. The case comes up on the judgment roll, and it will be sufficient for us to refer to some of the findings filed by the learned judge before whom the trial was had:—

“That in the early part of the year 1851, the line of the canal mentioned in the pleadings was surveyed and located on the lands sought to be recovered in this action; and that during the years 1851 and 1852, the canal was being excavated by the defendant; and was completed through said lands about the 1st of

March, 1853, and has ever since been continuously used and possessed by defendant for running water therein. That all the land over and through which said canal was constructed was vacant, unclaimed public land of the United States government."

"That said canal is about twenty-five miles in length, with several branches; and ever since its construction has been claimed by the defendant as its property, and so continuously held and used. That the premises described in plaintiffs' complaint were at the time said canal was located and constructed, and for a long time thereafter, public lands, belonging to the government of the United States."

"That for more than twenty-six years before the commencement of this action, the part or portion of the lands described in plaintiffs' complaint as passed over and occupied by said canal of defendant, was in the continued, uninterrupted, absolute, peaceable, and exclusive possession of defendant, except as interrupted by the suit brought by plaintiff's predecessor in interest, B. N. Bugby, to recover possession of said premises, as in the findings hereinafter set forth. That defendant claimed title thereto adverse to plaintiffs and all other persons, and that during all this time defendant was running water through said canal, and exercising dominion and control over the whole thereof, and running water therein for the purposes aforesaid."

"That defendant's right to the use of the land sued for in this action for the purposes of furnishing water for mining, agricultural, domestic, and other uses and purposes during all the time since the construction of said canal, has been uniformly acknowledged and recognized by the local customs and decisions of the courts of this State and the United States, except in the suit brought by plaintiff's predecessor in interest, B. N. Bugby, against defendant, to recover possession of said land and premises, as hereinafter in these findings set forth."

"That on the 22d day of April, 1867, the State of California, under the provisions of an act of the Congress of the United States, entitled 'An act to provide for the survey of the public lands of California, the granting of the pre-emption rights therein, and for other purposes, approved March 2d, 1853, and in accordance with the various acts of the legislature of said State preceding said 22d day of April, 1867, did by letters

patent grant and convey to B. N. Bugby, the plaintiffs' predecessor in interest, the tracts of land located and described as follows, to wit: The southeast quarter, and the east half of the southwest quarter, and the northwest quarter of the southwest quarter, all of section No. 16, township No. 10 north, range No. 8 east, Mount Diablo base and meridian, together with all the privileges and appurtenances thereunto belonging and appertaining."

By the twelfth finding it appears that Bugby (under whom plaintiffs derive title), commenced an action similar to the present on the 16th day of April, 1868, and recovered a judgment therein in the district court in April, 1873; that an appeal was taken to the Supreme Court and the judgment was affirmed on the 30th day of April, 1875; that thereupon a writ of error was taken to the Supreme Court of the United States, and by that court the judgment of the Supreme Court of the State was affirmed in the year 1878.

The complaint now before us was filed on the 18th day of February, 1880. There is but one question in the case, and that is, were the plaintiffs barred by the Statute of Limitations? If not, it is very clear that the judgment was correct, and should be affirmed. Was this statute saved by the bringing of the action of Bugby against the defendant? The present action is not founded upon the judgment in the Bugby case, and no allusion is made to such judgment in the complaint filed in this case. It is well settled that any interruption in the Statute of Limitations stops its running and establishes a new date from which it again begins to run. But does the bringing of an action and the recovery of a judgment affect the right of the defendant to avail himself of the statute as a defense in another action, between which two actions there is no connection except that they relate to the same subject-matter and are between the same parties or their privies?

In his argument the learned counsel for the defense very pertinently says: "This action is not an action in aid of the judgment put in evidence, nor a proceeding to procure the execution of that judgment." The present action is not a continuation of the former one, and is in no measure connected with it. It is a separate and independent proceeding which could have

been as well maintained without as with reference (by evidence or otherwise) to the first action and the judgment therein, and the plaintiff as fully established his right to a recovery after he had introduced his patent in evidence, as he did by superadding proof of a judgment in the case of Bugby, referred to above.

Our attention has not been called to any case which conflicts with the views above expressed, and we are not aware of any.

The California cases referred to by the learned counsel for plaintiffs are not in point.

Judgment reversed.

THORNTON, J., and SHARPSTEIN, J., concurred.

[In Bank. — June 20, 1883.]

IN THE MATTER OF THE ESTATE OF HENRY E.
ROBINSON, DECEASED — RESIDUARY LEGATEES,
APPELLANTS.

WILL — BEQUEST FOR CHARITABLE PURPOSES. — A bequest of money to the mayor and common council and commonalty of the city of San Francisco in trust to invest the same, and to pay the interest from time to time as they may deem proper to the destitute women and children of that city, is a bequest for charitable purposes, and not in violation of any provision of the Constitution or statutes of this State against perpetuities.

ID. — CAPACITY OF THE CORPORATION TO TAKE. — Under section 1313 of the Civil Code, a municipal corporation may take property in trust for charitable purposes within the general scope of its powers and duties. The care and support of its indigent women and children are matters germane to the objects of the municipality, and it is competent for the corporation to take a bequest for such purposes, and administer the trust as directed by the testator.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco making distribution of the estate of the deceased.

The facts are sufficiently stated in the opinion of the court.

D. P. Belknap, and *C. J. Swift*, for Appellants. (Cited *McCarlce v. Orphan Asylum*, 9 Cowen, 437; §§ 1275, 1313, Civ. Code.)

W. C. Burnett, for the Mayor and the city and county of San Francisco, Respondents.

Ross, J.— Henry E. Robinson, by his will executed in the State of New York, bequeathed "to the mayor, common council and commonalty of the city of San Francisco, California, the sum of forty thousand dollars (\$40,000), in trust, to be by them and their successors invested to the best advantage, the interest accruing thereon to be paid out from time to time to the destitute women and children of the city of San Francisco, California, in such a manner as such mayor and common council may deem most proper and beneficial."

Mr. Robinson having died and administration upon his estate having been had, the court below, in the decree of distribution, directed the executor to pay, out of the estate, "to the mayor and board of supervisors of the city and county of San Francisco the sum of forty thousand dollars in trust, to be by them and their successors in office invested to the best advantage, the interest accruing thereon to be paid out from time to time to the destitute women and children of the city of San Francisco, California, in such a manner as such mayor and board of supervisors may deem most proper and beneficial." The appeal is from this portion of the decree.

We do not understand appellants to claim that the court below erred in substituting the legal appellation of the municipality in question for that employed by the testator, but their claim is that the bequest itself is void because prohibited by statute.

In the *Estate of Hinckley*, 58 Cal. 457, we held that trusts for perpetual charitable uses are not in conflict with the Constitution of the State, nor are they in conflict with those provisions of the Civil Code which prohibit perpetuities; and further, that the perpetuities prohibited by the common law do not include trusts for charitable uses. It is here contended, however, that by section 1275 of the Civil Code, all corporations, other than those formed for scientific, literary, or solely educational purposes (within which exception the municipality in question does not come), are prohibited from taking under a will, unless expressly authorized by statute to take, and that the statute nowhere authorizes this corporation to take a bequest in trust for charitable uses.

The first of these propositions is obviously true, for the statute in terms so declares. It reads: "Sec. 1275. A testamentary

disposition may be made to any person capable by law of taking the property so disposed of, except corporations other than those formed for scientific, literary, or solely educational purposes, cannot take under a will, unless expressly authorized by statute."

But section 1313 of the same Code is as follows: "No estate real or personal, shall be bequeathed or devised to any charitable or benevolent society, or corporation, or to any person or persons, in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made at least thirty days prior to such death, such devise or legacy, and each of them, shall be valid: *provided*, that no such devises or bequests shall collectively exceed one third of the estate of the testator leaving legal heirs, and in such case a *pro rata* deduction from such devises or bequests shall be made, so as to reduce the aggregate thereof to one third of such estate; and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, next of kin, or heirs, according to law."

This section recognizes the right on the part of the testator to give to charitable uses, with such limitations as the legislature deemed sufficient to prevent extravagant donations—"to the disherison of natural heirs"—for by it, it is expressly declared that a bequest or devise made to any charitable or benevolent society, or *corporation*, or to any person or persons, in trust for charitable uses, if made at least thirty days prior to the death of the testator, *shall be valid*; subject to the *proviso* therein contained.

In the present case, the bequest was made more than thirty days prior to the death of the testator, and it does not fall within the *proviso* to the section. There is, therefore, express statutory authority for it, unless there is something in the nature of the corporation, upon which the trust is conferred, that prevents it from taking. The bequest, as must be admitted, is a most laudable one. It is a charity, for it is not limited to any particular persons. The objects to be benefited were strangers to the testator. They are the destitute women and children of the city of San Francisco. The care and protection and support of these are objects within the general scope and purpose of the municipal corporation, although not its immediate purpose. The purpose

for which the trust was conferred being, therefore, germane to the objects of the corporation, there is no reason why it may not take, under the statute, and abundant authorities sustain the proposition that it may. "Not only may municipal corporations," says Dillon on Municipal Corporations, vol. 2, sec. 567, "take and hold property in their own right by direct gift, conveyance, or devise, but the cases firmly establish the principle, also, that such corporations, at least in this country, are capable, unless specially restrained, of *taking property*, real and personal *in trust*, for purposes germane to the objects of the corporation, or which will promote, aid, or assist in carrying out or perfecting those objects. So such corporations may become *cestuis que trust* within the scope of the purposes for which they are created. And where the trust reposed in the corporation is for the benefit of the corporation, or for a charity within the scope of its duties, it may be compelled, in equity, to administer and execute it. But the legislature may divest a municipal corporation of the power to administer the charitable trusts conferred upon it, and appoint or provide for the appointment of new trustees independent of the corporation, and vest in them the management of such trusts."

Judgment affirmed.

MYRICK, J., SHARPSTEIN, J., THORNTON, J., and MCKEE, J., concurred.

[In Bank. — June 29, 1883.]

W. W. CROSS, ADMINISTRATOR OF THE ESTATE OF T. W. SIGOURNEY, DECEASED, RESPONDENT, v. MARKS ZELLERBACH ET AL., MARKS ZELLERBACH, APPELLANT.

SAME v. SAME — EUREKA LAKE AND YUBA CANAL COMPANY CONSOLIDATED, APPELLANT.

LAW OF THE CASE. — A decision on appeal, based upon a particular state of facts, is not binding in respect to questions arising on a second appeal, and depending for their solution upon facts essentially different.

MORTGAGE FORECLOSURE — PLEADING — CROSS-COMPLAINT — DEMURRER. — On the 1st of July, 1864, T. W. Sigourney brought an action to foreclose a mortgage against the property of a corporation known as the Eureka Lake Com-

pany. Marks Zellerbach and certain other persons, alleged to be subsequent encumbrancers, were made defendants. Zellerbach afterwards succeeded to the rights of the company, and was the only one of the original defendants who appeared in the action. On the 23d of August, 1865, Sigourney and Zellerbach made the agreement referred to in the opinion of the court. The Eureka Lake and Yuba Canal Company Consolidated was organized in pursuance of that agreement, and intervened in the action which was then tried, and resulted in the recovery of a judgment by Sigourney. This judgment was reversed on appeal, and before any other proceedings were taken Sigourney died, and his administrator was substituted as plaintiff. A supplemental complaint was afterwards filed, setting up the agreement, alleging its non-performance by Zellerbach, and making the Eureka Lake and Yuba Canal Company Consolidated a defendant. Zellerbach answered, and the Eureka Lake and Yuba Canal Company Consolidated withdrew its intervention, and filed an answer, and also a cross-complaint claiming affirmative relief against Zellerbach and the plaintiff. Zellerbach demurred to the cross-complaint, and the demurrer was sustained. The action was again tried, and from the judgment rendered, separate appeals were taken by Zellerbach and the Eureka Lake and Yuba Canal Company Consolidated. After an extended examination of the case as presented by the two appeals, *held*, that the demurrer was improperly sustained, and that the court below proceeded on an erroneous view of the rights of the parties.

APPEAL from a judgment of the Superior Court of the county of Nevada.

The facts stated in the opinion cannot be understood without the cross-complaint. This complaint, therefore, is given in full as follows:—

And further and for cause of action, by way of cross-complaint, defendant avers that it is a corporation duly organized in the year 1865, under and pursuant to the laws of the State of New York, and having its principal place of business in the city and county of New York, in the State of New York.

That the corporate name of this defendant, under which it was organized and still exists, is the "Eureka Lake and Yuba Canal Company Consolidated."

That as such corporation it now is, and for more than fifteen years last past has been, the sole and exclusive owner of, in the sole and exclusive possession of, and is entitled to the sole and exclusive possession of all and singular the water ditches, property, land, premises, franchises, and privileges described in the original complaint in this case, and in the mortgage described therein.

That in the year 1865, Marks Zellerbach, one of the defendants herein, had succeeded to the ownership of, and was the exclusive owner of, and possessed of, all and singular the prop-

erty described in the mortgage sought to be foreclosed by the original complaint in this case, holding and owning the same, however, subject to the lien of the two certain mortgages referred to in the agreement hereinafter set forth; and being desirous of selling such property, together with other and similar property in the vicinity thereof, by him, the said Zellerbach, either owned or controlled, and this defendant being willing to purchase all of said property, provided the same could be so purchased free and clear from all liens and encumbrances. Whereupon he, the said Marks Zellerbach, for the purpose of effecting the sale to this defendant, and of removing all such liens and encumbrances from the property about to be conveyed, and more particularly the lien of the mortgage of the plaintiff herein, and the lien of a certain other mortgage held by Sigourney and E. P. Marsellus, did enter into the following agreement with T. W. Sigourney:

“Articles of agreement made and entered into this twenty-third day of August, in the year of our Lord, one thousand eight hundred and sixty-five, between T. W. Sigourney, of the county of Nevada, in the State of California, party of the first part, and Marks Zellerbach, of the city and county of San Francisco, in said State of California, party of the second part.

“Whereas, the said party of the first part is the owner and holder of a certain note made by the Eureka Lake Company, for the sum of ten thousand dollars, which note is secured by a certain mortgage, made by said Eureka Lake Company to the said party of the first part, and hereinafter more particularly described.

“And whereas, the said party of the first part is also the holder and owner of a certain other note, made by the Eureka Lake Company, for the sum of twelve thousand dollars, which note is secured by a certain mortgage, made by the said Eureka Lake Water Company to the said party of the first part and one E. P. Marsellus, and which is also hereinafter more particularly described; and, whereas, the said party of the second part is desirous of purchasing such notes and mortgages, and the interest of said party of the first part therein, and the said party of the first part has consented and agreed to sell and convey the same to him, in manner hereinafter mentioned.

" Now this agreement witnesseth, that in consideration of the premises, and of the sum of one dollar, to him in hand paid, the receipt whereof is hereby acknowledged, the said party of the first part does hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said party of the second part, his executors, administrators, and assigns, in manner following — that is to say, that he will forthwith assign, transfer, and set over, by good and legal assignments, unto the said party of the second part, his executors, administrators, and assigns, the said hereinbefore recited note for ten thousand dollars, made by the said Eureka Lake Company, and all interest now due, or to grow due thereon, together with the said indenture of mortgage, made to secure payment of said note, and which indenture of mortgage is more particularly described as a certain indenture of mortgage, bearing date of the second day of July, A. D. 1859, and made between the Eureka Lake Company, party of the first part, and the said party hereto of the first part of the second part, and which is duly recorded in the office of the recorder of the county of Nevada, in said State of California, in book 3 of Chattel Mortgages, page 359, and also the said other hereinbefore recited note of twelve thousand dollars, made by the said Eureka Lake Water Company, and all interest now due, or to grow due thereon, together with all his interest in the said indenture of mortgage, made to secure the payment of said note, and which indenture of mortgage is more particularly described as follows: —

" A certain indenture of mortgage, bearing date the ninth day of November, A. D. 1861, and made between the Eureka Lake Water Company, party of the first part, and one E. P. Marsellus, and the said party hereto of the first part, parties of the other part, and which is duly recorded in the office of the recorder of said county of Nevada, in book 4 of Mortgages, page 235; and also in book 6 of Chattel Mortgages, page 523, such last described mortgage being given to secure said note of twelve thousand dollars; and also a certain other note of twenty-eight thousand dollars, which is now held and owned by said party hereto of the second part, and further, that he will immediately upon executing such assignments as aforesaid, place such assign-

ments, notes, and mortgages (so far as he can control the possession thereof) in the hands of John Parrott, of the city and county of San Francisco, aforesaid, to be by him held in escrow, and delivered to the said party of the second part, his executors, administrators, or assigns, at the time and in the manner hereinafter declared and set forth. And in consideration of the premises and such assignments so to be made to him as aforesaid, the said party of the second part does hereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree to and with the said party of the first part, his executors, administrators, and assigns, in manner following — that is to say, that immediately upon the execution of such assignments, and the deposit thereof, together with said notes and mortgages as aforesaid, in the hands of John Parrott, as aforesaid, he, the said party of the second part, will make, execute, and deliver to said party of the first part, his certain promissory note for the sum of forty thousand dollars, payable in United States gold coin to the order of said party of the first part, nine months after the date thereof, with interest thereon at the rate of one half of one per cent per month until the maturity thereof; and if not paid at maturity, said note to bear interest at the rate of one and one quarter per cent per month until paid, and also, at the same time, will make, execute, and deliver to said party of the first part his certain other promissory note for the sum of ten thousand dollars, payable in United States gold coin, to the order of said party of the first part, nine months after the date thereof, and interest thereon at the rate of one and one quarter per cent per month; and further, that he will pay, or cause to be paid, the interest on such forty thousand dollar note monthly, in United States gold coin, and on the said ten thousand dollar note, at the end of every three months, in like gold coin. And it is hereby mutually agreed and declared by and between the said parties hereto, that in case the said party of the second part, his executors, administrators, or assigns, shall, at any time hereafter, and before the expiration of the time of payment of the said last hereinbefore mentioned and described note, be desirous of paying off and discharging the same, that, in such case, it shall and may be lawful for him or them so to do, upon giving thirty days' previous notice in writing of such his or their intention, to the

said party of the first part, his executors, administrators, or assigns. And, whereas, it is the intention of said party of the second part to forthwith proceed to organize a corporation for the purpose of carrying on and conducting the works in Nevada and Sierra Counties, California, heretofore owned in and conducted by the said Eureka Lake Water Company (the property formerly belonging to whom the said hereinbefore recited mortgages in part cover), and by the Middle Yuba Canal and Water Company.

“Now this agreement further witnesseth, and it is hereby mutually declared and agreed, by and between the said parties hereto, that the hereinbefore mentioned and described assignments, together with the notes and mortgages so deposited, in escrow as aforesaid, in the hands of said John Parrott, shall remain and continue in his hands as security for the payment of the said hereinbefore mentioned and described notes of forty thousand dollars and ten thousand dollars, until said notes are paid or other security given as next hereinafter mentioned. And said assignments shall in no case be recorded, or filed for record, in the office of the county recorder of said county of Nevada until they are delivered to said party of the second part, as hereinafter provided for. And it is further mutually agreed and declared, by and between the said parties hereto, that if, in the formation of said company, as hereinbefore recited, the said party of the second part, his executors, administrators, or assigns shall deposit with the said John Parrott unencumbered and unassessable stock of said company, to the amount of one sixteenth part or share of the whole capital stock, as collateral security for the payment of said forty thousand dollar note, and the further amount of one sixty-fourth part or share of said stock, likewise unencumbered and unassessable, as collateral security for the payment of said ten thousand dollar note; then and in such case it shall be lawful, and it is hereby made the duty of said Parrott to receive such stock as such collateral security, and immediately thereupon to deliver to said party of the second part, his executors, administrators or assigns, or his or their attorney, the said assignments, notes, and mortgages so deposited with him in escrow as aforesaid; provided always, and it is made the duty of said Parrott, before receiving such stock as security, and delivering

such papers so deposited with him, as aforesaid, to be fully satisfied that the titles of all property formerly belonging to the Middle Yuba Canal and Water Company and the Eureka Lake Water Company are conveyed to, and the same fully and completely vested in the new company so to be formed as aforesaid, free and clear from encumbrances, other than liens, mortgages, or encumbrances held or controlled by said company, or by parties in trust for it, or held in escrow for its benefit.

“And it is further mutually agreed and declared that on payment of said notes the stock so deposited as security, as aforesaid, shall be retransferred and redelivered to said party of the second part, his executors, administrators, or assigns, and on the payment of either of said notes before the other, the part of said stock so specially deposited to secure such note shall be retransferred and redelivered as aforesaid; and on payment of a part of either of said notes, a proportionate part of the stock especially deposited to secure such note shall be so retransferred and redelivered as aforesaid.

“And it is further mutually agreed and declared that in case said notes of forty thousand dollars and ten thousand dollars, or either of them, shall remain wholly unpaid at the maturity thereof, it shall be the duty of said John Parrott to deliver on demand, to the said party of the first part, his executors, administrators, or assigns, the stock especially deposited as security for such notes so remaining unpaid as aforesaid; and in case a part only of said notes, or either of them, shall remain unpaid at the maturity thereof, then a proportionate part only of the stock so especially deposited as security for the note so remaining unpaid in part shall be so delivered to said party of the first part, his executors, administrators, or assigns. And upon the event of said party of the first part, his executors, administrators, or assigns so receiving any of such stock, as lastly hereinbefore provided, it shall and may be lawful for him or them to sell and dispose of said stock, or so much thereof as may be needful, at public sale, having first given thirty days' notice in writing of his or their intention to sell, and of the time and place of such sale, to the said party of the second part, his executors, administrators, or assigns, and

out of the proceeds arising therefrom shall, in the first place, pay the reasonable costs and expenses of such sale, and after payment thereof shall retain the amount due for principal and interest on the note or notes so remaining unpaid, and the balance (if any), together with the stock unsold (if any), he shall immediately pay and transfer to the said party of the second part, his executors, administrators, or assigns.

"In witness whereof, the said parties hereto have, to duplicates hereof, set their hands and seals, the day and year first above written.

"T. W. SIGOURNEY. [SEAL.]

"M. ZELLERBACH. [SEAL.]

"Signed, sealed, and delivered in the presence of

"OCTAVIUS BELL."

And defendant avers that said agreement in writing as above set forth was duly executed by said T. W. Sigourney and by Marks Zellerbach on the 23d day of August, 1865, and was by the parties thereto duly deposited with John Parrott, of the city and county of San Francisco, and the foregoing is a copy thereof, and of an agreement of which an imperfect copy is set out in the supplemental complaint of plaintiff herein.

That thereupon, as defendant is informed, verily believes, and avers the truth to be, T. W. Sigourney did execute assignment of the notes and mortgages in the said agreement specified, including the identical note and mortgage sought to be foreclosed in this action, to Marks Zellerbach, as in said agreement provided for; and the said Marks Zellerbach then and there did deliver to the said T. W. Sigourney his promissory note in writing, dated May 19, 1865, for forty thousand dollars, payable in United States gold coin, at the time and in the manner, with the interest, and in all respects as in said agreement specified, and did also make and deliver at the same time and place, and under the same date, his certain other promissory note for ten thousand dollars, payable in like gold coin, to the said T. W. Sigourney, at the time, in the manner, and with the interest, as in said agreement provided for; copies of which two several promissory notes are set out in the supplemental complaint herein.

And defendant avers that the consideration of the said two promissory notes included the sum of money due to T. W.

Sigourney upon the note secured by mortgage, described in the original complaint herein, and the sum of money due to said Sigourney on account of the note to him and E. P. Marsellus, mentioned in the foregoing agreement; that said promissory notes were, by the said Zellerbach, made and delivered, and by the said Sigourney received and held, in lieu of said former notes secured by mortgages; and thereupon and thereafter the note and mortgage described in the original complaint herein was held only as collateral security for the payment of said promissory notes, for forty thousand dollars and ten thousand dollars, as in the foregoing agreement expressly provided, and as this defendant is informed and verily believes, Marks Zellerbach has, since said date, and up to December 19, 1876, paid all the interest theretofore accrued on said two promissory notes to the said T. W. Sigourney, as in said agreement provided, and as in said notes specified.

Defendant is informed and verily believes and avers the truth to be, that Marks Zellerbach, in further compliance with the agreement aforesaid, and in the manner therein provided for, did deposit, or cause to be deposited, with John Parrott, unencumbered, unassessable paid-up capital stock of the Eureka Lake and Yuba Canal Company Consolidated, the corporation in said agreement specified and intended, to the extent of one sixteenth of all the capital stock of said company, consisting of twelve hundred and fifty shares of stock, as security for the payment of said promissory notes, which said stock, though less in quantity than called for by the contract, was by the parties thereto, and by each of them, taken and treated as a compliance with the contract, and the said stock was managed, controlled, and voted by the said Sigourney, or by his authority, and remained in the hands of John Parrott, as trustee under said contract, until disposed of as hereinafter stated.

And defendant is further informed, verily believes, and avers the truth to be, that, except as to the quantity of stock deposited, Marks Zellerbach has on his part fully kept and performed all the conditions, agreements and covenants by him, the said Zellerbach, to be kept and performed by said contract of August 23, 1865, between him, the said Zellerbach, and the said Sigourney, and hereinbefore set out.

And defendant avers that before receiving the stock aforesaid as security, the said John Parrott, trustee, became and was satisfied and reported to this defendant that the property in said agreement specified was free and clear from all encumbrances and liens, excepting only such as were held by defendant or by parties in trust for it, or in escrow for its benefit.

And defendant avers that the said Marks Zellerbach represented to it that the encumbrances in the agreement hereinbefore set out and referred to were so deposited as and for him, to be delivered up to him and cancelled upon the conveyance to it, the defendant, of the property of the Eureka Lake Company — the Eureka Lake Water Company — the Middle Yuba Canal Company and certain other property, upon the issuing and deposit of the stock called for by said agreement with John Parrott for T. W. Sigourney.

That relying upon such statement, and believing the same to be true, this defendant was thereby induced to purchase, and on, to wit, December 20, 1865, did purchase from the said Marks Zellerbach, and take and receive from him, the said Zellerbach, a deed of conveyance whereby he conveyed to defendant, in fee simple, all and singular the property in said agreement specified and referred to, including all the property in the mortgage in this cause described; that by said deed of conveyance the said Marks Zellerbach warranted and bound himself to defend the title to the property conveyed as against all liens and encumbrances, or adverse claims, and covenanted to and with defendant, the grantee in such conveyance, that all of said property was free and clear from liens and encumbrances of every nature and kind whatsoever.

That the conveyance aforesaid was duly recorded in the office of the county recorder of Nevada County, California, on, to wit, January 29, 1866, in book 21 of Deeds, pages 79-86, Records of Nevada County, and thereupon the stock was by this defendant issued to Marks Zellerbach, as called for by said contract, and by him deposited with John Parrott as aforesaid, and thence hitherto, until sold as hereinafter stated, has been managed and controlled by T. W. Sigourney, as collateral security for the payment of the promissory notes aforesaid.

And defendant denies that there is, in any event, due to

plaintiff the sum of ten thousand dollars and interest thereon at two and one half per cent per month, less five hundred dollars paid, as in his complaint specified; and in support of such denial avers that the sum of ten thousand dollars, the principal due on the promissory note secured by mortgage, and set out in the original complaint, formed a part of the consideration for the two promissory notes set out in the supplemental complaint.

And defendant is informed, verily believes, and avers the truth to be, that Marks Zellerbach has become and is insolvent, and is wholly without means to respond to the defendant for the damage it will sustain, or for any part thereof, if the mortgage herein is foreclosed, and decreed to be satisfied out of the property in such mortgage described, viz., out of the property of this defendant so conveyed to it under covenants and warranty by said Zellerbach as aforesaid.

Defendant further avers, that on, to wit, September 9, 1878, a decree of foreclosure was duly entered in this cause by the Hon. District Court, in and for the county of Nevada, which court was the predecessor to this honorable court, whereby and by virtue whereof, it was among other things decreed that the twelve hundred and fifty shares of capital stock aforesaid be first sold to satisfy the amount found due to T. W. Sigourney, viz., \$63,077.74, and interest thereon from September 9, 1878, at seven per cent per annum, and that the residue of said sum if any, after a sale of said stock, be made by a sale of the mortgaged premises in the mortgage set forth in this cause; that in said cause the court had jurisdiction of the parties, hereto, and of all of them, and of the subject-matter in the cause involved; that said judgment was duly entered, and was and remained in full force and effect until the 30th day of August, A. D. 1880, when it was, on an appeal therefrom by Marks Zellerbach, reversed by the Supreme Court of the State of California, as of the date of May 20, 1880, and a new trial ordered herein.

Defendant further avers that after the entry of the judgment and decree aforesaid, an order issued to the sheriff of Nevada County, in due form, commanding him to sell the twelve hundred and fifty shares of the capital stock so issued to T. W. Sigourney, as collateral security; whereupon said stock was, by the said sheriff, duly advertised for sale at public auction on the

13th day of February, 1879, on which last named day it was sold to this defendant for the full amount of the judgment and costs in said cause, to wit, for \$66,255.63, said defendant being the highest and best bidder therefor.

And defendant avers that the sum bid by it for the said twelve hundred and fifty shares of stock was in excess of the market value thereof at that time, by at least twenty thousand dollars; that this defendant was induced to bid said sum of money thereon by Marks Zellerbach who represented to defendant that, being bound by his covenants in the deed of conveyance by him made to this defendant as aforesaid, to hold the defendant harmless from the lien of plaintiff's mortgage, he was desirous to have the twelve hundred and fifty shares of stock sold for a sum sufficient to satisfy the entire demand of plaintiff and costs; and that, if this defendant would bid therefor such sum, he, the said Zellerbach, would, upon being given time therefor, purchase from this defendant said twelve hundred and fifty shares at the price by it paid therefor, and interest thereon; whereupon, and relying upon such statements, defendant purchased the stock as aforesaid for said sum of \$66,255.63, and thereupon, and on the same day, viz., on the 13th day of February, 1879, this defendant entered into a written agreement with said Marks Zellerbach whereby, in consideration of the payment to it by the said Zellerbach, at any time within eighteen months next thereafter, of the sum of \$66,255.63, and interest thereon at nine per cent per annum, it would deliver to said Marks Zellerbach the said twelve hundred and fifty shares of capital stock so by it purchased, together with an additional one thousand shares of such stock, and would deliver to Charles Allenberg an additional one thousand shares of its capital stock, and pay to said Allenberg two thousand dollars, and to said Marks Zellerbach the sum of two thousand dollars; which said two several sums of money were by defendant paid, and said thousand shares of stock were by it delivered to said Charles Allenberg, pursuant to said agreement, but that the said Zellerbach has neglected and refused to pay said sum of \$66,255.63, or any part thereof, though the period of eighteen months has long since elapsed.

And defendant avers that by his acts in the premises as above set forth, and in various other ways, the said Zellerbach

approved and ratified the hypothecation and holding said stock as collateral for the payment of said promissory notes, and the sale thereof and the application of the proceeds arising therefrom to the satisfaction of the sum of money due to plaintiff herein.

Defendant further avers that the said sum of \$66,255.63, realized from the sale of said twelve hundred and fifty shares of stock, was, after deducting costs, expenses, and fees of sale, paid over to T. W. Sigourney, and by him applied in satisfaction of his claim in this action.

Wherefore, in consideration of the premises, defendant prays this honorable court that it will, by its final decree herein, adjudge that said sum of money so realized from the sale of said twelve hundred and fifty shares of stock stand in lieu of and as the substitute for said stock.

That the plaintiff herein be decreed to retain and hold the same in full satisfaction of his claim in this action.

That plaintiff be adjudged to fully satisfy of record, and to cancel and deliver up the note and mortgage described in the original complaint herein, and to cancel and deliver up to Marks Zellerbach, defendant herein, the promissory notes for forty thousand dollars and ten thousand dollars in the supplemental complaint described, and that the note and mortgage to Sigourney & Marsellus be decreed to be fully satisfied, and for such other and further relief as may be just, proper, and in consonance with equity, and for costs of suit herein.

C. W. Cross, R. H. Taylor, William Irvine, and Garber, Thornton & Bishop, for Marks Zellerbach, on the appeal taken by him, and as respondent on the appeal of the Eureka Lake and Yuba Canal Company Consolidated.

Wilson & Wilson; Searles, Niles & Searles, and Stanley, Stoney & Hayes, for the Eureka Lake and Yuba Canal Company Consolidated, on its appeal, and as respondent on the appeal of Zellerbach.

H. V. Reardan, and T. B. Reardan, for the Plaintiff as respondent on both appeals.

Ross, J.—These cases have been argued and submitted

together. The first is an appeal by the defendant Zellerbach, and the second an appeal by the defendant, the Eureka Lake and Yuba Canal Company Consolidated. These defendants and the plaintiff are the real parties to the controversy. On the first appeal of Zellerbach, reported in 55 Cal. 431, the appeal came up and was considered on, (1) the complaint filed July 1, 1864, by Sigourney — the present plaintiff's intestate — which complaint was in the usual form for the foreclosure of a mortgage given to secure the payment of a promissory note for ten thousand dollars, executed, July 2, 1859, to Sigourney, by a corporation called the Eureka Lake Company; (2) a complaint in intervention filed by the Eureka Lake and Yuba Canal Company Consolidated; (3) the answer of Sigourney to the complaint in intervention; and, (4) the findings and decree of the court. There were some other pleadings in the case, not, however, important to mention.

On that appeal it was rightly held here that the decree of the court then under review, which adjudged Sigourney a lien on the twelve hundred and fifty shares of the stock of the Eureka Lake and Yuba Canal Company Consolidated, to secure the payment of the ten thousand dollar note set out in the complaint then before the court, and which directed a sale of that stock to pay the amount of that note, was erroneous — first, because the complaint contained no averment to sustain such decree; secondly, because the contract between Sigourney and Zellerbach of date August 23, 1865, did not provide for any lien on the shares of stock as security for the note then in suit; thirdly, because, even if the court could have looked to the complaint in intervention in support of the decree, that complaint showed full compliance on the part of Zellerbach with all of the agreements, covenants, and conditions of the contract of August 23, 1865, which performance, according to the terms of that contract, entitled Zellerbach to the surrender of the note and mortgage on which the complaint, then under consideration, was based, as also the notes and the mortgage made to Zellerbach and Marsellus by the Eureka Lake Water Company for cancellation; and lastly, because the findings then before us showed that none of the stock in question was ever accepted by Sigourney as security, or as a compliance with the contract of August 23,

1865, but, on the contrary, that it was deposited with Parrott only in escrow, and that the contingency upon which the transfer was to take effect had never happened.

But, by the records now brought here, the case is presented in a very different aspect. It now appears that, after the going down of the remittitur from this court, the plaintiff was permitted to, and did, file in the court below a supplemental complaint, to which Zellerbach and the Eureka Lake and Yuba Canal Company Consolidated filed an answer; the complaint in intervention of the last-mentioned company was, by the permission of the court, withdrawn, and there was filed by it a cross-complaint, a demurrer to which, filed by Zellerbach, was sustained by the court, and which ruling constitutes the ground of the present appeal, taken by the cross-complainant — the other appeal being brought by Zellerbach.

An examination of the pleadings shows that the decision of this court on the former appeal does not cover the points now presented. Facts are now alleged which were not then before the court, and which, if true, materially change the rights of the parties. The averments of the cross-complaint must, of course, be taken as true, and such of the averments of the supplemental complaint as were found by the court below to be true, and such as are not denied, must also be accepted as facts on these appeals. Both the supplemental and cross-complaints allege, and the court below on the last trial found the fact to be, that, in pursuance of the provisions of the contract of August 23, 1865 — which is fully set out in both the supplemental and cross-complaints — Sigourney executed assignments to Zellerbach of the note and mortgage on which the original complaint was based and of the twelve thousand dollar note made to him by the Eureka Lake Water Company, together with his (Sigourney's) interest in the mortgage given by the Eureka Lake Water Company to secure the payment of the note last mentioned and the twenty-eight thousand dollar note given to Marsellus, and that thereupon Zellerbach executed and delivered to Sigourney his two promissory notes for forty and ten thousand dollars, respectively, as provided for by the contract of August 23, 1865, and which are set forth in the supplemental and cross-complaints; and, further, that pursuant to the provisions of

the contract of August 23d, Sigourney deposited the note and mortgage set out in the original complaint, and the twelve thousand dollar note and mortgage securing the same, together with the assignments thereof, with Parrott, to be by him held as collateral security for the payment of the forty and ten thousand dollar notes executed to Sigourney by Zellerbach, or until Zellerbach should deposit with Parrott as security for said two last mentioned notes, the shares of stock of the Eureka Lake and Yuba Canal Company Consolidated as provided for in and by the contract of August 23d. Upon the deposit of the stock as provided for by the contract, or upon the payment of Zellerbach's notes for forty and ten thousand dollars, Parrott was to deliver up to Zellerbach for cancellation the notes and mortgages deposited with him by Sigourney. Zellerbach, it must be remembered, had become the owner of the property covered by the mortgage set out in the original complaint and of that covered by the mortgage executed by the Eureka Lake Water Company to secure the twelve and twenty-eight thousand dollar notes given to Sigourney and Marsellus, respectively, the latter of which he had also acquired; and being also the owner and controller of other property of like character as that mortgage, had become desirous of organizing a corporation in the State of New York, to which he might sell all of the said property. To accomplish his purpose in that regard it became necessary to free the property of all liens, and it was with that end in view that he entered into the contract with Sigourney — the holder of the liens — of date August 23, 1865. Both the supplemental and cross-complaints, as also the findings of the court below, show that Sigourney kept and performed all of the agreements, covenants, and conditions on his part provided to be kept and performed, in and by that contract. Zellerbach performed a part of his. He executed the forty and ten thousand dollar notes to Sigourney, and paid the interest thereon to the 19th day of December, 1876. He also deposited with Parrott, pursuant to his agreement, the one sixteenth part of the capital stock of the Eureka Lake and Yuba Canal Company Consolidated, consisting of twelve hundred and fifty shares. But he did not deposit with Parrott an additional one sixty-fourth part of the capital stock of that corporation as

in and by the contract of August 23, he had agreed to do. The cross-complaint, however, alleges that the twelve hundred and fifty shares he did deposit were so deposited, "as security for the payment of said promissory notes (for forty and ten thousand dollars respectively), which said stock, though less in quantity than called for by the contract, was by the parties thereto, and by each of them, taken and treated as a compliance with the contract, and the said stock was managed, controlled, and voted by the said Sigourney, or by his authority, and remained in the hands of John Parrott, as trustee under said contract until disposed of as hereinafter stated."

Parrott, according to the averments of the cross-complaint, having, before receiving the stock, become satisfied, and so reported to the cross-complainant, that the property was in the condition required by the contract of August 23, 1865, and Zellerbach having represented to it that the encumbrances in the said contract referred to were deposited for him to be delivered up and cancelled upon the conveyance to the cross-complainant of the property, and upon the deposit of the stock with Parrott as by the contract provided, the cross-complainant, relying upon such statements and believing them to be true, was thereby induced to purchase, and on December 20, 1865, to take from Zellerbach a deed of conveyance, whereby he conveyed to it all of the property referred to in the contract of August 23d, including that described in the mortgage sought to be foreclosed by the original complaint filed in this action, and by which deed Zellerbach warranted and bound himself to defend the title to the property conveyed as against all liens and encumbrances, or adverse claims, and covenanted to and with the grantee, the cross-complainant here, that all of the property was free and clear of liens and encumbrances of every nature and kind whatsoever. When the twelve hundred and fifty shares of stock which were deposited with Parrott were sold under the decree of the District Court, which was subsequently reversed by this court on the former appeal, they were purchased by the cross-complainant for the sum of \$66,255.63, which, according to the averments of the cross-complaint, was at least twenty thousand dollars in excess of the market value thereof. Cross-complainant, according to the averments of its

complaint, was induced to bid said sum for the stock by Zellerbach, who represented to it that, being bound by the covenants in his deed of conveyance to hold cross-complainant harmless from the lien of plaintiff's mortgage, he was desirous of having the twelve hundred and fifty shares of stock sold for a sum sufficient to satisfy the entire demand of plaintiff and costs, and that, if cross-complainant would bid therefor such sum, he, Zellerbach, would, upon being given time therefor, purchase from cross-complainant said twelve hundred and fifty shares at the price by it paid therefor, with interest thereon; whereupon, and relying upon such statements, cross-complainant purchased the stock as aforesaid, and thereupon, and on the same day, to wit, February 13, 1879, cross-complainant entered into a written agreement with Zellerbach, whereby, in consideration of the payment to it by him, at any time within eighteen months thereafter, of the sum of \$66,255.63, and interest thereon at nine per cent per annum, it would deliver to the said Zellerbach the twelve hundred and fifty shares so by it purchased, together with an additional one thousand shares of such stock, and would deliver to one Allenberg an additional one thousand shares, and pay to said Allenberg two thousand dollars in money, and to the said Zellerbach a like sum of two thousand dollars in money; which said two several sums of money were so paid by cross-complainant, and said one thousand shares of stock were by it so delivered to Allenberg; by all of which, it is averred, Zellerbach approved and ratified the hypothecation and holding of the twelve hundred and fifty shares of stock as collateral security for the payment of his notes for forty and ten thousand dollars respectively, and approved and ratified the sale thereof, and the application of the proceeds thereof, to the satisfaction of the amount due the plaintiff. The amount so bid and paid by the cross-complainant for the stock was, according to the averments of the cross-complaint, as also those of the supplemental complaint, sufficient in amount, after deducting costs and the expenses of sale, to fully satisfy the plaintiff's claim in this action, and was, by the officer making the sale, paid to and received by Sigourney; and both the supplemental and cross-complaints pray that the plaintiff be decreed to retain and hold the same in full satisfaction of his claim in this action, and that

he be adjudged to fully satisfy of record, and to cancel and deliver up the note and mortgage described in the original complaint, and to cancel and deliver up to Zellerbach the forty and ten thousand dollar notes executed by him, and that the twelve thousand dollar note executed to Sigourney by the Eureka Lake Water Company, together with the mortgage executed by that corporation to Sigourney and Marsellus, be decreed to be fully satisfied.

If the facts be as stated — and for the purposes of our decision we must so consider them — why should not such a decree be entered? It is true that the original complaint was one simply for the foreclosure of the mortgage executed July 2, 1859, by the Eureka Lake Company. But, during the pendency of the action, Zellerbach, who had become the owner of the property subject to the liens of Sigourney, desired to free the property of those liens in order that he might sell it, with other property, to the Eureka Lake and Yuba Canal Company Consolidated. For that purpose he made the contract with Sigourney of August 23, 1865. No objections have been urged to the validity of that contract, and it is clear that none could be successfully urged. Sigourney performed his part of the contract, and Zellerbach performed his obligations thereunder in part. He executed to Sigourney the forty and ten thousand dollar notes therein provided for, and from that time forth, according to the terms of the contract, the note and mortgage set out in the original complaint, as also the note and mortgage executed by the Eureka Lake Water Company, were held only as collateral security for the payment of Zellerbach's notes for ten and forty thousand dollars respectively. The latter became the principal obligations, and were assumed by Zellerbach in order that he might free the property of the liens held by Sigourney, to the end that he might effect the sale he contemplated making to the Eureka Lake and Yuba Canal Company Consolidated. In further pursuance of the contract with Sigourney, he (Zellerbach) deposited with Parrott twelve hundred and fifty shares of the capital stock of the Eureka Lake and Yuba Canal Company Consolidated. These shares were to be held as collateral security for the payment of the forty thousand dollar note executed by Zellerbach to Sigourney. The additional amount of one

sixty-fourth part of the capital stock of the same corporation which the contract required Zellerbach to deposit as collateral security for the payment of the ten thousand dollar note executed by him to Sigourney, he did not deposit; but the cross-complaint alleges that the twelve hundred and fifty shares so deposited were by both Sigourney and Zellerbach "taken and treated as a compliance with the contract, and the stock was managed, controlled, and voted by the said Sigourney, or by his authority, and remained in the hands of John Parrott as trustee under said contract" until taken and sold by the sheriff.

Whether under such a state of facts a lien attached to the twelve hundred and fifty shares of stock for the payment of the forty and ten thousand dollar notes executed by Zellerbach, or either of them, we find unnecessary to determine; for when the stock was sold under and by virtue of the decree of the District Court, which was subsequently reversed by this court, the cross-complainant purchased it, at the instance and at the request of Zellerbach, and under a definite and specific contract with him, for a sum largely in excess of its market value, and sufficient to discharge what Zellerbach had bound himself to discharge, to wit: the liens on the property held by Sigourney. The money thus paid and bid for the twelve hundred and fifty shares of the stock of the Eureka Lake and Yuba Canal Company Consolidated, less costs and the expenses of sale, was paid over to Sigourney, and according to the averments of the supplemental and cross-complaints, was sufficient in amount to satisfy the entire demand of the plaintiff. If the facts be as stated we see no reason why a decree should not be entered substantially as prayed for in both the supplemental and cross-complaints, to the effect that the plaintiff retain and hold the money so paid in full satisfaction of his demand in the action, and that he be adjudged to satisfy of record and to cancel and deliver up the note and mortgage described in the original complaint, and to cancel and deliver up to Zellerbach the forty and ten thousand dollar notes executed by him, and that the twelve thousand dollar note executed to Sigourney by the Eureka Lake Water Company, together with the mortgage executed by that company to Sigourney and Marsellus be decreed to be fully satisfied. Such decree would give effect to the contracts of the

parties and do exact justice between them. All of the parties in interest are, with sufficient pleadings, before the court of equity, which can and will take hold of the entire case and give effect to their contracts legally made.

We cannot at all assent to the proposition that the agreement under which the cross-complainant purchased the stock was "binding on nobody, and utterly void for want of consideration." The liens held by the plaintiff were the very liens Zellerbach had covenanted to remove; the debt for which they stood as security had become his debt, and, according to the facts as now made to appear, it was for the very purpose of paying that debt and satisfying those liens that he induced the cross-complainant to pay for the stock a sum of money largely in excess of its value and sufficient to pay the debt, and thereby discharge the liens, agreeing at the same time, and as part of the same transaction, to repurchase the stock, within a given time, at the same price (with interest as provided for), and obtaining for himself two thousand dollars in money, and a contract for an additional one thousand shares of stock, together with two thousand dollars in money, and one thousand shares of stock for one Allenberg. Performance of the agreement on the part of the cross-complainant is averred, and it would be grossly inequitable to permit Zellerbach to repudiate the agreement under which, at his request, the money of the cross-complainant went to pay his debt, and to remove encumbrances which he had, in the most solemn manner, bound himself to remove, and by which he received other and further considerations of value.

Judgment reversed and cause remanded, with directions to the court below to overrule the demurrer to the cross-complaint, and for further proceedings not inconsistent with this opinion.

MYRICK, J., SHARPSTEIN, J., MCKEE, J., and THORNTON, J., concurred.

EXTRA ANNOTATION
TO
PRECEDING VOLUME



VOLUME LXIII.

83 Cal. 3-5. . MARTIN v. THOMPSON.

Lien of a duly recorded mortgage of growing crops continues after severance so long as crop remains on mortgagor's land; it is not lost by tortious removal by a third person, p. 4.

Cited in *Wilson v. Prouty*, 70 Cal. 197, to same effect; *Ruggles v. Cannedy*, 127 Cal. 296, on point that chattel mortgage is void unless properly recorded (cf. dissenting opinion, page 311); *Hendy etc. Works v. Dillon*, 135 Cal. 11, granting right of intervention in replevin suit under facts stated; *Summerville v. Stockton etc. Co.*, 142 Cal. 544, holding lien not lost, under facts stated; *Beamer v. Freeman*, 84 Cal. 557, holding that an unrecorded mortgage of personal property is void as against a creditor acquiring a lien by attachment prior to the record, whether it is void as to all creditors doubted and not decided; *Chittenden v. Pratt*, 89 Cal. 183, to same effect as the principal case, and it makes no difference that the tortious removal may have been done in good faith.

63 Cal. 5-9. ESTATE OF SBARBORO.

Petition for revocation of probate must be filed with clerk of court within one year after probate. This law is imperative, not directory, pp. 7, 8.

Followed in *Estate of Sbarboro* (second appeal in same case), 70 Cal. 149; cited in *Edwards v. Grand*, 121 Cal. 256, discussing "filing"; *Estate of Davis*, 136 Cal. 594, holding rule operative as to nonresident heir alleging fraud in the probate.

63 Cal. 9-12. O'CONNOR v. FOGLE.

Title by Adverse Possession against a patentee of the land.—Time begins to run from date of the patent, p. 11.

Cited to same effect in *Wilhoit v. Tubbs*, 83 Cal. 288; note to 85 Am. Dec. 172, on estoppel in pais.

63 Cal. 12-16. MOORE v. JONES.

Community and Separate Property.—On death of wife the presumption is that property standing in her name was community property; the burden of proving the contrary is on the heirs, p. 14.

Cited in *Tibbetts v. Fore*, 70 Cal. 245, as to the presumptions attending the possession of property by either spouse; *Jackson and Thomas v. Torrence*, 83 Cal. 529, holding that by the amendment of 1889 to section 164 of the Civil Code the rule as to presumption has been changed; *Mortimer v. Marder*, 93 Cal. 177, to same effect as principal case; note to 86 Am. Dec. 637, on presumption in case of real property acquired during marriage; note to 86 Am. Dec. 638, on how presumption may be rebutted; 86 Am. Dec. 639, on against whom presumption may be rebutted; note to 96 Am. Dec. 423, on presumption created by deed.

Community Property, on death of wife, belongs to husband without administration, p. 14.

Cited to same effect in *Estate of Rowland*, 74 Cal. 525, 5 Am. St. Rep. 465, and that husband cannot have his claim of ownership determined upon a proceeding for the distribution of his wife's estate.

Separate Property, What Constitutes.—If purchased with separate funds, it becomes separate property, p. 15.

Cited in note to 86 Am. Dec. 634.

Res Gestae.—Declarations by husband that the purchase money was the separate property of the wife are admissible, and, if made at the time of the purchase, are part of the *res gestae*, p. 16.

Cited in note to 86 Am. Dec. 633, 641, on declarations of husband as evidence; note to 96 Am. Dec. 76, as to *res gestae*.

63 Cal. 16-18. DENNIS v. WINTER.

Probate Sale ordered by court cannot be collaterally attacked, except for want of jurisdiction, p. 17.

Cited in *Baum v. Roper*, 132 Cal. 48, as to attack on sufficiency of petition for sale; *Smith v. Biscailuz*, 83 Cal. 359, holding that the judgment of the court as to the sufficiency of the evidence upon which it proceeded could not be attacked collaterally; *Zilmer v. Gerichten*, 111 Cal. 77, to same effect; note to 29 Am. St. Rep. 497, on collateral attack.

63 Cal. 19. PEOPLE v. GARCIA.

Homicide.—Evidence of statements of accomplice as to weapon employed is admissible, p. 19.

Cited in *People v. Morine*, 138 Cal. 628, holding admission of similar evidence not prejudicial error.

63 Cal. 21. EX PARTE COX.

The legislature cannot delegate to an officer or board the power of declaring what acts shall constitute a misdemeanor, except to municipal corporations for local legislation, p. 21.

Cited in *Ex parte McNulty*, 77 Cal. 166, 11 Am. St. Rep. 258, with reference to a provision in the act of April 3, 1876 (to regulate the practice of medicine), but not deciding the point; S. C. p. 170, 11 Am. St. Rep. 261, in concurring opinion of Paterson, J., pointing out that, under the circumstances, the ruling of the principal case could not apply; *Harbor Commrs. v. Redwood Co.*, 88 Cal. 494, 22 Am. St. Rep. 322, applying the ruling to the board of harbor commissioners of Eureka; *United States v. Blasingame*, 116 Fed. 655, provision of sundry civil appropriation act of 1897, making it a crime to violate any rule or regulation thereafter to be made by Secretary of Interior for protection of forest reservations, is void; *United States v. Maid*, 116 Fed. 653, perjury under Revised Statutes, section 5392, cannot be based on affidavit of nonmineral character of land made in support of homestead entry, though land office regulation requires such affidavit, since it is not required by Revised Statutes, section 2290. Distinguished in *Hurst v. Warner*, 102 Mich. 245, 47 Am. St. Rep. 530, as to rules and regulations of the board of health for disinfecting baggage. Cited in note to 47 Am. St. Rep. 541, on quarantine and health laws and regulations.

63 Cal. 22-27. ROBERTS v. COLUMBET.

A location upon a school land warrant is valid as between the state and the locator, and as soon as the land is listed to the state the title passes to the locator; proof of the facts upon which title rests is admissible under a general denial (*Hastings v. Devlin*, 40 Cal. 358, distinguished), p. 24.

Cited in *Hooper v. Young*, 140 Cal. 278, discussing burden of proof on part of claimant under second patent; *Hyde v. Mangan*, 88 Cal. 326, apparently to the point that the party having a title could be entitled to some affirmative relief in the nature of a removal of a cloud if asked for; *Wixon v. Devine*, 91 Cal. 481, as to what might be shown under an answer amounting to confession and avoidance, in an action to determine the rights of parties to a stream of water; note to 87 Am. Dec. 80, on public lands not liable to location until surveyed.

63 Cal. 28-29. PEOPLE v. SCHMIDT.

Malice Aforethought, or words equivalent thereto, must be alleged in an indictment for murder, p. 28.

Cited in *People v. Schmidt* (same case), 64 Cal. 262, showing the ground for former reversal of the judgment; note to 87 Am. Dec. 102, on necessary ingredients to murder.

63 Cal. 30-33. McCREERY v. FULLER.

Res Adjudicata.—Where issues are made and decided with or without trial, the judgment is conclusive between the same parties as to all questions which were directly involved in the issues and which were or might have been presented and decided, p. 32.

Cited in *Partridge v. Shepard*, 71 Cal. 476, holding that a judgment by consent was of the same force as one entered after a trial of the issues; *Peterson v. Weissbein*, 75 Cal. 177, holding that as res adjudicata a judgment was conclusive between the parties thereto and their successors in interest.

General Citation.—*Lemmon v. Osborn*, 153 Ind. 177.

63 Cal. 33. WILLARD v. ARCHER.

Verdict for "defendant" in case of two defendants is sufficient, p. 33.

Cited in *Butler v. Estrella etc. Co.*, 124 Cal. 241, sustaining judgment based on similar verdict.

63 Cal. 34-36. CERKEL v. WATERMAN.

An agent who receives and sells goods, which he supposes to belong to his principal, to whom he accounts for the proceeds, is liable for the value of the goods to the true owner, p. 35.

Cited in *Swim v. Wilson*, 90 Cal. 131, 25 Am. St. Rep. 113, as having overruled *Rogers v. Huie*, 2 Cal. 571, and that a stockbroker who innocently sells certificates of stock for one who has stolen them is guilty of conversion. Note to 24 Am. St. Rep. 804, on intent of wrongdoer, when material.

63 Cal. 36-38. ESTATE OF BURTON.

Probate Law—Pleading.—Rules of pleading and practice are same as in civil actions, p. 37.

Cited in *Estate of Young*, 123 Cal. 348, holding fact admitted when not denied.

Probate Homestead.—The duty of the court to set apart a homestead is imperative, and the effect is only to withdraw such portion from the other assets as exempt from the claims of creditors, p. 38.

Cited in *Estate of Ackerman*, 80 Cal. 210, 13 Am. St. Rep. 117, distinguishing between a probate homestead and a recorded homestead; *Estate of Gilmore*, 81 Cal. 243, to the same effect.

Title to Probate Homestead cannot be tried in the probate proceedings, p. 38.

Cited in *Estate of Groome*, 94 Cal. 72, to same effect as to question of adverse ownership; *Estate of Kimberly*, 97 Cal. 282, to the same

effect; *Noble v. Superior Court*, 109 Cal. 527, on the question of review of proceedings in insolvency in setting apart a homestead.

General Citation.—*Nagle v. Robins*, 9 Wyo. 253.

63 Cal. 38-39. HOLLISTER v. SHERMAN.

Sale of Taxes on land assessed to the state university for a mortgage will not be enjoined, as all the proceedings are invalid, p. 39.

Cited in *Archbishop of San Francisco v. Shipman*, 69 Cal. 591, as to what must be shown to warrant the interference of a court of equity to remove a cloud on title; *People v. Board of Supervisors*, 77 Cal. 137, holding that the owner of property subject to a mortgage to the state university was to be assessed only for the balance of its value; note to 69 Am. Dec. 199, on interference of equity to restrain collection of taxes.

63 Cal. 39-43. MARTIN v. DURAND.

Confirmation of Lien Lands by act of Congress of March 1, 1877, applied to selections which had been certified to the state, but which were defective or invalid, p. 42.

Cited in *Green v. Hayes*, 70 Cal. 280, holding that as the act did not affect the rights of a prior settler in good faith, the decision of the department of the interior upon the question of the settlement being in good faith was final, unless the court could see clearly where the mistake of law was; *Hambleton v. Dulain*, 71 Cal. 142, describing the intention of the act; *People v. Noys Lumber Co.*, 99 Cal. 461, to the like effect; *Durand v. Martin*, 120 U. S. 366, confirming the ruling, and holding that the act applied to every defective certificate.

Damages.—A general averment of and prayer for relief in a specific sum is, in the absence of a special demurrer, sufficient to support a finding of the value of the use and occupation, and if that constitutes the whole or part of the damage arising from the unlawful detention, the judgment is right, p. 43.

Cited in *Haggin v. Lorentz*, 13 Mont. 411, holding, in an action of ejectment praying damages by reason of wrongful ouster, a general allegation of damage was sufficient, and a judgment for the amount claimed will not be reviewed on appeal.

63 Cal. 44-47. HEINLEN v. CROSS.

Mandamus Lies to compel court to punish for violation of injunction whose force was not suspended by appeal, p. 45.

Cited in *Cahill v. Superior Court*, 145 Cal. 46, granting mandamus to compel superior court to hear motion to vacate order setting apart homestead; *Crocker v. Conrey*, 140 Cal. 219, noted under *Merced Mining Co. v. Fremont*, 7 Cal. 130.

A perpetual injunction is not suspended by an appeal from the final judgment, p. 45.

Cited in *Lambert v. Haskell*, 80 Cal. 621, to the like effect as to the damages which can be recovered when, by decree, a temporary injunction is made perpetual and reversed on appeal; *Rogers v. Superior Court*, 126 Cal. 187, 188, noted under *Merced etc. Co. v. Fremont*, 7 Cal. 130; *Merchant v. Pielke*, 10 N. Dak. 48, holding contempt not purged by reason of such appeal; *Hawkins v. State*, 126 Ind. 297, to same effect as principal case, and that until reversed the decree must be obeyed; *Mining Co. v. Mining Co.*, 5 Utah, 153, holding that disobedience to an injunction; pending an appeal, was punishable as contempt; *Elliot v. Whitmore*, 10 Utah, 245, in dissenting opinion of Miner, J., who held that an order refusing to suspend an injunction should not be disturbed during the pendency of the appeal, the prevailing opinion holding that the ruling of the principal case did not apply to a mandatory injunction.

General Citation.—*Merchant v. Pielke*, 9 N. D. 249.

63 Cal. 47-50. **MARTEL v. MEEHAN.**

Unlawful Detainer lies only as provided by statute, p. 50.

Cited in *Ben Lomond W. Co. v. Sladky*, 141 Cal. 623, holding action not maintainable as against assignee of lease who had surrendered possession to subsequent assignee.

An action to recover leased premises for failure to pay rent will not lie against executor or administrator of deceased tenant, p. 50.

Distinguished in *Knowles v. Murphy*, 107 Cal. 112, as not applicable to action brought by an executor, who is specifically authorized to do so under section 1161 of the Code of Civil Procedure.

63 Cal. 53-55. **PORTER v. HOPKINS.**

Injunction—Undertaking for Damages.—What counsels' fees are properly allowable in a suit on the undertaking, pp. 54, 55.

Cited in *Lambert v. Haskell*, 80 Cal. 623, confining the ruling to fees on the appeal from an order refusing to dissolve the injunction; *Donahue v. Johnson*, 9 Wash. 191, to same effect.

Filing Memorandum of Costs must be done within five days after notice of the decision; time runs from the filing of the findings and conclusions of law signed by the court, p. 55.

Cited in *Mullally v. Benevolent Soc.*, 69 Cal. 561, holding that when the successful party shows actual knowledge of the decision a costs bill not filed within the five days was properly struck out; *Cantwell v. McPherson*, 2 Idaho, 1047, holding that failure to file memorandum within the time entailed loss of the costs.

63 Cal. 56-62. MORAN v. ABBEY.

Leading Questions.—The examination of a witness is a matter within the sound discretion of the court, who may allow or disallow leading questions, p. 58.

Cited in *People v. Clary*, 72 Cal. 60, to the same effect.

Newly-discovered Evidence.—That is not newly-discovered evidence which was known to a witness at the trial of a case, and might have been obtained from him by due attention, p. 57.

Distinguished in *State v. Stowe*, 3 Wash. 210, and held not to apply to additional cumulative evidence to support an alibi.

Payment of Note by a third party at request of the maker without concurrence or privity of the payee does not constitute a purchase of the note; it extinguishes the obligation, p. 61.

Cited in *Wheeler v. Bull*, 131 Cal. 425, *Lee v. Field*, 9 N. Mex. 439, 440, and *First Nat. Bank v. School Dist.*, 6 Wyo. 491, holding payment shown under facts stated; *Binford v. Adams*, 104 Ind. 43, 44, holding that whether a given transaction is an extinguishment of the debt is generally a question of fact; that payment discharges the debt, and as to what constitutes a purchase; *Ferree v. New York Security etc. Co.*, 74 Fed. Rep. 773, holding that the owner of a note cannot be made a seller without his knowledge and consent.

63 Cal. 62-66. BARRY v. BARRY.

Perjury.—Where a witness falsely denies on oath having previously made a statement circumstantially material to the issue, it is perjury, p. 65.

Approved in *Robertson v. State*, 54 Ark. 607, holding that a false denial of having testified differently on a point material to the issue before the grand jury is perjury; note to 85 Am. Dec. 494, on false swearing in collateral matter.

63 Cal. 66-67. KING v. FELTON.

Complaint—Contradictory Averments.—Where the complaint in a suit by an assignee in insolvency fails to aver an assignment and alleges that the insolvent is the owner, it does not state facts sufficient, p. 67.

Cited in *Martin v. Porter*, 84 Cal. 479, to the like effect.

Complaint in a suit by assignee in insolvency must aver the assignment, p. 67.

Cited in *Ward v. Healy*, 114 Cal. 195, to same effect, in an intervention by an assignee in insolvency. Distinguished in *Farnsworth v. Sutro*, 136 Cal. 243, 244, holding allegation of appointment and qualification unnecessary when assignment is alleged.

Notes Cal. Rep.—197.

63 Cal. 68-70. KELLY v. TEAGUE.

Recovery of Possession on Breach of Covenant.—In an action to recover possession of leased premises on breach of a covenant by lessee to pay taxes, a counterclaim is not allowed, p. 69.

Cited in *Ralph v. Lomer*, 3 Wash. 411, to same effect; *Philips v. Port Townsend Lodge*, 8 Wash. 533, to same effect, and that a counterclaim on account of repairs made by the tenant is no defense; note to 89 Am. Dec. 489, on action between landlord and tenant.

Landlord and Tenant.—Notice under Code of Civil Procedure, section 1161, need not be given where violated conditions cannot be afterward performed, p. 69.

Cited in *Harloe v. Lambie*, 132 Cal. 135, as to covenant not to sublet.

63 Cal. 71-72. FRASER v. BARLOW.

Inconsistent Allegations in complaint and exhibit render the former demurrable on the ground of ambiguity and uncertainty, p. 72.

Cited in *Blasingame v. Home Ins. Co.*, 75 Cal. 638, as to an averment in a complaint on a fire policy, which was not borne out by the exhibit, not open to attack by general demurrer; *Malone v. Big Flat Gravel Co.*, 76 Cal. 581, to same effect as the principal case; so also in *Wagner v. Hansen*, 103 Cal. 107; *Palmer v. Lavigne*, 104 Cal. 33.

63 Cal. 73-75. LORENZ v. JACOB.

Mine owners cannot exercise eminent domain to obtain water for their own use in working such mines, though the intention may also be to supply water to others for mining and irrigating purposes, p. 75.

Cited in *Smith v. Denniff*, 24 Mont. 22, noted under *St. Helena Water Co. v. Forbes*, 62 Cal. 182. Dissented from in *Ellinghouse v. Taylor*, 19 Mont. 464, holding that the ruling is too narrow.

63 Cal. 77-78. BOVO v. BOVO.

Divorce—Community Property.—Under section 146 of the Civil Code an award of nearly one-half of the community property to the wife is not an abuse of discretion, p. 78.

Mentioned as a case in point in *Sharon v. Sharon*, 67 Cal. 213. Distinguished in *Strozynski v. Strozynski*, 97 Cal. 193, saying that the reporter's headnote to the principal case is misleading.

Cross-Complaint praying divorce on ground of extreme cruelty. Propriety of the proceeding not questioned, pp. 77, 78.

Cited in *Wadsworth v. Wadsworth*, 81 Cal. 188, 15 Am. St. Rep. 43, as a case in point in considering the question whether the codes of California provided for a cross-complaint in actions for divorce.

63 Cal. 80. BRODRIBB v. TIBBITS.

Presumption in Favor of correct action of probate court arises in same manner as of courts of general jurisdiction, p. 80.

Cited in *Burroughs v. De Couts*, 70 Cal. 373, on the question of an attack on an appointment of a guardian for insufficiency of notice; *Latham v. Blake*, 77 Cal. 649, as correct ruling; *Smith v. Biscailuz*, 83 Cal. 354, to same effect.

63 Cal. 81. SEYMOUR v. WOOD.

Vacating Order of Dismissal of action for want of prosecution is discretionary with the court, and will only be reversed for manifest abuse of discretion, p. 81.

Cited in *Moore v. Thompson*, 138 Cal. 26, affirming such order; note to 95 Am. Dec. 215, on dismissal of action for want of prosecution.

63 Cal. 81-86. NEWBILL v. WHITFIELD.

Mining Location.—Evidence held to establish knowledge of prior location, p. 85.

Cited in *Talmadge v. St. John*, 129 Cal. 437, holding subsequent location invalid under facts stated.

63 Cal. 86-95. COLE v. SUPERIOR COURT. 49 Am. Rep. 78.

Guardian ad Litem may employ an attorney, but his compensation must be fixed by the court, pp. 89, 90.

Followed, as to power to employ, in *Taylor v. Hill*, 115 Cal. 149; note to 99 Am. Dec. 354, on jurisdiction of probate courts when exclusive (on the point of employment of an attorney by an administrator); also cited in *Walton v. Yore*, 58 Mo. App. 565, as authority for the proposition that a guardian ad litem appointed by the court for an infant defendant is entitled to compensation. The citation seems of doubtful value; *Seaton v. Tohill*, 11 Colo. App. 216, on point that court should intervene to protect infant's rights; *Richardson v. Tyson*, 110 Wis. 578, 583, 84 Am. St. Rep. 938, holding such attorney entitled to reasonable compensation only. Distinguished in *Schultheis v. Nash*, 27 Wash. 256, guardian is authorized to enter into a contract agreeing to pay attorneys one-half of all the estate they may recover for the ward in an action brought to establish his right therein.

63 Cal. 96-97. TRASK v. CALIFORNIA SOUTHERN RAILROAD COMPANY.

Master and Servant.—A railroad company is liable to an employee for injury resulting from improper and negligent construction of its road; the doctrine of common employment does not apply, p. 97.

Cited in *Brown v. Sennett*, 68 Cal. 231, 58 Am. Rep. 12, applying the ruling where a stevedore's employee injured by the negligence of the foreman in charge of the work; *Magee v. North Pacific Coast Co.*, 78 Cal. 436, 12 Am. St. Rep. 74, also to a case of damages through cattle trespassing in consequence of insufficient fences; *Indiana Car Co. v. Parker*, 100 Ind. 187, where a master was held liable for a negligent omission in selecting and maintaining machinery and appliance. Note this case, decided in November, 1884, should be compared with *Brown v. Sennett*, 68 Cal. 231, 58 Am. Rep. 12, which was decided in December, 1885, as to the extent to which a master was liable for the negligence of his foreman in charge of the work. Cited in *Evansville R. R. Co. v. Maddux*, 134 Ind. 583, as to the duty of a master to give an employee who is under age timely caution and make him aware of the risks; *Cunningham v. U. P. Ry. Co.*, 4 Utah, 214, holding that a mine owner was liable for injury to a miner from a fall of coal in a gangway which it was his duty to keep in a safe condition; *Bowers v. U. P. Ry. Co.*, 4 Utah, 223, holding that where defective material caused the injury, the rule as to common employment did not apply; note to 59 Am. Rep. 77. Distinguished in *Vaughn v. California Central R. R. Co.*, 83 Cal. 23, by Thornton, J.; in his concurring judgment, showing that where the employee went out on a train sent to repair a track damaged by wash-outs, he accepted the risks incident to its passage over the track, and could not recover.

63 Cal. 97-103. LOUP v. CALIFORNIA SOUTHERN RAILWAY COMPANY.

Contract to Pay amount settled by third party; no cause of action arises until the amount is fixed, p. 103.

Cited in *Cox v. McLaughlin*, 63 Cal. 207, prescribing the necessary averments in an action on contract to recover amounts ascertained by the engineer's estimates; *M. E. Church v. Seitz*, 74 Cal. 292, distinguishing between a submission to arbitration, and a provision for appraisal; *Castagnino v. Balletta*, 82 Cal. 253, 260, as authority for reversing the decision on the first appeal (not reported, but see 11 Pac. L. J. 277) because there was no averment of acceptance of the buildings by the architect; *McNamara v. Harrison*, 81 Iowa, 491, holding that no action can be maintained on a contract providing for payment on the certificate of a third person, until the certificate is given or good reason shown why it has not been furnished. Distinguished in *Valley Lumber Co. v. Struck*, 146 Cal. 271, where time for third payment to contractor stipulated in building contract was when building and improvements shall be "completed and accepted by architect" fact that owner paid before acceptance does not render payment invalid as to lien holders who had not given notice of claims.

Cited in *Roche v. Baldwin*, 135 Cal. 527, noted under *Holmes v. Richet*, 56 Cal. 307; *Miller v. Pine Min. Co.*, 3 Idaho, 495, following rule.

Averment of Corporate Existence of a defendant sued as a corporation is necessary, p. 99.

Cited to same effect in *People v. Central Pacific*, 83 Cal. 399; *Miller v. Pine M. Co.*, 2 Idaho, 1207; 35 Am. St. Rep. 290; *State v. Chicago M. etc. R. R. Co.*, 4 S. Dak. 263; 46 Am. St. Rep. 784; note to 35 Am. St. Rep. 291, on averment of corporate existence. Denied in *Los Angeles Ry. Co. v. Davis*, 146 Cal. 183, holding in action by corporation to quiet title to land, failure to aver that plaintiff is corporation is not available on demurrer.

Pleading.—Each count must contain in itself facts sufficient to constitute a cause of action, p. 100.

Distinguished in *Ward v. Clay*, 82 Cal. 506, as not applying to a complaint having but one count, and to which a copy of the note sued on was annexed as an exhibit.

63 Cal. 104-105. **HILLS v. OHLIG.**

Mechanic's Lien.—A filed claim which accurately states the contract is sufficient, p. 104.

Cited in *Tredinnick v. Mining Co.*, 72 Cal. 80, being an example of sufficient statement; *Jewell v. McKay*, 82 Cal. 152, holding that the statute only requires the actual agreement to be stated in the notice; *Russ Lumber Co. v. Garrettsen*, 87 Cal. 595, as to sufficient statement of ownership; *Kelley v. Plover*, 103 Cal. 37, holding the statement "Terms cash on completion of contract" to be sufficient; *McClain v. Hutton*, 131 Cal. 137, further holding that no time for payment is presumed given when claim is silent; *Albrecht v. C. C. Foster Lumber Co.*, 126 Ind. 319, holding that failure to state that the claim was due did not avoid the lien as between the materialman and the owner; *United States Blowpipe Co. v. Spencer*, 40 W. Va. 708, holding that the lien can be filed, whether the amount due and owing is then enforceable by suit or not.

63 Cal. 105-106. **SAVINGS SOCIETY v. HORTON.**

Compound Interest cannot be at a higher rate than that payable on the principal debt, p. 106.

Cited in *Dean v. Applegarth*, 65 Cal. 393, to same point, and holding that section 1918 of the Civil Code was limited as to compound interest by section 1919 of the Civil Code; *Yudart v. Den*, 116 Cal. 536, 538-541, 543, 544, 546, 547, 58 Am. St. Rep. 201-207, 209, 210, in which the ruling of the principal case was fully discussed, particularly with reference to *Thompson v. Gorner*, 104 Cal. 170, and held not to have been overruled (p. 547), holding, further, that if in a contract there is an agreement to pay compound interest at an illegal rate, there is no agreement at all to pay interest on interest, and the court will not aid the contract

(p. 546). Distinguished in *Nash v. El Dorado County*, 24 Fed. Rep. 256, 11 Saw. 91, holding that the ruling did not apply to coupons on bonds.

63 Cal. 106-107. ESTATE OF KELLEY.

Executor may resist application for order of partial distribution under section 1660 of the Code of Civil Procedure, p. 107.

Cited in *Estate of Murphy*, 145 Cal. 466, following rule; *Estate of Phillips*, 18 Mont. 314, explaining the reason for the statutory provision.

63 Cal. 107-112. MARKS v. RYAN.

Fixtures.—Buildings erected on leased land, in the absence of stipulation, belong to landlord, p. 111.

Cited in *Switzer v. Allen*, 11 Mont. 164, to same effect.

Fixtures put up under a former lease are not removable at end of new lease where no right is reserved, p. 111.

Cited in *Wadman v. Burke*, 147 Cal. 354, following rule; *Sanitary District v. Cook*, 169 Ill. 191, 195, 61 Am. St. Rep. 164, 167, to same effect; *Spencer v. Commercial Co.*, 30 Wash. 528, following rule. Note to 53 Am. Rep. 341.

63 Cal. 112-113. CENTRAL PACIFIC v. MEAD.

Title by Adverse Possession is lost by an offer to purchase within the prescribed period, p. 113.

Distinguished in *Unger v. Mooney*, 63 Cal. 597, holding that an attempt to obtain a quitclaim deed is not within the ruling. Cited in *McMahill v. Torrence*, 163 Ill. 283, where it is held that a negotiation for purchase of an outstanding interest is a recognition of title and interrupts the running of the statute; note to 95 Am. Dec. 209, on purchase of outstanding claim.

63 Cal. 113-117. LAUGHLIN v. WRIGHT.

Homestead.—Besides filing a declaration, the property must be used primarily as a home. Hotel cannot be made a homestead, although the owners live in it, p. 116.

Cited in *Hecht v. Slaney*, 72 Cal. 366, for the ruling that property used almost entirely for business purposes could not be set apart as a homestead in insolvency proceedings; also in *Maloney v. Hefer*, 75 Cal. 424, 7 Am. St. Rep. 182, that premises rented to tenants and separated from the residence in the rear by a tight board fence could not be homesteaded; but in *Lubbock v. McMann*, 82 Cal. 229, 16 Am. St. Rep. 110, the erection of a second house on the homestead property

held not to cause it to lose its homestead character; also cited in same case, 82 Cal. 233; note to 16 Am. St. Rep. 113, by Paterson, J., in his dissenting opinion, and, page 237, by same justice in his concurring opinion in Department; *Beronio v. Ventura etc. Co.*, 129 Cal. 236, 79 Am. St. Rep. 120, holding no valid homestead established; *Estate of Levy*, 141 Cal. 650, noted under *Ackley v. Chamberlain*, 16 Cal. 181. Distinguished in *Heathman v. Holmes*, 94 Cal. 296, in a case where part of the homestead was let off, but not so as to affect the homestead character. Cited in *McDowell v. Creditors*, 103 Cal. 267, 268, 42 Am. St. Rep. 116, refusing the homestead character to a hotel notwithstanding the owner lived in it with his family; *Garrett & Sons v. Jones*, 95 Ala. 100, to same effect as to a building of two rooms, one used as a bar-room and the other occupied as a bedroom by the owner; *Turner v. Turner*, 107 Ala. 470, 54 Am. St. Rep. 113, holding that hotel property could not be set part as a probate homestead to the widow, who had a home and resided elsewhere. Distinguished in *King v. Welborn*, 83 Mich. 198, as to an hotel. Cited in notes to 60 Am. Dec. 350, on Homesteads, nature of occupancy; 76 Am. Dec. 518, on what may be claimed as exempt as homestead; 91 Am. Dec. 644, on use of portion of homestead as a place of business.

63 Cal. 117-118. GIBBS v. BARTLETT.

Mandamus lies to compel the performance of an official duty, p. 117.

Cited to same effect in *Sansom v. Mercer*, 68 Tex. 493, 2 Am. St. Rep. 498, as to the effect of demurring to the complaint when the duty involved the exercise of judgment.

Private Persons may move for mandamus to enforce a public duty, p. 117.

Cited in *Kimberly v. Morris*, 10 Tex. Civ. App. 601, holding that any citizen can enforce by mandamus the ordering of an election to decide on local option.

63 Cal. 118-119. FARRIS v. MERRITT.

Statute of Limitations.—Bar of cannot be raised by demurrer, unless the complaint contains allegations of all the facts which the defendant would be required to prove under a plea of the statute, p. 119.

Cited in *Wise v. Hogan*, 77 Cal. 189; *Jenness v. Bowen*, 77 Cal. 311; *Redington v. Cornwell*, 90 Cal. 60, all to same effect.

Limitations.—Party sued by fictitious name is a party from the commencement of the action, p. 119.

Cited in *Hoffman v. Kreton*, 132 Cal. 197, holding action not barred as to such defendant.

63 Cal. 120. GILMAN v. BOOTZ.

Answer averring that the contract was other than as alleged in the complaint puts the allegation in issue, p. 120.

Cited in *Scott v. Wood*, 81 Cal. 404, holding that an affirmative traverse did not destroy its force nor change its essential nature; *Shamp v. White*, 106 Cal. 221, to sustain a ruling that where the complaint averred entry under a lease, of which only the legal effect was pleaded, the issue was sufficiently raised by an answer which denied the making of the lease pleaded and set forth in full the contract between the parties.

63 Cal. 121-122. HOGS BACK COMPANY v. NEW BASIL COMPANY.

Service by Mail is ineffectual when the affidavit fails to show that the server and the served reside or have their offices in different places, between which there is a regular communication by mail, p. 122.

Referred to in S. C. 65 Cal. 22, being a second appeal of same case.

63 Cal. 127-129. PEOPLE v. POTTER.

Officer de Facto is not entitled to recover the salary of the office to the exclusion of the officer de jure; one who seeks to recover the emoluments of an office must show his right to possession of it p. 128.

Cited in *Burke v. Edgar*, 67 Cal. 184, to the like effect. *Ward v. Marshall*, 96 Cal. 159, 31 Am. St. Rep. 200, to same effect as to the salary of a justice of the peace; *Stephens v. Campbell*, 67 Ark. 492, holding de facto night watchman not entitled to payment; *Rasmussen v. Board*, 8 Wyo. 300, noted under *Dorsey v. Smyth*, 28 Cal. 21; *Andrews v. Portland*, 79 Me. 490, 10 Am. St. Rep. 282, to same effect and holding that payment to the officer de facto was no defense to an action to recover a salary when the city had notice of the plaintiff's claim before payment; *Phelon v. Granville*, 140 Mass. 389, to the like effect; *Selby v. City of Portland*, 14 Oreg. 251, 58 Am. Rep. 313, also to same effect, but holding that the principal case was not an authority on the question that payment to de facto incumbent would exonerate the political body from payment to the de jure officer; *Warden v. Bayfield Co.*, 87 Wis. 185, to same effect as principal case.

63 Cal. 129-143; 49 Am. Rep. 83. REIS v. LAWRENCE.

Estoppel in Pais.—Married woman who, under color of an invalid decree of divorce and in good faith executes a mortgage of real estate as a feme sole is estopped from pleading coverture in bar of the deed, p. 135.

Approved in *Hand v. Hand*, 68 Cal. 137, 58 Am. Rep. 7, in the case of a woman who had deserted her husband for many years and had

executed a deed as a feme sole; S. C. 68 Cal. 141, and note to 58 Am. Rep. 8, in dissenting opinion of McKee, J.; *Ramboz v. Stowell*, 103 Cal. 590, applying the ruling of the principal case to a woman who having deserted her husband executed a deed as a widow, and S. C., p. 593, that the evidence of intentional misrepresentation was stronger than in the principal case; *Dobbin v. Cordnier*, 41 Minn. 167, 16 Am. St. Rep. 685, as to estoppel as applied to married women; note to 85 Am. Dec. 144, as to point dealt with in dissenting opinion of McKee, *supra*; notes to 85 Am. Dec. 171, on estoppel in pais; to 10 Am. St. Rep. 21, on application of estoppel to married women; to 12 Am. St. Rep. 504, on same subject; to 43 Am. St. Rep. 348, on dower; to 44 Am. St. Rep. 641, on estoppel against married women; to 57 Am. St. Rep. 183, on estoppel of wife to assert her coverture; to 64 Am. St. Rep. 864, 870, on effect of desertion by husband.

63 Cal. 150-154. PACIFIC INSURANCE COMPANY v. STROUP.

Estoppel of Lessee to deny title of lessor does not apply when an owner in possession accepts a lease through misapprehension of his rights, p. 153.

Cited in *Davis v. McGrew*, 82 Cal. 138, applying the ruling where a joint owner in possession accepted a lease from his co-owner; *Oneto v. Restano*, 89 Cal. 68, to same effect as *Davis v. McGrew*, *supra*; *Meyer v. Hope*, 101 Wis. 128, noted under *Cannon v. Stockmon*, 36 Cal. 538; note to 95 Am. Dec. 139, on estoppel of tenant to deny landlord's title.

Title by Possession.—Continuous adverse possession under claim of title for the prescribed time makes the title absolute, p. 153.

Cited in note to 94 Am. Dec. 742, on perfect title by adverse possession; note to 95 Am. Dec. 209, to same point.

63 Cal. 154-156. BENNETT v. PARDINI.

Failure to Amend, Effect of.—In an injunction suit, failure to amend the complaint after demurrer sustained and leave given, is the same as a decision that complainant was not entitled to the injunction, pp. 155, 156.

Cited in *Pettigrew Machine Co. v. Harmon*, 45 Ark. 294. Probably a wrong citation and intended for *Northern Ins. Co. v. Potter*, 63 Cal. 157 (see next case).

63 Cal. 157-158. NORTHERN INSURANCE COMPANY v. POTTER.

Joint Debtors.—One of several joint debtors is not discharged by a release to the others expressly providing that it should not have that effect, and independently of section 1543 of the Civil Code, p. 158.

Cited, it is suggested, under the title of *Bennett v. Pardini*, 63 Cal.

155 (*vide supra*): in *Pettigrew Machine Co. v. Harmon*, 45 Ark. 294, holding that a release, which expressly reserved the right to proceed against any other person whose liability could be shown, raised an implied agreement that the right of the codebtor to contribution, if it existed at all, should remain unimpaired; *Harrison v. McCormick*, 122 Cal. 654, discharge of one joint debtor which relates only to his personal privilege to be discharged by operation of law, is not available to remaining joint debtors who have not same privilege; *French v. McCarthy*, 125 Cal. 512, applying rule to co-obligors under contract; *Aigeltinger v. Whelan*, 133 Cal. 113, holding sheriff not released by release of sureties on his bond. (See note to 63 Cal. 154-156, *ante*.)

Partners are Joint Debtors, pp. 156, 157.

Cited in *Harrison v. McCormick*, 69 Cal. 620, ruling that joint contractors are jointly and not severally liable; especially so are partners with respect to their partnership obligations; note to 77 Am. Dec. 114, on proceedings to enforce partnership liability, where one partner has died.

63 Cal. 159-160. *ODELL v. WILSON*.

Cross-complaint in Foreclosure is not a proper proceeding in which to set up a tax title. The action should be directed against the mortgagor, holder of the legal title, p. 160.

Cited in note to 79 Am. Dec. 192, on persons not made parties to foreclosure proceedings are not affected in their rights; note to 83 Am. Dec. 254, on cross-complaint; note to 68 Am. St. Rep. 360, on general subject; *Wilson v. Bank*, 121 Cal. 632, on point that adverse title cannot be litigated in foreclosure suit.

Foreclosure—Parties.—One claiming under a tax deed made prior to the mortgage need not be made a party, p. 160.

Cited in note to 1 Am. St. Rep. 638, on holder of tax title, whether proper party defendant in suit to foreclose.

Mortgage Foreclosure.—Decree should be rendered without prejudice to prior tax title, p. 160.

Cited in *O'Dea v. Mitchell*, 144 Cal. 382, applying rule to street assessment lien.

63 Cal. 160-161. *SOCIETE FRANCAISE v. BEARDSLEE*.

Judgment by Consent cannot be appealed, p. 161.

Approved in *Erlanger v. Southern Pacific Co.*, 109 Cal. 395; *Rader v. Barr*, 22 Oreg. 496, to same effect.

63 Cal. 162-164. *LAMBERT v. McCLOUD*.

Claim and Delivery.—Plaintiff must show right of possession, p. 164.

Cited in *Kellogg v. Burr*, 126 Cal. 41, noted under *Triscony v. Orr*, 49 Cal. 612.

63 Cal. 165-166. PEOPLE v. SOTO.

Murder is sufficiently charged in the language of the statute defining it, p. 166.

Cited in *People v. Tomlinson*, 66 Cal. 345, as to embezzlement; *People v. Hyndman*, 99 Cal. 3 as to murder; *Sharp v. State*, 17 Tex. App. 498, as to what is included in an indictment alleging homicide with malice aforethought; *State v. Day*, 4 Wash. 107, to the same effect as the principal case; *Webb v. York*, 79 Fed. Rep. 621, 49 U. S. App. 172, stating in proceedings for extradition of a person charged with embezzlement, what was a sufficient affidavit for the requisition. Distinguished in *People v. Lee Look*, 137 Cal. 592, noted under *People v. Freeland*, 6 Cal. 96; *People v. Ung Ting Bow*, 142 Cal. 341, holding information sufficient.

63 Cal. 167-168. PEOPLE v. WELSH.

Conduct of Accused before and after the fact at issue is admissible, not as part of the *res gestae*, but to show intent, p. 168.

Cited in *Taylor v. State*, 22 Tex. App. 545, 58 Am. Rep. 656, to sustain a ruling that it is permissible, where motive is the important question, to prove other similar transactions.

Competency of Evidence of Child.—The right of a defendant to have the test of competency made in his presence is not violated when the witness has been examined on a former trial, and, on the second trial, is not re-examined until after testifying, p. 167.

Cited in *Taylor v. State*, 22 Tex. App. 545, 58 Am. Rep. 658, holding that the examination as to competency must be made in court in the presence of the accused.

63 Cal. 168-170. PEOPLE v. JONES.

Murder, First Degree—Discretion of Jury.—It is proper to instruct the jury as to the exercise of its discretion, p. 170.

Approved in *People v. French*, 69 Cal. 177; *People v. Rawden*, 90 Cal. 198.

Intoxication does not relieve from responsibility, but may be considered in determining the degree of the crime, p. 169.

Approved in *People v. Vincent*, 95 Cal. 428, distinguishing *People v. Phelan*, 93 Cal. 111, which was a case of burglary; but see *People v. Fellows*, 122 Cal. 239, when instructions held contradictory; cited in *People v. Hill*, 123 Cal. 49, noted under *People v. Belencia*, 21 Cal. 544; *People v. Methaver*, 132 Cal. 332, noted under *People v. Lewis*, 36 Cal. 533.

63 Cal. 170-173. DOUGHERTY v. DORE.

Undertaking on Injunction.—Damages caused by an injunction which prevented the party enjoined prosecuting his work are sufficiently proximate to be recovered, p. 173.

Explained in *Lambert v. Haskell*, 80 Cal. 624, as not in conflict with other rulings that loss of profits or counsel's fees after the making of the final decree could not be recovered; *White v. Brooke*, 11 Wash. 105, applying the ruling to an injunction against a sale by a first mortgagee during the pendency of which a sale was made by a second mortgagee. Also referred to in *Dore v. Dougherty*, 72 Cal. 233, 1 Am. St. Rep. 49, which was an appeal in an action in which the debt secured by the judgment in the principal case was garnisheed; *Montana etc. Co. v. St. Louis etc. Co.*, 23 Mont. 317, noted under *Clark v. Clayton*, 61 Cal. 634.

63 Cal. 174-178. HULL v. SUPERIOR COURT.

Quo Warranto is the only proceeding in which the right of a *de facto* incumbent of a public office can be questioned, p. 177.

Cited in *Hull v. Superior Court*, 63 Cal. 179, to same effect; *People v. Toal*, 85 Cal. 338, holding that the right to the office of police judge of Los Angeles could not be attacked collaterally; *People v. Hammond*, 109 Cal. 390, to same effect as the principal case as to office of tax collector; *People v. Sehorn*, 116 Cal. 508, to same effect as to office of justice of the peace; *Susanville v. Long*, 144 Cal. 365, applying rule to collateral attack on validity of ordinance; *Walcott v. Wells*, 21 Nev. 55, 37 Am. St. Rep. 484, to same effect as to the trial judge in a case of murder.

Classification of Counties.—A new census does not change a county government from one class to another, but imposes on the existing supervisors the duty of redistricting the county (concurring opinion of McKinsty, J.), p. 178.

Cited in *Tehama County v. Bryan*, 68 Cal. 67, holding that until the supervisors divided their counties into road districts, all districts in existence under former laws continued as such.

Official Bond must be given within the time prescribed by law or the office becomes vacant, p. 176.

Cited in *People v. Perkins*, 85 Cal. 511, to same effect, and holding the provisions of the law are mandatory.

63 Cal. 179. HULL v. SUPERIOR COURT.

Prohibition is not a remedy to prevent the acts of a *de facto* or *de jure* ministerial officer, p. 179.

Distinguished in *Havemeyer v. Superior Court*, 84 Cal. 392, 18 Am

St. Rep. 235, as not applying to uncompleted acts of an inferior tribunal. Cited in *State v. Ross*, 136 Mo. 273, holding that prohibition will not lie to prevent the prosecution of a suit for the appointment of a receiver of a corporation; nor, *State v. Superior Court*, 13 Wash. 228, to set aside judicial acts already done.

Prohibition does not lie as to act already done, p. 179.

Cited in *Valentine v. Police Court*, 141 Cal. 618, holding writ not maintainable to prevent bench-warrant to enforce judgment; *Bellevue W. Co. v. Stockslager*, 4 Idaho, 641 (miscited), refusing prohibition to restrain judge from holding court at certain place where term of court sought to be restrained has been held.

63 Cal. 179-181. **SAN JOSE BANK v. SIERRA L. COMPANY.**

Director de Facto.—His acts are valid as to third persons, p. 181.

Cited in *Balfour etc. Co. v. Woodworth*, 124 Cal. 173, as to appointment of trustee by such board; *Kuser v. Wright*, 52 N. J. Eq. 829, holding that acts of de facto officers are valid until the holders are lawfully ousted.

63 Cal. 182-183. **DONNELLY v. STRUEVEN.**

Attachment may issue in action of damages for breach of contract, p. 183.

Approved in *De Leonis v. Etchepare*, 120 Cal. 410, on same point; *Dunn v. Mackey*, 80 Cal. 107, 108, and that it makes no difference that the amount has to be ascertained at the trial; *Flagg v. Dare*, 107 Cal. 486, to same effect; *De Leonis v. Etchepare*, 120 Cal. 140, to same point; *Coats v. Arthur*, 5 S. Dak. 283.

Discharge of Attachment.—Notice of motion must state the particular ground relied on, p. 183.

Affirmed in *Omaha Co. v. C. F. F. Co.*, 18 Mont. 471, to same effect; *Cupit v. Park City Bank*, 10 Utah. 297, holding that the object of the rule is to give the opposite party an opportunity to answer the motion; also, on a rehearing, S. C. 11 Utah, 428, 429, holding that the laws of Utah and California on which the decision in the principal case had been based were alike.

63 Cal. 184. **HEWLETT v. EPSTEIN.**

Constitutional Law.—Act of April 23, 1880, Statutes of 1880, p. 134 (requiring monthly statements of receipts and expenditures of mining corporations to be made and posted in the office of the company) does not violate the constitution, p. 184. Note, the statute is found at page 134 of the statutes of 1880, not page 400, as stated in the reports.

Cited in *Miles v. Woodward*, 115 Cal. 312, holding that because the statute applied to all mining corporations, it was constitutional.

63 Cal. 185. HEWLETT v. MILLER.

Specific Performance.—Defense may show subsequent parol agreement that the title should be retained till other money than that named in the contract was paid, p. 185.

Distinguished in *Barsolon v. Newton*, 63 Cal. 226, holding that, where there was a conflict of evidence, the finding of the court as to the existence of such other agreement will not be disturbed.

63 Cal. 186. MACNEVIN v. MACNEVIN.

Order for Judgment is not a final judgment, and an order subsequently made setting aside previous orders cannot be treated as an order made after final judgment so as to be appealable, p. 186.

Cited in *Sharon v. Sharon*, 67 Cal. 201, to the point that all orders made in a case before judgment, except those enumerated in the code, are unappealable. Distinguished in S. C. pp. 215, 216, on the point that the principal case was not authority for the proposition that orders for alimony pendente lite were not appealable; also in S. C., p. 220, in opinion of Thornton, J., on a rehearing to same point and effect. Cited in *Mace v. O'Reilley*, 70 Cal. 234, holding that there can be no valid judgment entered unless findings are filed or waived; *Estate of Cook*, 77 Cal. 228; 11 Am. St. Rep. 273, where the decision in the principal case is limited and explained as having held that for the purpose of an appeal no order could be considered as an order made after final judgment which was made before the entry of the judgment; *Durant v. Comegys*, 2 Idaho, 811; 35 Am. St. Rep. 268, holding that the judgment appealed from must be that entered in the judgment book, and not that ordered or directed to be entered.

63 Cal. 187-188. DRESBACH v. CREDITORS.

Assignment for Benefit of Creditors does not prevent the debtor from applying for and receiving a discharge under the insolvent law, p. 187.

Affirmed in *Barroilhet v. Fisch*, 63 Cal. 463.

63 Cal. 188-190. ENKLE v. EDGAR.

Extra Clerk in tax collector's office duly appointed with a fixed salary is "an officer of the city and county of San Francisco," whose salary demand must be audited by the auditor, p. 190.

Cited in *Hunt v. Broderick*, 104 Cal. 315, as to a demand allowed by board of supervisors.

63 Cal. 194-196. FARRELL v. JONES.

Notice of Substitution of parties plaintiff made by the court need

not be given to defendants whose defaults have been previously entered, p. 196.

Cited to same point in *Kittle v. Bellegarde*, 86 Cal. 561.

63 Cal. 196-206. COX v. McLAUGHLIN.

Provision in Contract for ascertainment of amount payable by estimate or certificate of third party necessitates averment and proof of the making of such certificate, before the party liable can be put in default, p. 207.

Cited in *M. E. Church v. Seitz*, 74 Cal. 292, holding that such a provision was not a submission to arbitration in its proper sense, but was a condition precedent to the right of action. Referred to in *Cox v. McLaughlin*, 76 Cal. 62, 9 Am. St. Rep. 164, being another appeal in same case, but not to any special point; *McGlaughlin v. Wormser*, 28 Mont. 180, complaint in action to enforce mechanic's lien must allege that necessary architect's certificate of acceptance was given or demanded, and if refused, reasons why it should have been given, or if waived, a statement of that fact.

Variance between contract declared on and contract proved and found is fatal to recovery, p. 207.

Cited in *Palmer v. Lavigne*, 104 Cal. 34, holding that when the complaint and exhibit are inconsistent, so that a demurrer for ambiguity is sustained, there is also a fatal variance.

63 Cal. 208-218. McLAUGHLIN v. HEID.

Patented Lands.—Validity of patent may, in an action of ejectment, be attacked on the ground that the land was within the claimed exterior limits of a Mexican grant, p. 211.

Cited in *Southern Pacific v. Garcia*, 64 Cal. 517, to the point that lands within the exterior limits of a Mexican grant, still sub judice, could not be patented; *Southern Pacific v. McCusker*, 67 Cal. 68, extending the ruling of the principal case to swamp and overflowed lands; *Foss v. Hinkell*, 78 Cal. 161, to the same effect as *Southern Pacific v. Garcia*, supra; *Carr v. Quigley*, 79 Cal. 131, to same effect; *United Land Association v. Knight*, 85 Cal. 486, affirming the principal case as to San Francisco tide lands.

63 Cal. 219-220. PEOPLE v. JORDAN.

Judgment Sustaining Demurrer, with no direction for new information, bars another prosecution for same offense, p. 220.

Cited in *People v. O'Leary*, 77 Cal. 34, holding that the judgment need not give an opinion that the objection could be overcome; *People v. Ammerman*, 118 Cal. 27, holding that section 1008 of the Penal Code

and the ruling of the principal case did not apply when there was no demurrer, or the demurrer was disallowed; *State v. Crook*, 16 Utah, 219, construing similar local statutes.

63 Cal. 220-223. GRAY v. NUNAN.

New Trial.—Notice will be presumed to have been given or waived where no objection to the settlement of the statement for want of notice is made, and the trial court in denying the motion appears to have proceeded on the questions presented by the motion alone, p. 221.

Cited in *Brichman v. Ross*, 67 Cal. 602, holding to the like effect and that the time had also been extended by consent of parties; *Savings and Loan Society v. Moore*, 68 Cal. 158; *Schieffery v. Tapia*, 68 Cal. 185; *Girdner v. Beswick*, 69 Cal. 119; *Hegard v. California Ins. Co.*, 72 Cal. 536, all holding to same effect; *Simpson v. Budd*, 91 Cal. 491, as to the extent of waiver and consent as shown by the principal case and the other cases, *supra*; *Hamilton v. Dooly*, 15 Utah, 292, holding that failure to object is equivalent to waiver.

Possession by wife is that of her husband, and unless she can show a separate right of property, she must be dispossessed under a writ against the husband, p. 222.

Cited in *Huerstal v. Muir*, 64 Cal. 453, holding that mere assertion of a claim by the wife is not sufficient to overcome the presumption. Note to 15 Am. St. Rep. 60, on who may be removed under writ of possession.

63 Cal. 223-227. BARSLOU v. NEWTON.

Specific Performance.—Tender is not always required as a condition precedent; part performance and readiness to perform the remainder may be, under the circumstances, sufficient, p. 226.

Cited in *Sheplar v. Green*, 96 Cal. 221, exemplifying the rule where a plaintiff in an action to quiet title had never offered to convey; held the defendant might by cross-complaint seek specific performance without tender; dissenting opinion in *McCowen v. Pew*, 147 Cal. 312, majority determining measure of damages in suit for specific performance of contract to sell timber land where vendor cut timber prior to expiration of option.

63 Cal. 227-232. CAVAGNARO v. DON.

Trusts.—Purchaser of trust property with notice is affected by terms of the trust, p. 231.

Cited in *Haslam v. Haslam*, 19 Utah, 9, as to property subject to contract of sale; *Savings etc. Soc. v. Davidson*, 97 Fed. 713, noted under *Page v. Naglee*, 6 Cal. 241.

63 Cal. 232-233. WHITE v. LONGMIRE.

Transcript.—When the papers are not identified as having been used on the hearing, the orders appealed from must be affirmed, p. 233.

Cited in *Peltret v. Frank*, 66 Cal. 34, to same effect.

63 Cal. 233-234. BATE v. MILLER.

Statement on Motion for New Trial must specify the particulars in which the evidence is insufficient, p. 233.

Affirmed in *Heinlen v. Heilbron*, 71 Cal. 563.

Motion to Amend Findings cannot be made after entry of judgment and denial of motion for new trial, p. 234.

Cited in *Los Angeles v. Lankershim*, 100 Cal. 532, to same effect. Affirmed in *Thompson v. Connecticut Ins. Co.*, 139 Ind. 353.

63 Cal. 234-235. SHARON v. NUNAN.

Replevin.—No demand necessary before commencing the action, p. 235.

Referred to in *Brenot v. Robinson*, 108 Cal. 145, where it was held that an averment in the complaint for claim and delivery that a demand had been made was sufficient as against a general demurrer; *Burchett v. Purdy*, 2 Okl. 396, to same effect, where the officer levies on the property of one not named in the writ, or on one person's property to pay the debt of another, or when the original taking was wrongful or the seizure illegal in any way, or if the property is found in the custody of a stranger to the writ, either actual or constructive; *Eddings v. Boner*, 1 Ind. Ter. 178.

63 Cal. 235-239. HILLER v. COLLINS.

Motion to Dissolve Injunction.—Plaintiff may use affidavits in reply to a verified answer which, on the motion, is treated as an affidavit, p. 237.

Cited in *Smith v. Stearns etc. Co.*, 129 Cal. 61, noted under *Falkenburg v. Lucy*, 36 Cal. 52; *Hefflon v. Bowers*, 72 Cal. 272, as to when the right of plaintiff to oppose by affidavits exists. Note to 95 Am. Dec. 90.

Complaint on Information and Belief not sufficient to support injunction, p. 237.

Cited in *Yuba County v. Cloke*, 79 Cal. 245, to the point that allegations in the complaint positively denied under oath in the answer would not sustain the injunction.

Dissolution of Injunction rests in the discretion of the court under the circumstances of the case, p. 238.

Notes Cal. Rep.—198.

Affirmed in *Blue Bird Min. Co. v. Murray*, 11 Mont. 475, to same effect; the abuse of discretion was alone appealable.

Stockholder's Statutory Liability is concurrent with others existing when statute was enacted, p. 239.

Cited in *Sacramento Bank v. Pacific Bank*, 124 Cal. 150, 71 Am. St. Rep. 39, noted under *Harmon v. Page*, 62 Cal. 448.

63 Cal. 239-240. HULME v. SUPERIOR COURT.

Receiver.—When there has been a wrongful taking the court may order restoration, p. 240.

Affirmed in *Tapscott v. Lyon*, 103 Cal. 309, but where a receiver, ordered to bring suit for recovery of specific goods, makes demand prior to suit and the holder voluntarily surrenders them, the receiver's possession is lawful, and surrender will not be ordered.

63 Cal. 242-245. NEWELL v. DESMOND.

Sale of Undivided Interest in Personal Property by owner in possession will be void as to creditors of vendor unless accompanied by transfer of possession (see section 3440 of the Civil Code), p. 245.

Affirmed in *Brown v. O'Neal*, 95 Cal. 266, 29 Am. St. Rep. 114, as to share in a stud horse of which vendor remained in possession as manager for the co-owners; *Howe v. Johnson*, 107 Cal. 76, to same effect as principal case, and holding that the transfer of possession should be immediate.

Statement on Motion for New Trial should contain a specification of the particulars in which the evidence is alleged to be insufficient full enough to enable the court to understand the question presented, p. 245.

Cited in *State v. Yoakam*, 103 Cal. 505, defining the object of specifications of error. *Livestock G. P. Co. v. Union Co.*, 114 Cal. 450, to same effect.

63 Cal. 245-246. SPRING VALLEY W. W. v. BARTLETT.

Prohibition will not lie to restrain board of supervisors from fixing water rates, p. 246.

Affirmed in *Spring Valley W. W. v. San Francisco*, 82 Cal. 307, 10 Am. St. Rep. 126, to same point. Cited in *State v. Hogan*, 24 Mont. 382, noted under *People v. Board*, 54 Cal. 404; *San Diego etc. Co. v. National City*, 174 U. S. 750, quoting *Spring Valley W. W. v. San Francisco*, 82 Cal. 307.

63 Cal. 246-247. McVERRY v. KIDWELL.

Street Assessment.—Findings that the evidence produced showed

noncompliance with the contract will support judgment for defendant, p. 247.

Cited in *Santa Cruz v. Bowie*, 104 Cal. 287, to the point that fraud must be specifically pleaded and proved.

63 Cal. 247-252. SULLIVAN v. SHANKLIN.

Mandamus will not lie to compel the return of land purchase money paid to the state while the title is sub judice. Its proper office defined, p. 251.

Cited in *Nagle v. Wakey*, 161 Ill. 395, in dissenting opinion of Phillips, J., who contended that it applied to highway commissioners to enforce the discharge of their duties to keep roads in repair. Note to 79 Am. Dec. 473, on judicial and ministerial acts distinguished.

63 Cal. 252-257. WRIGHT v. ROSEBERRY.

Swamp Lands.—Title does not, under the act of July 23, 1866, pass to the state from the United States until the land has been certified over to the state by the commissioner of the general land office, p. 255.

Affirmed in *Easton v. O'Reilly*, 63 Cal. 309, holding that under the act of 1850 the character is not definitely fixed upon a specific tract until the action of a proper federal officer. Doubted in *State v. Portsmouth Savings Bank*, 106 Ind. 439, where the act of 1850 held to have been a grant in praesenti of all the swamp lands in the state.

63 Cal. 257-261. PEOPLE v. HARRINGTON.

Quorum of Board represents the board, and the action of a majority of the quorum binds the board, p. 260.

Affirmed in *People v. Hecht*, 105 Cal. 628, 45 Am. St. Rep. 101, holding that a majority of the board of freeholders constituted a legal board competent to act in the framing of a charter; *Turnquist v. Drain Commrs.*, 11 N. Dak. 518, drainage assessment is valid though only two drain commissioners acted.

Office—County Hospital.—Practicing physician in is a county officer, p. 260.

Cited in *Wall v. Directors of Deaf, Dumb and Blind Asylum*, 145 Cal. 472, directors of deaf, dumb and blind asylum, cannot remove physician during his term. Distinguished in *People v. Wheeler*, 136 Cal. 654, 655, and held inapplicable to appointment under subdivision 5, section 25, of County Government Act of 1897.

63 Cal. 261-268. CENTRAL PACIFIC v. SHACKELFORD.

Title by Adverse Possession must be for prescribed period, and all taxes must have been paid by holder, p. 265, 266.

Cited in *Unger v. Mooney*, 63 Cal. 595, stating five elements as necessary to establish a title by adverse possession; *Webb v. Clark*, 65 Cal. 57, holding that defendant who claimed title by adverse possession but testified he had paid no taxes failed to establish his title. Distinguished in *Swamp Land District v. Glide*, 112 Cal. 89, 90, holding that the ruling is not applicable to an amendment changing the period in the statute of limitations, and that a man has no vested right in the running of the statute.

Amendment to Code is not retroactive unless expressly so declared, pp. 264, 265.

Cited in *Webber v. Clarke*, 74 Cal. 19, with reference to section 325 of the Code of Civil Procedure; *Teralta Land Co. v. Shaffer*, 116 Cal. 522, 58 Am. St. Rep. 196, holding that no part of the Political Code is retroactive unless expressly so declared; cited in *Estate of Richards*, 133 Cal. 527, noted under *Sharp v. Blankenship*, 59 Cal. 288; *Dodge v. Nevada etc. Bank*, 109 Fed. 731, as to Political Code, section 3628 et seq.; *Bullard v. Smith*, 28 Mont. 398, Laws of 1899, page 115, amending Civil Code, section 3996, did not make negotiable a note given before its passage, which was non-negotiable by reason of its containing provision for attorney's fees.

The rule stated as to the portions of amended Code sections which are left unchanged and those in which changes are made, pp. 265, 266.

Affirmed in *People v. Sutter St. Ry. Co.*, 117 Cal. 613, as to section 502 of the Civil Code amended in 1875; *The Louis Olsen*, 52 Fed. Rep. 654, as to section 813 of the Code of Civil Procedure, amended and re-enacted in 1874; *State v. Horton*, 21 Nev. 306, as to an act of 1889, amending an act of March 5, 1887, entitled "An act to encourage the sinking of artesian wells"; *Fargo v. Ross*, 11 N. Dak. 373, Laws of 1901, chapter 149, amending Revised Code of 1899, section 2496, repeals part of section only which authorizes county treasurers to retain commissions or penalties on taxes.

63 Cal. 269-276. **ASTON v. NOLAN.**

Right of Lateral Support is incident to the land. The notice required before excavating, under section 832 of the Civil Code, as amended, does not relieve from the prudent care which one excavating must take. How far the right extends to buildings on the land, pp. 272, 273.

Cited in *Conboy v. Dickinson*, 92 Cal. 604, to same effect, and stating an example of insufficient precaution in excavating; *Sullivan v. Zenier*, 98 Cal. 348, holding that the omission of the words "by nature" from the original section 832 of the Civil Code did not enlarge the common law right of lateral support. Overruled in S. C., p. 349, as to right to support of a building; *Green v. Berge*, 105 Cal. 58, 45 Am. St. Rep. 28, holding that the only neglect necessary to give a cause of action is the neglect to furnish the support required by the statute; dissenting

opinion *Bohrer v. Harness Co.*, 19 Ind. App. 514, 520, main opinion sustaining recovery irrespective of negligence. Note to 66 Am. Dec. 649, on no natural right to support of building by adjacent land; note to 66 Am. Dec. 650, on notice to be given to adjacent owner of building before excavation; note to 66 Am. Dec. 650, on prescriptive right to support of buildings. See, also, note to 66 Am. Dec. 651, on conflicting authority; note to 76 Am. St. Rep. 425, on general subject; note to 33 Am. St. Rep. 464, on prescription, the American decisions; note to 33 Am. St. Rep. 471, on duty of person excavating to give notice to owner of adjacent buildings.

Rule of *Respondeat Superior* does not apply where the excavation is done by an independent contractor, who is liable for damages, pp. 274, 275.

Doubted in *Green v. Berge*, 105 Cal. 57; 45 Am. St. Rep. 28, and S. C., pp. 58, 59, 45 Am. St. Rep. 29, saying that all other authorities hold that the landowner cannot relieve himself of responsibility by making a contract. Cited in note to 66 Am. Dec. 650, on work done by contractor, owner not liable; 33 Am. St. Rep. 473, on acts of independent contractor.

63 Cal. 280-281. GALLOWAY v. ROUSE.

Notice of Appeal may be filed after service. See section 940 of the Code of Civil Procedure. Previous decisions inapplicable, p. 280.

Approved in *San Francisco etc. Co. v. State*, 141 Cal. 358, declining to dismiss appeal; *Robinson v. Templar Lodge*, 114 Cal. 42, holding no particular time after service is prescribed for filing.

63 Cal. 281-282. ESTATE OF DORLAND.

The court uses its own discretion in fixing attorney's fee in administration and is not bound by the opinions of witnesses, p. 282.

Approved in *Estate of Straus*, 144 Cal. 558, sustaining allowance; *Remington v. Eastern Ry.*, 109 Wis. 162, and *Sanders v. Graves*, 105 Fed. 850, applying rule in actions for services; *Peyre v. Peyre*, 79 Cal. 340, as to fee in pending divorce proceedings allowed with alimony. Limited in *Freese v. Pennie*, 110 Cal. 469, to the trial court, and holding that the decision will not be interfered with except in case of a plain abuse of discretion. Cited in *Ehlers v. Warmack Bros.*, 118 Cal. 312, to same effect as to an architect's compensation.

63 Cal. 282-285. HANSEN v. MARTIN.

Judgment on Appeal Bond must be jointly against both sureties; the course pointed out by the statute must be strictly pursued, p. 285.

Cited to same effect in *Davis v. Heimback*, 75 Cal. 262.

63 Cal. 286-288. HUTCHINSON v. AINSWORTH.

Mortgage by Married Woman.—Defective Acknowledgment may be corrected in same action with foreclosure, p. 288.

Referred to in *Hutchinson v. Ainsworth* (being appeal from second trial of same case), 73 Cal. 453, holding the notary not a necessary party, as the reformation of the certificate would be made by the court; note to *Williams v. Hamilton*, 65 Am. St. Rep. 485, 513, on reformation. Distinguished in *Cox v. Holcomb*, 87 Ala. 592, 13 Am. St. Rep. 82, as resting on special statute, and some of the cases conceded that in the absence of such authority the court would not assume to correct a defective certificate.

Certificate of Acknowledgment must state that the notary made the married woman acquainted with the contents of the instrument, p. 288.

Cited to same effect in *Beck v. Soward*, 76 Cal. 531, and *Bollinger v. Manning*, 79 Cal. 10.

63 Cal. 288-296. PEOPLE v. HURTADO.

Depositions in Criminal Cases.—Section 13, article I of the constitution is not restrictive of the power of the legislature to authorize the taking of depositions by the defendant in all classes of criminal cases; *semble*: whether they can be used against the defendant in cases of homicide, p. 294.

Explained in *Willard v. Superior Court*, 82 Cal. 460, and developing the meaning of the section. Cited by Thornton, J., S. C. p. 467, in his dissenting opinion arguing that nothing could take away the constitutional right of a prisoner to compel the attendance in court of a prisoner witness on his behalf.

Charge to Jury.—If taken as a whole it fairly and correctly presents the law, it will be upheld, though one of the instructions fails to contain all the conditions and limitations, p. 292.

Approved in *People v. Clark*, 84 Cal. 583, *United States v. Cannon*, 4 Utah, 140, both to same effect; *State v. Bartmess*, 33 Or. 126, noted under *People v. Doyell*, 48 Cal. 85.

Evidence, in itself irrelevant, cannot be admitted to support testimony which is relevant, p. 291.

Cited in *People v. Mitchell*, 94 Cal. 554, as governing the admissibility of testimony in rebuttal.

Prosecution by Information in felony cases is not forbidden by the federal constitution in states where that procedure is authorized by the state constitution, p. 294.

Cited as a case in point in *State v. Boswell*, 104 Ind. 543. Note the principal case after being affirmed as appears above (63 Cal. 288) went

back to the trial court, and on the day for fixing the date for execution defendant's counsel raised the question that all the proceedings were invalid because founded on information instead of indictment, and argued that the provision in the constitution of California, article I, section 8, was in conflict with the fifth and fourteenth articles of amendment of the constitution of the United States. The objection was overruled and on appeal the decision was sustained. (See 54 Cal., cases not reported XVIII.) From this decision error was taken to the supreme court of the United States; *Hurtado v. California*, 110 U. S. 516, where after an elaborate discussion of the question it was held that a proceeding by information after examination and commitment by a magistrate instead of by presentment and indictment by a grand jury was "due process of law."

Murder.—Adultery of defendant's wife will not reduce degree of crime of murder of her paramour, p. 296.

Cited in dissenting opinion in *Gafford v. State*, 122 Ala. 73, discussing admissibility of evidence of such adultery.

63 Cal. 299-301. EX PARTE HARRISON.

Gambling.—Section 330 of the Penal Code prescribes minimum and maximum of fine and maximum of imprisonment; it gives no right to pay either fine or costs by imprisonment at the rate of one dollar per day, p. 300.

Cited in *Ex parte Sing Ah Tong*, 84 Cal. 166, 167, holding that a judgment of a fine and, in default, imprisonment at the rate of one day for each dollar fine is not void when the fine and the term of imprisonment are both within the limits defined in section 330; *State v. Sheppard*, 15 Oreg. 603, holding that, a statute authorizing imprisonment until the amount of a fine is paid will not permit a sentence of imprisonment until the aggregate of fine and costs is paid.

63 Cal. 302, 303. YOUNG v. MILLER.

Maker and Indorser of a note may be joined as parties defendant in same action, p. 302.

Cited as a case in point in *Loustalet v. Calkins*, 120 Cal. 690.

63 Cal. 303, 304. BROWN v. DELAVAU.

Injunction.—Costs are not allowable where injunction is denied and judgment is for less than three hundred dollars, p. 303.

Distinguished in *McCarthy v. Gaston R. etc. Co.*, 144 Cal. 546, noted under *Himes v. Johnson*, 61 Cal. 259.

Appeal from order made after judgment cannot be entertained if the order is not excepted to, p. 304.

Cited in *Mining Co. v. Weinstein*, 7 Mont. 352, as holding that an appealable order, although deemed to be excepted to in law, nevertheless must be made part of the judgment-roll by bill of exceptions.

63 Cal. 304. BUCKNER v. VEUVE.

Prohibition is not the remedy to prevent the usurpation of an office—*quo warranto* is, p. 304.

Approved in *People v. Toal*, 85 Cal. 338, but held not to apply where the question was as to the existence of the office. Cited in *Walcott v. Wells*, 21 Nev. 55, 37 Am. St. Rep. 484, holding that the right of a *de facto* judge to try a case could only be tested on a writ of *quo warranto*.

63 Cal. 305-310. EASTON v. O'REILLY.

Amended Complaint takes the place of the original, but commencement of the action dates from the filing of the original complaint, p. 308.

Approved in *Frost v. Witter*, 132 Cal. 427, 84 Am. St. Rep. 59, noted under *Lorenzana v. Camarillo*, 45 Cal. 125; *Vanderslice v. Matthews*, 79 Cal. 277, and that the statute of limitations does not bar the action where the amended complaint is filed after the statutory time; *White v. Soto*, 82 Cal. 658, to the point that an amended complaint relates back to the date upon which the original was filed; and see *Harrison v. McCormick*, 122 Cal. 654, as to bar as to new defendant so brought in.

Patent raises the presumption that all necessary steps had been taken prior to its issue to support its validity, p. 309.

Cited in *Edwards v. Rolley*, 96 Cal. 411, 31 Am. St. Rep. 235, to same point.

63 Cal. 310-311. SAVINGS AND LOAN SOCIETY v. HORTON.

Correction of Decree may be made by the court as to computations or clerical errors, but such correction does not change the date of the entry so as to extend the time of appeal, p. 311.

Affirmed in *Fallon v. Brittan*, 84 Cal. 514, holding that the corrections might be made even after an appeal. Distinguished in *Spencer v. Troutt*, 133 Cal. 609, discussing right of defendant to appeal whose name was omitted from the original judgment.

63 Cal. 312-317. WALKER v. BUFFANDEAU.

Findings.—What they must contain as to ultimate and probative facts, p. 315.

Cited in *Bull v. Bray*, 89 Cal. 293, to support ruling of necessary findings in action to set aside deeds on the ground of fraud.

Prior Record of one of two mortgages does not necessarily establish priority of execution, p. 317.

Cited in *Bank of Ukiah v. Petaluma Bank*, 100 Cal. 591, as authority for the proposition that the lien of a mortgage attached on the execution, not the recording of the instrument; *Sheldon v. Brown*, 72 Minn. 498, holding contemporaneous execution presumed.

63 Cal. 317-319. O'KANE v. DALY.

Notice of Appeal by one of several defendants must be served on all codefendants interested and affected as well as plaintiff, p. 319.

Distinguished in *Williams v. S. C. Min. Assn.*, 66 Cal. 196, in a case where only a modification was sought which could not affect the rights of the parties not served with notice. Cited in *Millikin v. Houghton*, 75 Cal. 540, interpreting the term, "adverse party," in section 940 of the Code of Civil Procedure; *In re Castle Dome Min. Co.*, 79 Cal. 249; *Lancaster v. Maxwell*, 103 Cal. 68; *Vincent v. Collins*, 122 Cal. 390; *Bank v. Savings Land B. Co.*, 13 Utah, 199, all to same effect as the principal case.

63 Cal. 319-324. KIRSCH v. BRIGARD.

Ejectment may be maintained by a tenant whose tenancy expires before the trial, and how that fact must be set up, p. 322, 323.

Cited in *Kirsch v. Smith*, 64 Cal. 14, on the point that amendments will not be disturbed except for abuse of discretion.

63 Cal. 324-325. NEVADA BANK v. DRESBACH.

Affidavit of Merits is required to support motion to vacate judgment, p. 325.

Cited in *Tuttle v. Scott*, 119 Cal. 588, as being too vague, and as to the effect of a plea of discharge in bankruptcy.

63 Cal. 326-328. GARDNER v. OMNIBUS RAILROAD COMPANY.

Salary of Employee.—A signed receipt left with the employer's secretary as his agent for safe custody binds the employee, p. 327.

Distinguished in *Carroll v. People's Ry. Co.*, 14 Mo. App. 495, where it was clear that the money was left undrawn with the secretary and treasurer as representing the company, holding the signed pay-roll did not bar recovery from the company.

63 Cal. 332-333. DUFFICY v. SHIELDS.

Chattel Mortgage on hotel furniture is void when it is intended to secure more than the purchase price of the furniture, p. 333.

Mentioned in *San Francisco Breweries v. Schurtz*, 104 Cal. 426, as

having been cited by appellant to hold that a mortgage of saloon fixtures and other personal property not mortgageable was wholly void, the court stating that the principal case was also cited in *In re Fischer*, 94 Cal. 523, and, to the extent that it (the principal case) did so declare, it was in effect overruled by the last-named case, and was no longer authority.

Note.—In the case of *In re Fischer*, 94 Cal. 523, above referred to, the principal case was cited by appellant's counsel, but not by the court in its opinion as authority for the proposition that the mortgage was wholly void for a failure to strictly comply with the provisions of the Civil Code, but in what respect the report does not state, and the court held that a mortgage of printing presses was not wholly void because it included other property not mortgageable. It is conceived that the court in the case of *San Francisco Breweries v. Schurtz*, supra, if it intended to overrule the principal case, and, also, the writer of the annotation to section 2955 of the Civil Code (Deering's), subdivision eight, in stating, on the authority of the principal case, that "if the chattel mortgage on the furniture in a hotel included other property it would be void," have both misread the decision of the principal case, and also overlooked the fact that subdivision eight of section 2955 of the Civil Code contains a special feature, not found in any of the other subsections, to the effect that a mortgage on hotel furniture can only be given to secure the purchase money of the articles mortgaged, and that the decision in the principal case turned on this one point, viz., that there the mortgage was given to secure something else, namely, the purchase money for the hotel or part of it, and was not held void because it included other property, viz., the lease of the hotel. The principal case therefore has not been overruled.

63 Cal. 333-339. PEOPLE v. BLANDING.

Legislature.—Officer may be confirmed at extra session, although confirmation not specified in proclamation, p. 338.

Distinguished in *People v. Curry*, 130 Cal. 89, holding passage of charter not allowable unless so proclaimed.

63 Cal. 340-341. SAVAGE v. SWEENEY.

New Trial.—Order granting, on the ground of insufficiency of evidence to justify the decision, will not be disturbed except for abuse of discretion, p. 341.

Approved in *Reclamation Co. v. Cunningham*, 71 Cal. 222.

63 Cal. 341-343. BLUM v. SUNOL.

New Trial.—Where there has been a conflict of evidence the lower court on a review of the evidence exercises its discretion, which will not be interfered with unless abused, p. 343.

Cited in *Mullins v. Wieland*, 68 Cal. 233, holding that same rule applies when the trial was before a jury; *Wilson v. California C. R. R. Co.*, 94 Cal. 168, to same effect where the motion was made, and the statement settled by the trial judge and granted by his successor in office; so, also, *Reay v. Butler*, 95 Cal. 215; *Jones v. Saunders*, 103 Cal. 679.

63 Cal. 343-345. **BRIGGS v. HAYCOCK.**

Conversion.—Refusal to surrender property warehoused on tender of the charges due amounts to a conversion, p. 345.

Cited in note to 24 Am. St. Rep. 807, on demand and refusal as evidence of conversion.

63 Cal. 345-346. **PEOPLE v. GIESEA.**

Appealable Order.—An order dismissing a case (criminal) and discharging the defendant, is a final judgment and appealable, p. 346.

Cited to same effect in *People v. More*, 68 Cal. 504.

Discharge for Delay in bringing on trial; section 1382 of the Penal Code does not apply where the sustaining of defendant's demurrer has necessitated an appeal, p. 346.

Cited in dissenting opinion in *In re Bogerow*, 133 Cal. 358, 85 Am. St. Rep. 185, construing Penal Code, section 1382; *People v. Lundin*, 120 Cal. 311, to same effect, where on defendant's appeal the case is remanded for a second trial.

63 Cal. 346-349. **ESTATE OF ROSE.**

Probate Decree directing sale of real estate held invalid by reason of defects in the petition.

Referred to in S. C., 80 Cal. 175, 179, being a second appeal in the same estate on other points; see, also, S. C. 66 Cal. 242; S. C. 72 Cal. 577.

63 Cal. 349-351. **ESTATE OF ROSE.**

Administrator's Account.—Vouchers must be produced. Orders on the administrator for payment are not vouchers, p. 349, 350.

Cited in *Estate of Hilliard*, 83 Cal. 426, reason not apparent. Referred to also in S. C., 80 Cal. 179, vide note, *supra*.

63 Cal. 352-353. **CASSIDY v. CASSIDY.**

Divorce.—A finding that all the material allegations in the complaint are fully sustained and proved is insufficient, p. 352.

Approved in *Musselman v. Musselman*, 140 Cal. 197, noted under *Ladd v. Tully*, 51 Cal. 277; *Warren v. Robinson*, 71 Cal. 381, as to a like finding in an action for materials furnished and labor performed.

General Demurrer will not hold when one of several counts in the complaint states a cause of action, p. 352.

Cited in *Hulsman v. Todd*, 96 Cal. 230, to same effect when the complaint states facts, though imperfectly, and shows that plaintiff is entitled to relief, either legal or equitable.

63 Cal. 355-357. BANK v. GOVE. 49 Am. Rep. 92.

Promissory Note.—The purchaser of an overdue note from one who acquired it before maturity and is unaffected by any infirmity in it, is relieved of any equities between the original parties, pp. 356, 357.

Cited in *Koehler v. Dodge*, 31 Neb. 337, 28 Am. St. Rep. 524, on the law of purchase of a negotiable note after maturity from an innocent holder; *Donnerberg v. Oppenheimer*, 15 Wash. 293, to same effect. Note to 84 Am. Dec. 401, on what amount paid constitutes purchaser for value; note to 11 Am. St. Rep. 323, on rights of transferee from bona fide holder.

63 Cal. 359-365. ANGLO BANK v. GRANGERS' BANK.

Stock Certificate, which does not show on its face that no transfer on the books will be made until all dues have been paid, is not actual or constructive notice of a by-law to that effect, p. 364.

Cited and distinguished in *Jennings v. Bank*, 79 Cal. 331, 12 Am. St. Rep. 51, holding that, when the certificate contained such condition, the transferee was put upon notice to inquire; *Trust and Savings Co. v. Home Lumber Co.*, 118 Mo. 461, as to failure to print such a by-law being a waiver of it; note to 85 Am. Dec. 621, on by-law cannot enlarge corporate powers; note to 6 Am. St. Rep. 839, on liability of transferee of stock for unpaid calls; note to 43 Am. St. Rep. 156, on limitations of power of private corporations to enact by-laws; note to 57 Am. St. Rep. 393, on transfers of stock.

By-laws, which attempted to create a lien in favor of the corporation against a bona fide purchaser for value without notice, was in conflict with section 324 of the Civil Code, p. 364.

Cited in *Ranch Land Co. v. Herberger*, 82 Cal. 603, but no opinion expressed; *Bank v. Durfee*, 118 Mo. 444; 40 Am. St. Rep. 402.

Transfer of Stock valid according to the provisions of the law, entitles the transferee to have it transferred on the books of the corporation, p. 364.

Cited in *Trust and Savings Co. v. Home Lumber Co.*, 118 Mo. 459, to same effect.

63 Cal. 366, 367. BARTLETT v. COTTLE.

Recovery of Debt Secured by Mortgage.—An action on the note alone cannot be maintained, p. 367.

Cited in *Bull v. Coe*, 77 Cal. 60, 11 Am. St. Rep. 239, holding that, where no personal judgment is sought, the suit for foreclosure need not embrace the whole of the mortgaged property, but that the mortgage is thereby waived as to the part omitted; *Lavenson v. Soap Co.*, 80 Cal. 248, 13 Am. St. Rep. 149, as authority for ruling that a mortgagee had concurrent remedies at law for damages, or in equity to restrain threatened waste; *Barbieri v. Ramelli*, 84 Cal. 157, holding that an action for debt on the promissory note secured by a mortgage will not lie; that the remedy is by foreclosure. Note the decision is by Thornton, J., who states that the head note in the principal case was incorrect and misleading, and that the court did not there decide that an action could not be maintained on the note alone, unless the security was valueless. Cited in *McKean v. German-American Sav. Bank*, 118 Cal. 336, 337, reaffirming the rule of the principal case, that the remedy must be first sought in foreclosure; *Woodward v. Brown*, 119 Cal. 291, 63 Am. St. Rep. 113, holding that a mortgagee cannot, without the consent of the mortgagor, release part of the security and have a deficiency judgment against him; *Bank v. Williams*, 2 Idaho, 626, holding that where a mortgage was given to secure a note and to protect a surety, and the security was of value, an action could not be maintained on the note alone against the maker and surety, ignoring the mortgage (note in this case the principal case is cited according to the meaning given in its head note, which was subsequently repudiated by Thornton, J., vide, supra); note to *Colby v. McClintock*, 73 Am. St. Rep. 564, on general subject. Distinguished in *Rudolph v. Herman*, 4 S. Dak. 288, holding that the ruling in the principal case was founded on the special statute of California, and that under the North Dakota statute an action at law on the note was distinctly allowed. Cited in *Winters v. Hub Min. Co.*, 57 Fed. Rep. 292, following the ruling of the principal case, but pointing out that it depended upon special statute. Conf: *Ould v. Stoddard*, 54 Cal. 613.

63 Cal. 367-369. FISK v. MILLER.

Note.—Indorser of note before delivery is liable as indorser, p. 369.

Cited in note to *Cadwallader v. Hirschfield*, 72 Am. St. Rep. 682, on general subject.

63 Cal. 369-370. SUNOL v. MOLLOY.

Cropping Lease, whereby landlord and tenant become tenants in common of the crop, mortgagee of tenant succeeds to his contract rights, and his refusal to deliver the landlord's share of the crop is conversion, p. 370.

Distinguished as not in point in *Stockton S. and L. Soc. v. Purvis*, 112 Cal. 243, 53 Am. St. Rep. 215, where the lease reserved a fixed money rent and there was an oral agreement that the crop should be

security for its payment. Approved in *Riddle v. Dow*, 98 Iowa, 29, in dissenting opinion of Granger, J.

63 Cal. 371-374. SCHMIDT v. NUNAN.

Delivery of Possession of property to a bailee for the purchaser is delivery to the purchaser, and it cannot be attached for a debt of the vendor, p. 374.

Cited in *West v. Humphery*, 21 Nev. 85, holding that a carrier is the bailee of the person to whom, not by whom, the goods are sent; note to 97 Am. Dec. 347, on what delivery sufficient as against creditors and subsequent purchasers.

Replevin.—Interest is allowable by way of damages from date of taking, p. 374.

Cited in *Black v. Vermont M. Co.*, 137 Cal. 685, noted under *Kelly v. McKibben*, 54 Cal. 192.

63 Cal. 375-379. BRYCE v. JOYNT. 49 Am. Rep. 94.

Before books can be introduced to prove partnership there must be preliminary testimony to justify their admission, the sufficiency of which is for the trial court, p. 378.

Cited in *Dennis v. Kolm*, 131 Cal. 94, applying rule to declarations of alleged partners; *Webster v. San Pedro Lumber Co.*, 101 Cal. 329, to same effect as to any kind of documentary evidence, and that the decision would not be disturbed except for abuse of discretion.

63 Cal. 379-381. TRENOUTH v. GORDON.

Ejectment.—Plaintiff cannot recover when title is in third person, p. 380.

Cited in *Pacific Bank v. Hannah*, 90 Fed. 80, denying recovery under facts stated.

63 Cal. 381-382. MOHLE v. TSCHIRCH.

Preferred Claims for Labor.—Section 1206 of the Code of Civil Procedure is not unconstitutional. It provides for notice to the attaching creditor. It is not special legislation, pp. 382, 383.

Cited in *Alexander v. Archer*, 21 Nev. 28, as applicable to a similar statute in Nevada; *Gleason v. Tacoma Hotel Co.*, 16 Wash. 415, as applying to similar statute in Washington state; *State v. Britton*, 80 Mo. 62.

63 Cal. 384-385. BIAGI v. HOWES.

Appeal without undertaking will be refused a hearing, p. 385.

Followed in *Stratton v. Graham*, 68 Cal. 169; *Duffy v. Greenbaum*, 72 Cal. 160, distinguishing the undertakings under sections 941 and 942 of the Code of Civil Procedure; also, in *Bellegarde v. San Francisco Bridge Co.*, 80 Cal. 62; *Perkins v. Cooper*, 87 Cal. 243; *Centerville Co. v. Bachtold*, 109 Cal. 114, as to the former and present practice in such cases; *Cook v. Railway Co.*, 7 Utah, 420, denying right to file new undertaking when original filed too late.

63 Cal. 390-391. FINNIGAN v. HIBERNIA SAVINGS AND LOAN SOCIETY.

Earnings of Wife are not liable for debts of husband, p. 391.

Cited in note to 86 Am. Dec. 635, on wife's earnings.

63 Cal. 391-394. JOHNSON v. BROWN.

Coterminous Owners.—Where each has had adverse possession for more than five years up to a division line, recognized by each as the true line, both are estopped from questioning it, p. 393.

Approved in *Quinn v. Windmiller*, 67 Cal. 464, but held not to apply where the line was never settled and agreed upon as to the true boundary; *Water Co. v. Richardson*, 72 Cal. 601; *Hughes v. Wheeler*, 76 Cal. 234, holding that the sufficiency of the manner in which estoppel was pleaded will not be reviewed on appeal. Cited in notes to 94 Am. Dec. 742, on title by adverse possession; 95 Am. Dec. 209, on same subject.

Statute of 1878 making payment of taxes an essential element of adverse possession, is not retrospective, p. 393.

Approved in *Heilbron v. Heinlen*, 72 Cal. 378; and *Webber v. Clarke*, 74 Cal. 19, both to same effect.

63 Cal. 394-396. QUIMBY v. LYON.

Demand of Payment need not be alleged in an action for money had and received, p. 395.

Cited in *Pierce v. Whiting*, 63 Cal. 541, to same effect where there is an unqualified promise to pay, either generally or on demand; also in *People v. Central Pacific Co.*, 76 Cal. 42, to the point that in such case there need be no averment of demand. Approved in *Drew v. Pedlar*, 87 Cal. 452, 22 Am. St. Rep. 264; and *Rhodes v. Webb Co.*, 19 Ind. App. 196, applying rule to mechanic's lien case.

63 Cal. 396, 397. PETTIGREW v. DOBBELAAR.

Deed—Sufficiency of Description.—"All lands belonging to vendor" will pass title, p. 397.

Cited in *Knowlton v. Dolan*, 151 Ind. 85, 86, noted under *Lick v. O'Donnell*, 3 Cal. 59; *Idaho G. Min. Co. v. Union Min. Co.*, 5 Idaho, 120,

deed conveying certain mine and all grantor's property, real, personal and mixed, located in certain county, passed title to another mining claim in said county; *McCulloh v. Price*, 14 Mont. 322, 43 Am. St. Rep. 639, that "all and singular the lands belonging to the party of first part," is sufficient; *Higgins v. Higgins*, 121 Cal. 488, as to lien on "his estate."

Description of land in San Francisco as "Gift-map, No. 2, lots 406, 407" sufficient if there was a map of lands in San Francisco known by that name, p. 397.

Cited in *Olsen v. Rogers*, 120 Cal. 227, as to land described in complaint as "Lot No. 318 as delineated upon gift-map, No. 2."

63 Cal. 397-402. JENNINGS v. LE ROY.

Street Law.—The act of 1878 authorizing the grading of Bay street, San Francisco, is a modification of and supplemental to the general street laws then in force. It is not unconstitutional, p. 401.

Cited in *Onderdonk v. San Francisco*, 75 Cal. 536; to same effect *Jennings v. Le Breton*, 80 Cal. 10, holding that the sole remedy of an owner for alleged defective work was an appeal to the board of supervisors; *Ede v. Knight*, 93 Cal. 166, affirming the constitutionality of the act.

The assessment under section twelve of the street law of 1871, 1872, is prima facie evidence of validity of prior proceedings, p. 401.

Cited in *Reid v. Clay*, 134 Cal. 210, applying rule to proceedings under act of 1889; *Fanning v. Leviston*, 93 Cal. 187, holding that the character given to the evidence of the assessment extended to all the proceedings upon which it was based; but in *Witter v. Bachman*, 117 Cal. 323, that it did not extend to proceedings subsequent to the assessment.

63 Cal. 402-404. ESTATE OF PALOMARES.

Probate Homestead under Code of Civil Procedure, section 1464, may be set apart without prior general notice to creditors, p. 403.

Cited in *Estate of Atwood*, 127 Cal. 430, denying right to vacate letters for failure to publish notice to creditors when estate is less than fifteen hundred dollars.

63 Cal. 404-408. TRENOUTH v. GILBERT.

Action to Establish a Trust by one claiming to be a cotenant of a tract of land.

Referred to in *Trenouth v. Gilbert*, 86 Cal. 585, second appeal, S. C.

63 Cal. 414-417. ESTATE OF MAGEE.

Succession to Estate by Illegitimates is provided for by sections 1337, 1388 of the Civil Code. Section 1386 applies to legitimates, p. 417.

Cited in *Estate of Jessup*, 81 Cal. 438 (in the original opinion on the hearing of the case in Bank, which was reversed on a rehearing), holding that the principal case had no application to a case of adoption by the father; *Blythe v. Ayres*, 96 Cal. 582, holding that if section 1387 was a statute of descent, pure and simple, the plaintiff (an illegitimate child) was entitled to all the benefits of it, regardless of domicile, status or extraterritorial operation of state laws; *Eddie v. Eddie*, 8 N. Dak. 381, 73 Am. St. Rep. 770, construing similar local statutes; note to 12 Am. St. Rep. 102, on illegitimate children.

63 Cal. 417-421. ADAMS v. DOHRMANN.

New Trial.—Statement must be certified, settled and signed by the judge before the motion is heard. After that when the appeal is perfected the lower court loses jurisdiction over the case and cannot make another record, p. 419.

Cited in *Beets v. Chart*, 79 Cal. 186, holding that an uncertified statement cannot be considered, either as a statement or bill of exceptions. Doubted as of authority in *Jackson v. Puget Sound Lumber Co.*, 115 Cal. 635, holding that the filing of an uncertified bill of exceptions by mistake of the clerk ought to be considered as error, and on a timely request should be certified and refiled. Approved in *Raymond v. Thexton*, 7 Mont. 304, the Montana statute corresponding with the California Code; *Scherrer v. Hale*, 9 Mont. 64, to same effect in *Parrot v. City of Hot Springs*, 9 S. Dak. 206, to same effect; as also *Slater v. Railway Co.*, 8 Utah, 180.

Code provisions as to computation of time do not apply to the supreme court which is by the constitution always open for the transaction of business, pp. 420, 421.

Cited in *Herrlich v. McDonald*, 83 Cal. 506, holding that a remittitur issues at the end of thirty days after filing of the opinion; *Niles v. Edwards*, 95 Cal. 47, holding a modification in a judgment of the supreme court may be made at any time within thirty days, and is not affected by failure of the clerk to enter the modifying order until after the thirty days have expired; *Brown v. Leet*, 136 Ill. 206, in dissenting opinion of Baker, J., as to exclusion of Sunday; note to 78 Am. St. Rep. 377.

63 Cal. 421-426. PEOPLE v. RATEN.

Murder of First Degree.—The question of malice is for the jury, p. 426.

Cited in *People v. Martinez*, 66 Cal. 281, to same effect.

Self-Defense.—The burden of proving justification is on the defendant, and he may show it by a preponderance of evidence only, p. 422.

Approved in *People v. Knapp*, 71 Cal. 8, holding that an instruction to this effect was good; *People v. Bushton*, 80 Cal. 165, to same effect;

People v. Elliott, 80 Cal. 306, by Thornton, J., in his opinion, concurring in the judgment, but differing as to the correctness of an instruction that circumstances of justification should be proved by a preponderance of evidence, the prevailing opinion being that it was only necessary for defendant to introduce evidence sufficient to raise a reasonable doubt; *People v. Bruggy*, 93 Cal. 484, approving the ruling of the principal case; *State v. Yokum*, 11 S. Dak. 558, noted under *People v. Milgate*, 5 Cal. 127.

63 Cal. 426-428. **THOMAS v. DESMOND.**

Suit by Married Woman to recover property; complaint must aver that it was her separate property, or belonged to her as a sole trader, p. 427.

Cited in *Shumway v. Leakey*, 67 Cal. 458, to like effect; *McCaughy v. Schuette*, 117 Cal. 224, 59 *Am. St. Rep.* 177, holding that ultimate and not probative facts must be averred; and on same point *Simons v. Bedell*, 122 Cal. 346; *Freeburger v. Gazzan*, 1 *Wash.* 773, holding that where the separate property of a wife has been seized for the husband's debt, she must claim it as separate property; note to 76 *Am. Dec.* 498, on code pleadings; note to 77 *Am. St. Rep.* 103, on sole traders.

63 Cal. 429-431. **McINTYRE v. TRAUTNER.**

Foreclosure of Mechanic's Lien.—Nonsuit granted on ground that notice of lien was not filed in time was reversed on appeal, p. 431.

Referred to in S. C., 78 Cal. 449, being a second appeal in same case, on a question of attorney's fees.

Mechanic's Lien—Completion of Contract.—When owner requires additional work to be done to complete the contract, he cannot be heard to say it was not a continuation of the previous work, and done under same contract, p. 430.

Cited in *Conlee v. Clark*, 14 *Ind. App.* 212, 56 *Am. St. Rep.* 303, to same effect, although the defect is caused by contractor's own negligence; *General etc. Co. v. Schwartz etc. Co.*, 165 *Mo.* 181, but holding completion and acceptance not shown under facts stated; *Shaw v. Fjellman*, 72 *Minn.* 468 (quoted in *Minneapolis etc. Co. v. Great N. Ry. Co.*, 74 *Minn.* 33), holding lien filed within statutory time. Disapproved in *Avery v. Butler*, 30 *Oreg.* 293, holding that after a structure has been completed, inspected, and approved by the owner, any latent defects that may be cured by the builder upon the request of the owner, are to be considered as repairs, and not omissions in the original contract.

63 Cal. 431-434. **MacDOUGALL v. CENTRAL RAILROAD COMPANY.**

Contributory Negligence.—Burden of proof is on defendant unless the plaintiff has already shown such negligence, p. 432.

Cited in *Smith v. Occidental Steamship Co.*, 99 Cal. 468, holding, in action for damages, it is sufficient for a plaintiff to show in the first instance that the injury resulted from the negligence of defendant; *Schneider v. Market St. Ry. Co.*, 134 Cal. 487, noted under *Robinson v. W. P. R. R. Co.*, 48 Cal. 426; *Linden v. Anchor etc. Co.*, 20 Utah, 144, holding instruction improper; *Bowers v. U. P. R. R. Co.*, 4 Utah, 224, to same effect as principal case; note to 62 Am. Dec. 687, on burden of proof as to contributory negligence.

63 Cal. 435-436. CURTIS v. SUPERIOR COURT.

Appeal from Justice's Court will lie where issues of fact have been passed on without the introduction of any evidence, and case may be tried anew in the appellate court, p. 436.

Cited and distinguished in *Myrick v. Superior Court*, 68 Cal. 100, and held that where there had been a judgment but no trial, the case should have been sent back to the justice's court to be tried; *Fabretti v. Superior Court*, 77 Cal. 307, as to duty of superior court, when there has been no trial upon issues of fact in the justice's court, to decide the appeal upon questions of law alone; *Harvey v. Bunker Hill Co.*, 2 Idaho, 738, holding that a judgment by consent and answer is subject to appeal.

63 Cal. 437-438. CALLAHAN v. HICKEY.

Notice of Overruling Demurrer.—Under rule sixteen of the superior court of San Francisco, defendant demurring, entitled to five days' notice before judgment can be taken, p. 438.

Cited in *White v. Superior Court*, 110 Cal. 68, as to violation of the rule being an irregularity which could be corrected on appeal.

63 Cal. 440-442. CARROLL v. ELLIS.

Homestead.—Conveyance by the husband and wife of an undivided interest to a third party destroys the whole, p. 442.

Cited in *Rosenthal v. Merced Bank*, 110 Cal. 202, to sustain the rule that a homestead cannot be created upon land held in cotenancy or tenancy in common in favor of one of the cotenants; nor, *Lindley v. Davis*, 6 Mont. 456, in land held in partnership; but, *S. C.*, 7 Mont. 214, on a rehearing the first decision was reversed, and it was held that a cotenant was an "owner" within the meaning of the homestead laws of Montana, and entitled to the homestead exemption; note to 83 Am. Dec. 134, on homesteads cannot be carved out of land held in joint tenancy or tenancy in common; note to 1 Am. St. Rep. 594, on homestead exemptions. Distinguished in *Payne v. Cummings*, 146 Cal. 432, where homestead declared on community property including pre-emption claim and desert land claim and water rights in which claimant

had part interest appurtenant to desert claim, after death of wife, conveyance by husband of moiety of desert land claim and water rights does not affect homestead exemption.

Note.—The broad assertion of the rule in *Rosenthal v. Merced Bank*, 110 Cal. 203, that "it is well settled in this state that a homestead cannot be created in lands held by tenancy in common," is unintelligible in view of the alteration effected in the law by the statute of March 9, 1868 (Stats. 1867-68, p. 116.) This act, in the plainest terms, enabled a homestead to be declared on land held in joint tenancy or tenancy in common, the sole requirement being that the land should be inclosed and exclusively occupied by the intending homesteader. If this law has not been repealed or declared unconstitutional, then it is conceived the recent decisions are contrary to law. The statute is referred to by Mr. Deering in his annotations to the Civil Code, section 1238, edition 1887, as in force, also in the note to 63 Am. Dec. 124, although in the subsequent note to 83 Am. Dec. 134, it is apparently overlooked. In the Am. & Eng. Ency. of Law, ed. 1889, vol. IX, p. 428, note 4, the statute is again mentioned as in force, and the statement made that the sole requisites were exclusive possession (the statute reads "occupation"), and inclosure of the tract. It is noteworthy that the act of 1868 was not cited or referred to by either of the counsel or by the court in the case of *Rosenthal v. Merced Bank*, supra. The court in *Rosenthal v. Merced Bank* cite *Fitzgerald v. Fernandez*, 71 Cal. 504, as an authority for their ruling; reference to that case will show that it holds squarely the reverse, and that it upholds the act of 1868, when the requisites of exclusive occupation and inclosure are present. The question depends on whether the act of 1868 is still in force. The foregoing references appear to show that it is; but in the index to the laws of California, prepared in accordance with the act of March 11, 1893, while in one place, p. 285, it appears under the head of "Homestead, joint tenant entitled to without any reference to a repeal"; at another page, 710, it is indexed as a statute superseded or intended to be superseded by the codes.

63 Cal. 442-445. KENNEY v. KELLEHER.

Res Adjudicata does not apply to motions made in the course of practice. Renewal of a motion once decided is allowable, p. 444.

Approved in *Hitchcock v. McElrath*, 69 Cal. 635, as within the discretion of the court; *Wallace v. Lewis*, 9 Mont. 403, held that when a motion is overruled, without prejudice, the time for making it is not thereby enlarged; *Bank v. Jennings*, 4 N. Dak. 234; but a motion decided by one judge cannot be reopened by another, and S. C., p. 236, doubting whether in such a case it would be such an exercise of discretion by the judge as could not be reviewed.

63 Cal. 445-447. EGGERS v. HINK. 49 Am. Rep. 96.

Trademark.—A sign which relates only to the description of an article dealt in cannot be protected as a trademark by the dealer, p. 447.

Cited in *Ball v. Siegel*, 116 Ill. 147, 56 Am. Rep. 769, holding that the court will not interfere where ordinary attention will enable purchasers to distinguish between the trademarks used by different parties; note to 1 Am. St. Rep. 421, on trademarks, right to use of, when protected.

63 Cal. 447-450. DYER v. HARRISON.

Street Assessment under act of 1872, which omits some lots liable to assessment, is wholly void, p. 448.

Cited in *Davies v. City of Los Angeles*, 86 Cal. 49, as to sufficient allegation in complaint to declare void a street assessment; *Kansas City v. Bacon*, 147 Mo. 301, discussing verdict in condemnation proceedings. Distinguished as inapplicable in *Ede v. Knight*, 93 Cal. 166; *Ryan v. Altschul*, 103 Cal. 177, holding that the principal case did not say that an appeal to the board for a new assessment was the only remedy.

63 Cal. 450-451. MATTHEW v. CENTRAL PACIFIC RAILROAD COMPANY.

Damages to husband in consequence of injuries to wife cannot be recovered in action by wife in which husband joins, p. 451.

Cited in *Tell v. Gibson*, 66 Cal. 249, holding that for the direct injury to the wife husband and wife must sue, for the consequential injuries to himself the husband may sue alone, and the two causes of action cannot be joined; *Baldwin v. Second St. R. R. Co.*, 77 Cal. 392, to same effect; *Mosier v. Beale*, 43 Fed. Rep. 358, holding that the husband cannot himself recover for the personal injuries sustained by his wife; *Fink v. Campbell*, 70 Fed. Rep. 666, to same effect as to joinder of the action.

Husband must be Party to the wife's action, p. 451.

Cited in note to 79 Am. Dec. 196.

63 Cal. 452-454. HAVEN v. HAWS.

Certificates of Sale of public land are prima facie evidence of ownership by the holder, only by virtue of section 1925 of the Code of Civil Procedure, p. 453.

Cited in *McTarnahan v. Pike*, 91 Cal. 544, holding that the section applied to mineral land also.

63 Cal. 454-457. ESTATE OF HUDSON.

Probate Final Decree.—After the time specified in section 473 of the

Code of Civil Procedure, jurisdiction of the probate court ceases; but relief may be granted in equity against a final decree obtained through fraud, p. 457.

Cited in *Estate of Cahalan*, 70 Cal. 607, to like effect; *Curtis v. Schell*, 129 Cal. 216, 79 Am. St. Rep. 112, as to decree granting family allowance; *Levy v. Superior Court*, 139 Cal. 591, as to decree granting homestead; *De Pedrorena v. Superior Court*, 80 Cal. 145, as to the power of the court to set aside a final decree on a proper showing under section 1713 of the Code of Civil Procedure; *Moore v. Superior Court*, 86 Cal. 496, as to the time within which an order substituting a trustee could be set aside; *Lataillade v. Orena*, 91 Cal. 577, 25 Am. St. Rep. 223, holding that a fraudulent concealment or disposition of property would be ground for interposition of equity; *Wickersham v. Comerford*, 96 Cal. 440, holding that a decree setting apart a homestead might be set aside when obtained through fraud; *Buckley v. Superior Court*, 102 Cal. 10, 41 Am. St. Rep. 438, holding that the apparent exception to the loss of jurisdiction lay in proceedings for partition under sections 1675 and 1676 of the Code of Civil Procedure; *Hitchcock v. Judge of Probate*, 99 Mich. 130, holding that the judge of probate has no power to set aside his own adjudications and grant rehearings; notes to 48 Am. Dec. 746, 747, on conclusiveness of decrees of distribution in California; 73 Am. Dec. 560, on jurisdiction of chancery over settlement of estates; note to 41 Am. St. Rep. 141, on partition in connection with distribution of estates of decedents; note to 60 Am. St. Rep. 634, on vacating of judgments.

Presumption is that all matters decided by a decree were heard and determined, p. 457.

Cited in *Crew v. Pratt*, 119 Cal. 149, to same effect.

63 Cal. 458-460. ESTATE OF BEECH.

Person Entitled to Serve as Administrator must be a bona fide resident, and a nonresident cannot name a substitute, p. 459.

Approved in *Estate of Hyde*, 64 Cal. 228; *Estate of Allen*, 78 Cal. 586, holding that married women could neither serve as nor nominate an administrator; *Estate of Harrison*, 135 Cal. 8, quoting *Estate of Richardson*, 120 Cal. 344; *Estate of Brundage*, 141 Cal. 541, 542, denying right of assignee of nonresident daughter of decedent as against decedent's resident son; *Estate of Bedell*, 97 Cal. 342, holding that, under section 1365 of the Code of Civil Procedure, a nonresident husband or wife might nominate an administrator; *Estate of Bergin*, 100 Cal. 378, holding that the principal case did not apply to a foreign will under which a resident devisee applied for letters to which he was entitled. *Semble*, whether the public administrator is under any circumstances entitled to letters of administration of a foreign will; *Estate of Muersing*, 103 Cal. 587, to same effect as principal

case; *Estate of Donovan*, 104 Cal. 624, as to requisites to enable a party to nominate an administrator; *Estate of Richardson*, 120 Cal. 346, a resident executor of a foreign will cannot nominate a substitute.

63 Cal. 460-462. CROWLEY v. DAVIS.

Railroad on Public Street cannot be enjoined by owner of property abutting on street, unless he will suffer special injury not merely greater in degree than the general public, p. 462.

Approved in *Hogan v. Central Pacific*, 71 Cal. 87; *McCloskey v. Kreling*, 76 Cal. 513, applying ruling to a wooden building built in violation of the fire-limit ordinance.

63 Cal. 464-467. KANE v. DESMOND.

Justices' Courts.—Judgment carries no presumption in its favor, and all jurisdictional facts must be shown, p. 467.

Cited in *Fisk v. Mitchell*, 124 Cal. 360, as to proof of service of summons; *Brann v. Blum*, 138 Cal. 659, noted under *Cardwell v. Sabichi*, 59 Cal. 490; *Eltzroth v. Ryan*, 89 Cal. 140, holding absence of proof of service of summons sets up presumption that the judgment is void; *Hunter v. Eddy*, 11 Mont. 264, holding that a statement of confession of judgment on the justice's docket is a conclusion and no proof of jurisdiction; *Lonsdale v. License Commrs.*, 18 R. L. 12, stating rules applicable to courts of limited jurisdiction.

Gift by Husband to Wife is good as between the parties and as to all the world, except existing creditors and bona fide subsequent purchasers without notice, p. 466.

Cited in *Darville v. Mayhall*, 128 Cal. 618, as to proof necessary on justification for seizure of property of third person; *Wilholt v. Lyons*, 98 Cal. 413, holding that an assignment for the benefit of creditors, though wrongly recorded, is good as against subsequent creditors; *Farr v. Swigart*, 13 Utah, 156, to same effect as the principal case; note to 79 Am. Dec. 206, on fraudulent conveyance is void only as against creditors.

63 Cal. 467-470. SAN FRANCISCO v. CENTRAL PACIFIC CO. 49 Am. St. Rep. 98.

Taxation.—Steamers used solely for conveying railroad cars across San Francisco bay did not form part of the roadbed, and should be assessed by the local assessor, not by the state board of equalization, p. 469.

Cited in *Standard Ins. Co. v. Langston*, 60 Ark. 385, as to meaning of the term "roadbed"; *Germania etc. Co. v. San Francisco*, 128 Cal. 593, discussing taxation of railroad bonds; *Chicago etc. Co. v. Cass Co.*, 8 N. Dak. 20, noted under *San Francisco etc. Co. v. Board*, 60 Cal. 12;

Santa Clara Co. v. Southern Pacific, 118 U. S. 413; *California v. Pacific Railroads*, 127 U. S. 33, both affirming the principal case.

63 Cal. 470-473. SAN FRANCISCO v. FRY.

Taxation.—Shares owned by a citizen and resident of the state in mining corporations constituted under the laws of California, but whose tangible property is in another state, are taxable in California, p. 473.

Cited in *San Francisco v. Flood*, 64 Cal. 507, to same effect; *People v. National Bank*, 123 Cal. 60, 69 Am. St. Rep. 37, and *Germania etc. Co. v. San Francisco*, 128 Cal. 595, noted under *People v. Badlam*, 57 Cal. 594; *San Francisco v. Mackey*, 22 Fed. Rep. 605, 607, 10 Saw. 435, 438, holding that the "situs" of incorporeal shares of stock for the purposes of taxation follows the person of the owner; note to 56 Am. Dec. 531, on corporate personal property, where taxed.

63 Cal. 473-478. DEAN v. SUPERIOR COURT.

Probate Final Decree cannot be set aside for fraud after six months; the only remedy is by appeal or by suit in equity, pp. 477, 478.

Cited to same effect in *Estate of Cahalan*, 70 Cal. 607; *Curtis v. Schell*, 129 Cal. 216, 79 Am. St. Rep. 112, noted under *Estate of Hudson*, 63 Cal. 454; *Silva v. Santos*, 138 Cal. 541, sustaining power of equity court to compel accounting by guardian where settlement of account had been procured by fraud; *Estate of Rose*, 80 Cal. 170, holding that an order settling the administrator's account was appealable under subdivision 3 of section 963 of the Code of Civil Procedure; *Moore v. Superior Court*, 86 Cal. 496, holding that an order substituting a trustee could not be set aside after six months; *Lataillade v. Orena*, 91 Cal. 577, 25 Am. St. Rep. 223, holding that fraud in obtaining a decree of settlement of accounts and discharge of administrator was ground for the interposition of equity; *Wickersham v. Comerford*, 96 Cal. 440, as to what was a sufficient averment of fraud to support an action to set aside a decree granting a homestead; *Hubbard v. Urton*, 67 Fed. Rep. 421, as to a suit maintainable by the heirs, after final settlement and discharge; notes to 48 Am. Dec. 746, 747, on conclusiveness of decrees of distribution in California; note to 73 Am. Dec. 560, on jurisdiction of chancery over settlement of estates.

63 Cal. 478-480. STRATHERN v. DAKIN.

Appeal—Defective Transcript.—When the record contains no bill of exceptions or statement, nor any papers identifiable as used on hearing the motion, the conclusive presumption is in favor of the order, and it will not be reviewed, p. 479.

Cited and approved in *Larkin v. Larkin*, 76 Cal. 324; *Cleland v. Walbridge*, 78 Cal. 360, holding that an order striking out an amended com-

plaint is not itself appealable; it may be reviewed on appeal from the judgment, but there must be a bill of exceptions.

63 Cal. 483-485. WOLFORD v. LYON ETC. MG. CO.

Death by Negligence.—Verdict for nominal damages will be vacated as inadequate, p. 485.

Cited in *Turner v. Hearst*, 137 Cal. 235, noted under *Mariani v. Dougherty*, 46 Cal. 26.

63 Cal. 485-489. SAN FRANCISCO v. TALBOT.

Assessment is a ministerial, not a judicial, act, p. 489.

Cited to same effect in *Ford v. McGregor*, 20 Nev. 451.

63 Cal. 490. CHAPMAN v. STONEMAN.

Governor has Power to investigate official acts of prison directors, and prohibition will not lie, p. 490.

Distinguished in *State v. Board*, 19 Wash. 15, granting writ against trial of teacher where member of board was disqualified by prejudice.

63 Cal. 491-492. EX PARTE RAYE.

Unlawful Imprisonment only occurs when the proceedings of an inferior court are void, p. 492.

Cited in *Ex parte Dela*, 25 Nev. 350, noted under *In re Ring*, 28 Cal. 253; note to 91 Am. Dec. 554, on imprisonment, when not unlawful.

63 Cal. 493-494. BOYD v. SLAYBACK.

Delivery of Deed is essential to its validity. No presumption of delivery arises from signature and acknowledgment, p. 494.

Explained in *Ward v. Dougherty*, 75 Cal. 243, 7 Am. St. Rep. 154, the decision as to presumption in the principal case referred only to the fact of delivery. Approved in *Leonard v. Kebler's Admr.*, 50 Ohio St. 453, being an instance of an assignment executed but never delivered, and which passed no title.

63 Cal. 494-497. MERRILL v. HURLBURT.

Assignee in Insolvency is a successor in interest of the creditors, and a person upon whom the estate of the insolvent devolves in trust for the benefit of others than himself, within the meaning of section 3440 of the Civil Code relating to fraudulent transfers, p. 497.

Approved in *Brown v. Bank of Napa*, 77 Cal. 546; *Ruggles v. Cannedy*, 127 Cal. 304, as to action to vacate chattel mortgage because improperly recorded; distinguished in *First Nat. Bank v. Menke*, 128 Cal. 108, and held inapplicable to assignee for benefit of creditors;

Francisco v. Aguirre, 94 Cal. 185, holding that actual delivery and change of possession is required, as the assignee is not one on whom the estate devolves by operation of law.

Transfer of Possession does not arise when the property is left with the vendor for safe custody, p. 497.

Cited in note to 97 Am. Dec. 342, on change of possession.

General Citation.—**Walters v. Ratliff**, 10 Okla. 275.

63 Cal. 497-498. HOLMES v. McCLEARY.

Appeal—Interlocutory Order.—An order denying a motion to vacate an order denying a previous motion, and for a new trial of the latter motion, is not appealable, p. 498.

Cited in **Sharon v. Sharon**, 67 Cal. 201, holding that all interlocutory orders, except those specified in section 939 of the Code of Civil Procedure, are unappealable; **Reay v. Butler**, 69 Cal. 586, to same effect as to an order refusing to vacate a judgment; **Tripp v. Santa Rosa Street R. R.**, 69 Cal. 632, to same effect; **Eureka R. R. Co. v. McGrath**, 74 Cal. 51, to same effect; **Goyhinech v. Goyhinech**, 80 Cal. 409, holding that when a judgment or order is itself appealable, the appeal must be taken from such judgment or order, and not from a subsequent order refusing to set it aside; **Harper v. Hildreth**, 99 Cal. 269, to same effect; **Insurance Co. v. Weber**, 2 N. Dak. 246, to same effect.

63 Cal. 499. FREEMAN v. STEPHENSON.

Verdict of Jury in an equity case is only advisory, and the finding of the court determines the fact, p. 499.

Cited in **Wallace v. Maples**, 79 Cal. 438, where the court disregarded the findings of the jury and rendered contrary findings of its own; **Harris v. Lloyd**, 11 Mont. 399, 28 Am. St. Rep. 480, to same effect as the principal case.

63 Cal. 500, 501. WATKINS v. DEGENER.

Affidavit of Merits which read that "I have fully and fairly stated the case in this action to my attorney and counsel" is sufficient, p. 501.

Cited in **People v. Larue**, 66 Cal. 236, where the words "his case" were insufficient, not the same as stating "the case"; **Nolan v. McDuffie**, 125 Cal. 336, holding affidavit sufficient.

Change of Venue.—The right is absolute when the defendant satisfies the court of his residence, and at the time he appears and answers or demurs, files an affidavit of merits and demand of change, pp. 500, 501.

Cited in **Hennessey v. Nicol**, 105 Cal. 141, to same effect and that the court cannot impose terms; **Thurber v. Thurber**, 113 Cal. 610, to same

effect; *Yore v. Murphy*, 10 Mont. 311, to same effect; *McDonnell v. Collins*, 19 Mont. 373, to same effect; *Elam v. Griffin*, 19 Nev. 443, showing how the right is waived or lost.

63 Cal. 501-503. CANNEY v. S. P. ETC. CO.

Physician cannot Recover for services rendered injured railroad employee when not employed by company, p. 502.

To same effect in *Thomas etc. Co. v. Prather*, 65 Ark. 32, denying recovery on similar facts; note to *Baxter v. Camp*, 71 Am. St. Rep. 194, on contracts for benefit of third persons.

63 Cal. 503-505. CUMMINGS v. HOWARD.

Demand not Necessary when money becomes due under contract on the happening of a particular event, p. 505.

Cited in *Melone v. Davis*, 67 Cal. 281, to the like effect as to a sum ordered to be paid by an administrator within ten days from a fixed date.

63 Cal. 505-509. THOMPSON v. WHITE.

New Trial is the proper mode to review the action of the trial court upon an issue of fact, whether at law or in equity, p. 500.

Cited to same effect in *Pico v. Sepulveda*, 66 Cal. 337, as to a motion to amend the findings after a decree has been entered; *Hawthurst v. Rathgeb*, 119 Cal. 533, 63 Am. St. Rep. 143, to same effect.

Interlocutory Decrees may be made in equity cases, and are reviewable on appeal from the final judgment, p. 509.

Cited in same case, 76 Cal. 381, 383, a second appeal on retrial of same case; *Watson v. Sutro*, 77 Cal. 611, holding that interlocutory decrees are not by themselves appealable, except in the cases provided by statute; *Fox v. Hale and Norcross Co.*, 112 Cal. 571, doubting whether more than one judgment in a suit in equity could be entered.

63 Cal. 514-517. HAVEN v. HAWS.

Pre-emption to an entire quarter section can be initiated by an act of settlement on part, the other part being inclosed and cultivated by another person before and at the time the attempt to pre-empt begins, p. 517.

Approved in *Whittaker v. Pendola*, 78 Cal. 298, to same effect, and that the whole premises can be recovered in ejectment against a trespasser who has held part under an inclosure; *Kitts v. Austin*, 83 Cal. 170, to same effect as *Whittaker v. Pendola*, supra; *Caldwell v. Bush*, 6 Wyo. 360, discussing *Whittaker v. Pendola*, 78 Cal. 298.

63 Cal. 517-520. **KELLEY v. DESMOND.**

Execution Sale.—Purchaser is only concerned with the judgment, execution, and sale as evidenced by his deed, p. 519.

Mentioned in note to 99 Am. Dec. 448, on validity of title of purchaser at sheriff's sale.

63 Cal. 520-524. **MCLELLAN v. DOWNEY.**

Final Account—Notice.—Recital in decree of final distribution that proper notice of the time and place of hearing had been given is conclusive, but subject to the usual review on appeal, p. 523.

Cited in Estate of Sbarboro, 70 Cal. 149, to same effect.

Decree of Final Distribution is conclusive on the administrator and his sureties, p. 523.

Cited in Treweek v. Howard, 105 Cal. 445, to same effect; notes to 48 Am. Dec. 746, 747, on conclusiveness of decrees of distribution.

63 Cal. 524-537. **SAN FRANCISCO v. SPRING VALLEY WATER WORKS COMPANY.**

Taxation—Capital Stock.—Where prior to the constitution of 1879, all the tangible property of a corporation has been assessed, and all the shares of its capital stock are owned and held by third persons, it is not liable for taxes assessed on "capital" or upon capital stock, p. 528.

Cited in note to 91 Am. Dec. 616; note to 99 Am. Dec. 384, on meaning of capital stock.

63 Cal. 538-543. **PIERCE v. WHITING.**

Undertaking to Release Attachment.—Demand on principal and sureties must be made before suit, pp. 540-543.

Cited in Coburn v. Brooks, 78 Cal. 448, distinguishing between suit on undertaking to release attachment, and on an undertaking given under section 1254 of the Code of Civil Procedure; Carter v. Mulrein, 82 Cal. 169, 16 Am. St. Rep. 100, holding that sureties on statutory bonds can stand on the express terms of their undertakings; Ogden v. Davis, 116 Cal. 36; Curtin v. Harvey, 120 Cal. 621, to same effect as Carter v. Mulrein, supra. Cited in Stevenson v. Palmer, 14 Colo. 571, 20 Am. St. Rep. 299, but to what point is not apparent.

Recitals in undertaking are, as between the parties thereto, conclusive evidence of the facts recited, p. 540.

Cited in Lambert v. Haskell, 80 Cal. 617, as to a recital of the pendency of a suit, to what extent binding the sureties; Alaska Imp. Co. v. Hirsch, 119 Cal. 256, to same effect as to previous issue of a temporary restraining order. Distinguished in Murphy v. Montadon, 2

Idaho, 1051, 35 Am. St. Rep. 281, holding that the estoppel did not extend to fraud in the affidavit on which the attachment was issued. Cited in Parrott v. Kane, 14 Mont. 30, showing that the estoppel extended to a question of jurisdiction, when raised for the first time in the appellate court; Cooper v. Davis Mill Co., 48 Neb. 425, also to the point that the surety is bound by the terms of the bond.

Surety on Bond is entitled to stand on its precise terms, p. 543.

Cited in Tally v. Parsons, 131 Cal. 518, applying rule to sureties on building contract.

63 Cal. 544-545. PEOPLE v. WONG AH TEAK.

Justifiable Homicide.—When an assailant really and in good faith declines further struggle, he may justify a subsequent killing, as if he had not been the original aggressor, p. 545.

Cited as stating the true rule in People v. Conkling, 111 Cal. 627.

63 Cal. 546-547. SOUTHARD v. McBROWN.

Execution sale under judgment which has been assigned for value prior to levy passes no title, though assignment not filed, pp. 546-547.

Approved in Curtin v. Kowalsky, 145 Cal. 435, following rule.

63 Cal. 547-549. SANFORD v. INSURANCE ASSOCIATION.

Insurance.—Performance or nonperformance of an act does not involve forfeiture of the policy, unless specially provided, p. 549.

Cited in Warwick v. Supreme Conclave, 107 Ga. 127, holding forfeiture of benefit certificate not established under facts stated; Hobbs v. Iowa Ben. Assn., 82 Iowa, 111, 31 Am. St. Rep. 469, holding that a by-law defining certain occupations as "extra hazardous" could not be read into the contract of insurance.

63 Cal. 550-553. BERSON v. NUNAN.

Replevin.—Judgment must be in the alternative form prescribed by section 667 of the Code of Civil Procedure, p. 552.

Cited in Brichman v. Ross, 67 Cal. 606, to same effect; Stewart v. Taylor, 68 Cal. 6; Washburn v. Huntington, 78 Cal. 578; Arzaga v. Villalba, 85 Cal. 195; Cook v. Aguirre, 86 Cal. 483. Doubted and not followed in Claudius v. Aguirre, 89 Cal. 506. Cited in Thompson v. Laughlin, 91 Cal. 315, 316, holding that a judgment in the alternative form did not entitle the party to both property and value.

Chattel Mortgage.—Recording is, under section 2957 of the Code of Civil Procedure, the equivalent of an immediate delivery and continued change of possession, and a recorded mortgage passes the legal title,

and subsequent purchasers and encumbrancers are bound by the notice which it imparts, p. 552.

Cited and approved in *Beamer v. Freeman*, 84 Cal. 557; *Chittenden v. Pratt*, 89 Cal. 183, holding that a subsequent encumbrancer was charged with notice that the legal title was in the mortgagee; *Cardenas v. Miller*, 108 Cal. 258, 49 Am. St. Rep. 89, holding that recording the instrument takes the place of delivery of possession of the mortgaged chattels. Distinguished and explained in *Fassett v. Wise*, 115 Cal. 325, 326, in dissenting opinion of Garoutte, J. Cited in *Alferitz v. Ingalls*, 83 Fed. Rep. 971, 972, as an instance of a decision following the common-law rule that a chattel mortgage operates to transfer the legal title to the mortgagee. Note: The decisions in this state as to the effect of a chattel mortgage upon the legal title are hopelessly at variance. In the above-mentioned cases, down to that in 115 Cal. 325, which was decided in Bank, December 14, 1896, it seems to have been held in language more or less distinct that, as is said in the principal case (decided in June, 1883), the mortgage "passes the title." But in the later cases of *Bank of Ukiah v. Moore*, 106 Cal. 673, after stating, p. 680, that in many of the states it was held, as at common law, that a mortgage of personal property transfers the title, the court says: "Such is not the rule in this state." Again, in *Shoobert v. De Motta*, 112 Cal. 215, the court says, p. 218: "Prior to 1872 the giving of a chattel mortgage in this state vested the mortgagee with the title to the property mortgaged. . . . The Civil Code, however, went into effect that year, and under its provisions the mortgagor is not, by the execution of the chattel mortgage, divested of his title to the property, but still remains its owner, while the mortgagee has only a lien thereon, citing Civil Code, section 2888. It may be that the decision was intended to have reference only to the particular chattel mortgage there in question, one of livestock, it being doubted whether such mortgage covered the natural increase of the stock, but the opinion lays down the proposition in general terms as applicable to all chattel mortgages. Overruled in *Alferitz v. Borgwardt*, 126 Cal. 207, holding title not to pass, *Ruggles v. Cannedy*, 127 Cal. 296, 311, noted under *Martin v. Thompson*, 63 Cal. 3; *Flinn v. Ferry*, 127 Cal. 652, in point that mortgagee may maintain replevin where entitled to possession under the contract; and cf. *Erreca v. Meyer*, 142 Cal. 311, stating effect of *Claudius v. Aguirre*, 89 Cal. 501, on main case.

Levy on Chattels covered by a recorded mortgage is unauthorized without first paying the mortgage debt, p. 552.

Cited in *Keith v. Haggart*, 4 Dak. Ter. 452, to same effect, and that the sheriff is liable in damages.

Replevin.—Judgment, not in the alternative form, may be remanded for correction, p. 553.

Cited in *Johnson v. Fraser*, 2 Idaho, 378, to same point.

63 Cal. 553. BUELL v. DODGE.

Change of Venue.—Affidavit of merits held sufficient, p. 553.

Cited in *Nolan v. McDuffie*, 125 Cal. 336, noted under *Watkins v. Degener*, 63 Cal. 500.

63 Cal. 554-563. JOHNSON v. SAN FRANCISCO SAVINGS UNION.

Guardian ad Litem of an infant defendant cannot be appointed until the summons has been served on the infant, p. 563.

Cited in *McCloskey v. Sweeney*, 66 Cal. 53, to same effect; also in *Redmond v. Peterson*, 102 Cal. 599, 41 Am. St. Rep. 206, to same point; *Phelps v. Heaton*, 79 Minn. 484, holding all proceedings void unless infant has first been served.

Foreclosure of Mortgage on Community Property made by surviving husband after the death of wife, the children are necessary parties, p. 563.

Sustained in S. C., 75 Cal. 141, 7 Am. St. Rep. 133, being a second appeal from a retrial of the case; *Von Rosenberg v. Perrault*, 5 Idaho, 726, 728, where husband sold lands belonging to community estate, existence of community debts and necessity for sale will be presumed after long lapse of time.

63 Cal. 564-570. FERREA v. CHABOT. S. C. 121 Cal. at 233.

A judgment is not evidence of any matter incidentally cognizable in the action in which it was rendered, or collateral to it, or inferable from it by argument, or which rests in evidence, p. 570.

Cited in *Graves v. Hebborn*, 125 Cal. 406, noted under *People v. Frank*, 28 Cal. 507; *Sanders v. Simcich*, 65 Cal. 54, applying the ruling to a statement in letters of administration upon a wife's estate that she was the surviving wife of her husband; held, the fact must be proved aliunde; and see *Walton v. Campbell*, 51 Neb. 793, discussing breach of covenant of warranty.

63 Cal. 575-577. HALLIDIE v. SUTTER STREET RAILROAD COMPANY.

Executory Contract requires delivery by seller and acceptance by buyer. Until acceptance, there is no sale, and title does not pass, p. 577.

Cited in *Exhaust Ventilator Co. v. Chicago etc. R. R. Co.*, 66 Wis. 227, to same effect, where machinery is guaranteed to do certain work, and is not to be paid for until satisfactory, there is no sale if it prove unsatisfactory; *Silsby Mfg. Co. v. Town of Chico*, 24 Fed. Rep. 894, 11 Saw. 184, where, under a contract that an article to be made and delivered shall be satisfactory, held, "it must be satisfactory to the

purchaser," or he is not required to take it; note to 74 Am. Dec. 658, on rescission by mutual agreement.

63 Cal. 578-581. JOHNSON v. SUPERIOR COURT.

In California the punishment for contempt has been regulated by statute. A party in contempt cannot be denied process of the court to enable him to obtain testimony, pp. 579, 580.

Cited in *Estate of Jessup*, 81 Cal. 482, affirming the right of the legislature to control and provide for the procedure of the courts in respect even to their inherent powers, as in the matter of contempt; *Foley v. Foley*, 120 Cal. 39, 42, 65 Am. St. Rep. 151, 154, limiting the right of the court to refuse to permit a defendant to answer because he had failed to obey its order for alimony; *Gordon v. Gordon*, 141 Ill. 163, 33 Am. St. Rep. 295, holding that a defendant in contempt could not be deprived of his right to answer in divorce suit; *McMahin v. McMahn*, 68 Mo. App. 61, to same effect; *Larson v. Larson*, 9 S. Dak. 3, to same effect; but see *State v. Tugwell*, 19 Wash. 248, sustaining contempt proceedings for newspaper publication; *Bachelor v. Bachelor*, 30 Wash. 642, failure of defendant in divorce suit to pay alimony does not warrant court in striking answer.

Before a party can be brought into contempt for not complying with an order of court, he must be served; delivery to a person out of the state of a certified copy of the order is not service, p. 580.

Cited in *Hennessy v. Nicol*, 105 Cal. 142, to same effect; *Larson v. Larson*, 9 S. Dak. 5, to same effect; *State v. Clancy*, 24 Mont. 363, noted under *Batchelder v. Moore*, 42 Cal. 412; *State v. Downing*, 40 Or. 325, though affidavit filed as basis for contempt proceedings should show facts constituting contempt, that disobeyed order had been served on defendant, or that he had personal knowledge or notice of it, and that demand for compliance had been made by authorized person, want of some of these allegations may be supplied by answer.

63 Cal. 581-584. DAVIS v. SUPERIOR COURT.

Constitutionality of statute cannot be inquired into, on mandamus, p. 582.

Cited in *Thoreson v. State Board*, 19 Utah 31, granting writ accordingly.

Municipal Court of Appeals.—No order is necessary for a transfer of a cause from the county court, p. 583.

Approved in *Millard v. Yee Teen*, 63 Cal. 585.

63 Cal. 586-598. UNGER v. MOONEY. 49 Am. Rep. 100.

Adverse Possession.—Five necessary elements are: 1. Actual occupation, open and notorious; 2. Must be hostile to plaintiff's title; 3.

Held under claim of title, exclusive of any other right, as one's own; 4. Continuous for five years prior to commencement of action; 5. Payment of taxes (since 1878), p. 592.

Cited in *Nathan v. Dierksen*, 146 Cal. 67, following rule; *Bree v. Wheeler*, 129 Cal. 147, noted under *American Co. v. Bradford*, 27 Cal. 368; *Andrus v. Smith*, 133 Cal. 79, holding such possession proved; *Churchill v. Louie*, 135 Cal. 611, quoting *Oneto v. Restano*, 78 Cal. 374; but cf. *Altschul v. O'Neil*, 35 Or. 207, 218, holding aliter; *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 596, 597, holding prescriptive right to water shown, and sustaining pleading of such prescription; *Kerns v. McKean*, 65 Cal. 417, as to element No. 2; *Thomas v. England*, 71 Cal. 458, applying the ruling to a right of way claimed by prescription; *Water Co. v. Richardson*, 72 Cal. 603, applying the ruling to a claim of prescriptive right of water; *Oneto v. Restano*, 78 Cal. 376, holding that the evidence must show the possession to have been adverse; *Archbishop v. Shipman*, 79 Cal. 294, as to element No. 3, and holding, where property is purchased by one who is also a corporation sole, there can be no adverse possession by the individual, as a corporation as against the title of the individual; *De Frieze v. Quint*, 144 Cal. 663, 28 Am. St. Rep. 156, as to element No. 1, in a claim of adverse possession under a tax sale to swamp and overflowed land; *Sullivan v. Zeiner*, 98 Cal. 351, holding that the acts constituting the adverse use must be of such a nature as to give a cause of action in favor of the person against whom the acts are performed; *Echols v. Hubbard*, 90 Ala. 315, holding that ten years' continuous adverse possession before suit brought will support or defeat ejectment; *Hoffman v. White*, 90 Ala. 356, to same effect as to the location of a division fence; *Trufant v. White & Co.*, 99 Ala. 534, holding that when title has been acquired by adverse possession, it may be lost by a subsequent recognition for the statutory period of the title of the legal holder; *Peter v. Stephens*, 11 Mont. 121, 28 Am. St. Rep. 450, as to element No. 3, and that the intention of the party in adverse holding is a vital element; note to 99 Am. Dec. 282, on adverse possession; note to 28 Am. St. Rep. 158, on notoriety essential to.

Term of Continuous Possession need not be next before the commencement of the action, p. 595.

Note to 95 Am. Dec. 209.

The possession of one tenant in common is the possession of and has no element of hostility to the right of his cotenant. The cotenant out of possession is not informed by such possession that it has any adverse character, and he must in some way be notified of the adverse holding in order to be prejudiced by it, p. 591.

Cited in *Newman v. Bank of California*, 80 Cal. 373, 13 Am. St. Rep. 172, holding that if, in contemplation of law, one cotenant was in possession when he commenced an action to eject an adverse holder, then the

Notes Cal. Rep.—200.

adverse holder must be regarded as out of possession as to the whole; *Watson v. Sutro*, 86 Cal. 529, holding that where there has been no adverse possession against a tenant in common by any of his cotenants, the statute did not run against the tenant out of possession; *Winterburn v. Chambers*, 91 Cal. 182, holding that the possession by persons other than his cotenants was enough to put a cotenant out of possession on inquiry; *Schumacher v. Truman*, 134 Cal. 433, *Faubel v. McFarland*, 144 Cal. 720, and *Mattis v. Hosmer*, 37 Or. 532, holding adverse possession not established; but cf. *Roumillot v. Gardner*, 113 Ga. 63, and *Grubbs v. Leyendecker*, 153 Ind. 251, holding aliter.

Ouster of One Cotenant by Another.—To constitute an ouster of a cotenant out of possession, there must be some conduct of the occupying tenant, evidenced by acts and declarations, in its nature and essence hostile to the title of the tenant out of possession, and imparting knowledge of such hostility to the latter, p. 592.

Cited in *Alvarado v. Nordholt*, 95 Cal. 126, showing what acts constituted an ouster; *Feliz v. Feliz*, 105 Cal. 5, to same points, further illustrative of ouster; *Price v. Hall*, 140 Ind. 316, 49 Am. St. Rep. 197, being a case of ouster by a conveyance by one cotenant, purporting to include the entire land and estate followed by possession and claim of title for the period of limitation; *Ricker v. Butler*, 45 Minn. 548, to same effect; *Maxwell v. Higgins*, 38 Neb. 678, to same effect; as also *Smith v. Water Co.*, 16 Utah, 200, note to 43 Am. St. Rep. 310, on conveyance of whole tract by one cotenant.

63 Cal. 598-607. ODD FELLOWS' ASSOCIATION v. JAMES. 49 Am. Rep. 107.

Liability of a Corporation Officer for loss of moneys while in his possession depends on his contract and exercise of due diligence, pp. 603, 604.

Cited in *Fairchild v. Hedges*, 14 Wash. 127, as to the acts required by the Washington statute; note to 95 Am. Dec. 125, on loss by the act of God; note to 56 Am. Rep. 66, on duty of county tax collector.

63 Cal. 614-616. PEOPLE v. BURNS.

Burglary.—Information held sufficient, p. 615.

Cited in *People v. Goldaworthy*, 130 Cal. 603, sustaining burglary information.

63 Cal. 616-620. CARPENTER v. NATOMA COMPANY.

Unexecuted Judgment in ejectment does not stop the running of the statute of limitations; an actual entry is necessary, pp. 617, 618.

Cited in *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 593, noted under *Langford v. Poppe*, 56 Cal. 77; *Breon v. Robrecht*, 118 Cal. 471,

62 Am. St. Rep. 248, holding that an executed judgment is conclusive against defendant of any asserted right founded merely upon his possession, either at the time of commencement of the action or at the time of the judgment; Gould v. Carr, 33 Fla. 533, holding that a judgment in ejectment establishes simply the right of plaintiff to possession; Barrel v. Title Guarantee Co., 27 Or. 87, 91, holding that a judgment in ejectment followed by entry stopped the running of the statute at the date of the commencement of the action; note to 54 Am. Dec. 545, on effect of judgment and proceedings in ejectment upon the statute of limitations: note to 52 Am. St. Rep. 648, on same subject.

63 Cal. 620-622. ESTATE OF ROBINSON.

Will—Charitable Purposes.—Bequest held to be for, p. 621.

Cited in Fay v. Howe, 136 Cal. 603, noted under Estate of Hinckley, 58 Cal. 471.

63 Cal. 623-643. CROSS v. ZELLERBACH.

Law of the Case.—When a decision on an appeal does not cover the points presented by a subsequent appeal, and different facts are alleged, the decision is not binding as to the questions raised on the second appeal, p. 637.

Cited in Sharon v. Sharon, 79 Cal. 655, holding that the rule of "stare decisis" has no application when the facts presented on the second appeal differ materially from those on which the decision was rendered; Watson v. Sutro, 86 Cal. 529, holding that the owner of an equitable title might sue to establish his right, and, when established, ask for a partition on the ground that equity will not allow litigation by piecemeal; Pence v. Sweeney, 2 Idaho, 923, to same effect.

Equity will take hold of entire case, where all parties are before court under sufficient pleadings, p. 643.

Cited in Whitehead v. Sweet, 126 Cal. 76, holding bill not multifarious.



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REPORTS
OF
CASES AT LAW AND IN CHANCERY
DETERMINED IN THE
SUPREME COURT
OF
COLORADO TERRITORY
TO THE PRESENT TIME

By MOSES HALLETT

VOLUME I

EXTRA ANNOTATED EDITION

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I HAVE endeavored to give place in this volume to every thing which may be necessary to a correct understanding of the opinions of the court and to nothing more. The briefs of counsel are omitted, and where the opinion contains a sufficient statement of facts I have not thought it necessary to explain the omission of such statement by the reporter. All dissenting opinions will be found in their connection, and when the bench was not full the fact is noted. Several early cases of little interest to the profession, and some in which the facts cannot be obtained, are not reported. The number of unreported cases does not exceed ten, according to the best information I can get. It has been difficult to limit the cost of this publication to the amount which may probably be obtained from sales of it, and if any thing has been omitted from these pages which should have a place therein, I trust that the omission will be excused in view of the necessity of the occasion.

M. H.

DECEMBER, 1872.

JUSTICES OF THE SUPREME COURT
TO THE PRESENT TIME.

Names.	Date of Commission.	Expiration of Term.
CHIEF JUSTICES.		
Benj. F. Hall.....	March 25, 1861.....	* December 31, 1865. †
Stephen S. Harding.....	July 10, 1863.....	
Moses Hallett.....	April 10, 1866.....	
ASSOCIATE JUSTICES.		
Chas. Lee Armour.....	March 28, 1861.....	March 28, 1866.
Allan A. Bradford.....	June 6, 1862.....	March 3, 1865.
Charles F. Holly.....	June 10, 1865.....	May 25, 1866.
Wm. H. Gale.....	June 10, 1865.....	July 10, 1866.
Wm. R. Gorsline.....	June 18, 1866.....	June 18, 1870.
Christian S. Eyster.....	August 11, 1866†.....	March 2, 1871.
James B. Belford.....	June 17, 1870.....	
Ebenezer T. Wells.....	February 8, 1871.....	

JUSTICES OF THE COURT.

At January Term, 1864.

STEPHEN S. HARDING, C. J.,
CHAS. LEE ARMOUR, J.,
ALLAN A. BRADFORD, J.

During the Terms of 1867, '68 and '69.

MOSES HALLETT, C. J.,
CHRISTIAN S. EYSTER, J.,
WM. R. GORSLINE, J.

During July Term, 1870, and February Term, 1871, until March 2, 1871.

MOSES HALLETT, C. J.,
CHRISTIAN S. EYSTER, J.,
JAMES B. BELFORD, J.

After March 2, 1871. ¶

MOSES HALLETT, C. J.,
JAMES B. BELFORD, J.,
EBENEZER T. WELLS, J.

* I am unable to ascertain the date of Chief Justice HALL's resignation.
† Re-appointed April 6, 1870.
‡ Congress was not in session at this time. The appointment was confirmed by the Senate and another commission issued March 2, 1867.
§ To take effect March 2, 1871.
¶ The cases decided after Mr. Justice WELLS became a member of the court may be found from page 317 to the end of the volume.

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ERRATA.

- On page 121, second line from bottom, for "running" read *mining*.
170, twelfth line from top, for "rules" read *rule*.
195, ninth line from bottom, for "time" read *list*.
200, third line of statement of case, for "was rejected" read *which*
was rejected.
219, sixteenth line from top, for "brethern" read *brethren*.
380, seventh line from bottom, for "Walsen" read *Wilson*, and for
"18" read 12.
376, twelfth line from bottom, for "as" read *and*.
416, after the word "fact" a semicolon (;) is wrongly inserted.
453, thirteenth line from bottom, for "except" read *accept*.
457, twelfth line from bottom, for "Mann." read *Maine*.
494, seventh line from top, for "Reversed" read *Affirmed*.
510, tenth line from bottom, for "impart" read *import*.

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RULES OF THE SUPREME COURT.

Adopted September 28, 1872.

WRIT OF ERROR; SUPERSEDEAS; PROCESS ON WRITS OF ERROR.

I. Writs of error shall be directed to the clerk or keeper of the record of the court, in which the judgment or decree complained of is entered, commanding him to certify a correct transcript of the record to this court. But when the plaintiff in error shall file, in the office of the clerk of this court, a transcript of the record, duly certified to be full and complete, before a writ of error issues, it shall not be necessary for the clerk of the inferior court to certify another transcript of the record to this court, but such transcript so filed with the clerk of this court shall be taken and considered to be a due return to said writ, and in such case the clerk of the inferior court shall return upon said writ, that the same has been served upon him, and that it appears by the indorsement thereon that a transcript of the record has been filed in the office of the clerk of the supreme court.

II. A *scire facias* or summons to hear errors may be made returnable on any day of the term; but all such writs which shall be issued more than ten days before the term shall be made returnable on the first day of the term, and if any such writ shall not be served ten days before the return day thereof, the defendant so served shall not be required to appear in obedience thereto until the first day of the term of court next succeeding such return day. A defendant, upon whom process has not been served, may enter his appearance and, upon five days' notice to the plain

tiff, may proceed in the same manner as if duly served with process.

III. If a *scire facias* or summons to hear errors shall not be served, an *alias* or *pluries* may be issued without an order of court therefor.

IV. No supersedeas will be granted unless the transcript of the record, on which the application is made, be complete and certified by the clerk of the court below, with an assignment of errors written thereon or appended thereto.

V. When a writ of error shall be made a supersedeas, the clerk shall indorse upon said writ the following words: "A transcript of the record in this cause having been filed in my office with an order indorsed thereon, that the writ of error herein be made a supersedeas according to law, this writ of error is therefore made a supersedeas and shall operate accordingly;" which indorsement shall be signed by the clerk of this court.

VI. Whenever execution or other final process shall be issued upon a judgment at law or decree in equity, and the record of such judgment or decree shall be removed into this court by writ of error operating as a supersedeas, such writ of error may be served upon the officer in whose hands such execution may be, and thereupon all proceedings under such execution shall be discontinued, and such officer shall return the same into the court from whence it was issued, together with the copy of the writ of error served on him, and shall set forth in his return to such execution what, if any thing, he hath done in obedience to the command thereof. Such service of the writ of error and supersedeas may be made by delivering to the officer having such final process for execution a copy of such writ of error and the indorsements thereon, with the certificate of the clerk of the supreme court or of the clerk of the inferior court, to whom the same is directed, that the same is a true and perfect copy of the original of such writ of error and the indorsements thereon.

VII. Whenever a bond is executed by an attorney in fact, the original power of attorney shall be filed with the bond in the office of the clerk of this court, unless it shall appear that the power of attorney contains other powers than the mere power to execute the bond in question, in which case the original power

of attorney shall be presented to the clerk and a true copy thereof filed, certified by the clerk to be a true copy of the original.

TRANSCRIPT OF THE RECORD.

VIII. Clerks of inferior courts, in making up an authenticated copy of the record, shall certify to this court a copy of the process with the return thereto, the pleadings of the parties, the verdict in jury trials, the judgment of the court below and all orders of the court, the bill of exceptions, the appeal bond in cases appealed. This rule shall not extend to appeals or writs of error in chancery or criminal causes.

IX. The clerk of the court below shall arrange the several parts of the record in chronological order.

X. The clerk of this court shall not tax as costs in this court any matter inserted in the transcript contrary to the foregoing rules.

XI. The appellant or plaintiff in error, or his attorney, may, by precipe, indicate to the clerk what of the files of the cause shall be inserted in the record, and in such case, if the record shall be insufficient, it shall be perfected at his costs, and if unnecessarily voluminous, the costs of the unnecessary parts shall be taxed against him.

ASSIGNMENT OF ERRORS.

XII. Appellants and plaintiffs in error shall assign errors at the time of filing the transcript of the record, and each error shall be separately alleged and particularly specified. When the error alleged is to the charge of the court, the part of the charge referred to shall be quoted *totidum verbis* in the specifications. The same shall be signed by an attorney or counselor of the court.

XIII. If the appellant or plaintiff in error shall fail to assign errors, the appeal or writ of error may be dismissed, and if the appellee or defendant in error shall not appear and join in error the cause may be heard *ex parte*, or the judgment or decree may be, in the discretion of the court, reversed without a hearing.

XIV. Counsel will be confined to a discussion of the errors stated, but the court may, in its discretion, notice any other errors appearing in the record.

ABSTRACTS OF THE RECORD.

XV. Appellants and plaintiffs in error, in all causes in the supreme court, shall prepare a printed abstract of the record in each case, in which they shall set forth the title of the cause, with the date of the filing of all papers in the court below, and a brief statement of the contents of each pleading, and shall set forth fully the points of the pleadings or evidence, and the points relied upon for the reversal of the judgment or decree. The clerk of the court below shall also number each folio of one hundred words, in the transcript of the record, and appellants and plaintiffs in error shall refer to the same in the margin of the abstract in such manner that orders, pleadings and evidence referred to in the abstract may be easily found in the record. They shall file with the clerk of this court, for the use of the appellee or defendants in error and judges of this court, four copies of such abstracts at least three days before the cause is heard.

XVI. The defendant's counsel shall be permitted, if he is not satisfied with the abstract or abridgment by the plaintiff's counsel, to furnish each of the justices of this court with such further abstracts as he shall deem necessary to a full understanding of the merits of the cause.

XVII. In case the appellant or plaintiff in error shall neglect to file an abstract, in compliance with the rules of this court, the opposite party may file the abstract and prepare the cause for a hearing *ex parte*, and have the costs taxed therefor, provided the appellant or plaintiff in error would have been entitled to have the cause heard at the same term, or the court may dismiss the appeal or writ of error.

XVIII. If the abstracts filed shall not present the parts of the record to which reference is made in the assignments of errors, the appeal or writ of error may be dismissed.

BRIEFS AND ARGUMENTS OF COUNSEL.

XIX. The brief of the counsel for appellant or plaintiff in error shall contain a statement of the errors relied upon and the authorities to be used in the argument, and four copies thereof shall be filed with the clerk of this court at least three days be-

fore the cause is heard. One of the copies may be withdrawn by the counsel for appellee or defendant in error, and the others shall be for the use of the justices of the court.

XX. Counsel for appellee or defendant in error shall also file with the clerk four copies of his brief for the use of the justices, and the opposing party, on or before the day next preceding the day in which the cause is to be heard.

XXI. In citing cases from published reports, the names of the parties as they appear in the title of the case, as well as the book and page, shall be given.

XXII. Counsel who have not complied with the rules relating to briefs will not be heard.

XXIII. If the counsel for both parties shall submit arguments in writing, it shall not be necessary to file briefs; but if counsel for either party shall desire to address the court orally, the opposing counsel shall file his brief as required by the rule.

MOTIONS.

XXIV. All motions, except motions for further time to assign errors or to file briefs, abstracts and the like, shall be in writing, and at least twenty-four hours' notice of the time at which the same will be heard shall be given to the opposite party.

XXV. The party holding the affirmative shall begin and conclude the argument upon the hearing of any matter before the court.

DISMISSAL OF APPEALS.

XXVI. If a transcript of the record shall not be filed as required by law in case of appeal, the appellee may present a transcript of the judgment, the order allowing the appeal, the bond and the approval thereof, and thereupon the appeal shall be dismissed with costs.

WITHDRAWAL OF PAPERS.

XXVII. No paper shall be taken from the files except by leave of court; but appellants and plaintiffs in error may withdraw the transcript of the record, for the purpose of making abstracts, upon giving receipt therefor to the clerk; and, upon such withdrawal, may retain the same for eight days and no more.

If the appellee or defendant in error shall desire to make an abstract of the record, he may withdraw the transcript upon giving the like receipt and retain the same for the like time.

Neither party shall withdraw the transcript of the record more than once.

AGREED CASE.

XXVIII. No judgment will be pronounced in any agreed case unless an affidavit of some credible person shall be filed, setting forth that the matters presented by the record were litigated in good faith, about a matter in actual controversy between the parties, and that the opinion of this court is not sought with any other design than to adjudicate and settle the law relative to the matter in controversy between the parties to the record.

REHEARING OF CAUSES.

XXIX. Application for rehearing of any cause shall be by petition to the court, signed by counsel, briefly stating the points wherein it is alleged that the court has erred; such petition to be filed within fifteen days next after the filing of the opinion in the cause, if the same shall have been filed in term time, or if such opinion shall have been filed in vacation, then within the first five days of the next succeeding term: counsel may accompany such petition with a brief of the authorities relied upon in support thereof.

XXX. If in any cause in which the opinion of this court is filed in vacation, or within fifteen days of the adjournment of the court, a petition for rehearing is presented to either of the justices of this court, and he shall certify that there is probable cause for granting the prayer of the petition, all further proceedings authorized by the judgment of this court shall be stayed until the next term of the court.

COSTS.

XXXI. Upon printed abstracts being furnished, as required in the foregoing rules, it shall be the duty of the clerk to tax a printer's fee at the rate of forty-five cents for each one hundred words of one copy of such abstract, against the unsuccessful party not furnishing such abstracts, as costs, to be recovered by the successful party furnishing the same.

XXXII. Clerks of district and probate courts shall be entitled to receive the fees allowed by law for all copies of records before delivering the same. If, in a criminal cause, the defendant shall be unable to pay for a transcript of the record, the justice assigned to the judicial district in which such record may be shall have power to order and direct that such transcript be made and furnished to the defendant without charge.

ATTORNEYS.

XXXIII. No person shall be admitted to practice as an attorney and counselor at law, upon evidence that he hath been admitted to the bar of another State or territory, unless such evidence shall proceed from the highest court of law or equity authorized by the laws of such State or territory to grant the same, nor unless such admission to the bar of such other State or territory shall have been upon examination of the applicant or other evidence of his knowledge of law. Provided, that if it shall appear by the affidavit of some disinterested party or other satisfactory evidence, that the applicant has been actually engaged in the practice of law as his usual occupation in the State and territory wherein such license was obtained, for the space of two years, such applicant may be admitted to the bar of this court.

XXXIV. No person shall be admitted to practice as an attorney and counselor at law upon evidence that he hath been admitted to the bar of another State or territory, if, at the time of his admission to the bar of such State or territory, he was a citizen of this territory.

XXXV. No person shall be admitted to practice law in this territory, who shall not first have taken and subscribed an oath, that it is *bona fide* his intention to become a citizen of the territory of Colorado, and to make the practice of the law his permanent and usual occupation, and that he will commence the practice of the law therein within three months from the date thereof, and the fee of the clerk of the supreme court for filing such oath and entering the name of such party upon the record and issuing a license shall be \$10.

XXXVI. There shall be hereafter kept in the office of the clerk of the district court of each county a roll of attorneys of the

supreme court, and, in order thereto, the clerk of the supreme court shall, within thirty days next after the promulgation hereof, transmit to the clerk of the district court in each judicial district a certified copy of this and the following rules: No. XXXVII, XXXVIII, XXXIX of this court, and of the roll of the attorneys of this court, as the same then appears in his office.

XXXVII. Upon receiving such certified copy of said rules and roll of attorneys, the clerk of each of the district courts shall cause the same to be entered at large in a book to be kept in his office, and shall immediately prepare copies thereof at length and certify the same to each of his deputies, except in the county where the said clerk himself resides, and each of such deputies shall in like manner enter such rules and the roll of attorneys in a book to be kept in his office; all such certificates shall be preserved in the office where the same are transmitted.

XXXVIII. Whenever the name of any attorney, hereafter admitted to the bar, shall be entered upon the roll of attorneys kept in the office of the clerk of the supreme court, the clerk of the supreme court shall certify to the clerk of the district court in each judicial district a copy of the roll of attorneys, so far as the same includes the name of such attorney so admitted, and the clerk of each of said district courts shall cause the name of such attorney so admitted to be entered upon the roll of attorneys so kept in his office, and shall prepare copies of such certificate of the clerk of the supreme court, and certify the same to each of his deputies, save in the county wherein the said clerk himself resides. When the name of such attorney shall in like manner be added to the roll of attorneys there kept, and no person shall be entered upon any such rolls of attorneys unless his name shall appear on the roll of attorneys of the supreme court certified in manner aforesaid.

XXXIX. Hereafter no clerk of any district court shall issue any writ, or permit any cause to be instituted or discontinued at the instance of any person, unless the name of such person appear upon the roll of attorneys in his office, or at the instance of the plaintiff in such cause appearing thereunto in his own proper person, and no person, whose name is not upon the roll of attorneys in the office of the clerk of such court, shall be permitted

to appear in any cause in any district court, or take part in any such cause, unless he is himself a party thereto, and then only in his own behalf.

LIBRARY.

XL. No book shall be withdrawn from the library of this court for any purpose, except by the order of the court in open session.

XLI. The foregoing shall be the standing rules of this court, and all other rules are hereby rescinded.

COLORADO REPORTS.

GARDNER v. DUNN.

APPEAL BOND, may be amended. On appeal to the district court from the judgment of a justice of the peace, if the appeal bond be adjudged insufficient, the appellant may file an amended bond, and time should be allowed him for that purpose.

Appeal from District Court, Park County.

Mr. S. E. BROWNE, for appellant.

Mr. C. C. POST, for appellee.

BRADFORD, J. This was an action of forcible entry and detainer, instituted before a justice of the peace of Park county on the 16th day of April, A. D. 1862. On the 5th of May, following, trial of said cause was had before the justice, and the verdict and judgment was for the defendant. The plaintiff appealed to the district court, and on the following day, May 6th, filed his appeal bond, which bond was approved by the justice. On the 3d of June, 1862, being one of the days of the June term of the district court of Park county, the cause came on to be heard, and the defendant moved the court to dismiss the appeal for want of a sufficient bond. The plaintiff asked leave to file a sufficient bond, the court refused the leave and sustained defendant's motion to dismiss appeal, and rendered judgment against plaintiff for costs. The plaintiff appealed to this court, and assigns the following errors, viz. :

1st. That the said court erred in sustaining the motion of the defendant to dismiss the said appeal.

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2d. That the court erred in refusing to permit the plaintiff to file a good and sufficient bond.

3d. That said judgment was given for the defendant when it should have been given for the plaintiff.

It is not doubted by this court but that the appeal bond was informal and insufficient ; but it is equally clear that the court erred in overruling the motion of the appellant to permit him to file a good and sufficient bond in pursuance of the forty-fifth section of the act of our legislature, entitled, "An act concerning justices of the peace and constables," approved October 31, 1861. That act, after prescribing the mode of taking appeals from judgments of justices of the peace, goes on and declares that "if upon the trial of any appeal the bond required to be given shall be adjudged informal or otherwise insufficient, the party who shall have executed such bond shall in nowise be prejudiced by reason of such informality or insufficiency ; provided he will, in reasonable time, to be fixed by the court, execute a good and sufficient bond." That Gardner intended to take an appeal is manifest, and whenever a party intends appealing and makes such an attempt at the execution of a bond, that the officer authorized to approve accepts the bond, it is not the design of the statute that the appellant should be prejudiced by any informality or deficiency therein. By executing what was honestly intended to be a good bond, with such security as was approved by the justice, the appellant did all that was required of him until the bond was adjudged insufficient by the court ; and even then, the law declares that such insufficiency shall not operate to his prejudice, if he will execute a good one. This the appellant offered to do, but the court refused permission and dismissed the appeal.

The evident intent of the legislature in enacting the law herein referred to was to simplify proceedings before justices of the peace, and to dispense with all technicalities consistent with a fair trial of the cause upon the merits. This just intent would be defeated by giving to the act any other construction than the one we have adopted.

The judgment of the district court is reversed and the cause remanded, with directions to that court to permit the appellant to file a good and sufficient bond, and to hear and determine the cause upon its merits. *Reversed.*

THE PRINCIPAL CASE is adopted as authority for the decision in *Lynn v. Merriole*, 1 Colo. 2.

LYNN v. MERRIOLE.

Appeal from District Court, Jefferson County.

ASSUMPSIT before a justice of the peace, and appeal to district court. Motion by appellee to dismiss, because of defective appeal bond, and cross-motion by appellant for leave to file a sufficient bond. The district court refused to allow the amendment and dismissed the appeal.

BRADFORD, J. The opinion given at the present term of this court, in *Gardner v. Dunn*, ante, 1, is applicable to this case. The judgment of the district court must be reversed, and the cause remanded to the district court for further proceedings.

Reversed.

WILCOX et al. v. FIELD et al.

PRACTICE—*judgment nil dicit*. If defendants, after appearance, fail to plead or demur, judgment *nil dicit* should be rendered against them before other proceedings are had in the case.

JUDGMENT *exceeding ad damnum*. Judgment should not be rendered for a greater amount than is claimed in the declaration.

Error to District Court, Arapahoe County.

Mr. J. BRIGHT SMITH, for plaintiffs in error.

Mr. G. W. PURKINS, for defendants in error.

BRADFORD, J. This was an action in debt, instituted in the district court of Arapahoe county, on the 2d day of

July, A.D. 1862, by C. H. Field and E. Magoffin, trustees of Jones & Cartright, against B. C. Wright, P. P. Wilcox, E. C. Mason and D. M. Bivens, on a promissory note alleged to have been executed by said defendants, and payable to said plaintiffs on the 21st day of December, 1861, for the sum of \$110, the *ad damnum* in the plaintiff's declaration being laid at \$110. At the August term of said district court, the cause came on to be heard, and the defendants, by J. Bright Smith, their attorney, appeared and filed a motion to dismiss the suit, alleging that plaintiffs were non-residents of Colorado territory; and said motion being heard, the court overruled the same, and ordered the case referred to the clerk to assess damages. The clerk, the same day, reported the plaintiffs' damages at \$127.84, and the court thereupon rendered judgment against the said defendants for the sum of \$127.84, and for costs.

To reverse this judgment the plaintiffs in error, being the defendants below, have brought the case to this court by writ of error.

The plaintiffs in error assign the following errors, viz.:

1. There was no judgment of *nil dicit* rendered against the plaintiffs in error in default of a plea, but a reference made to the clerk to assess damages without such judgment.

2. The final judgment rendered is for a greater amount than the *ad damnum* in the declaration.

It is a well-settled rule of practice that where defendants, after appearance, neither plead nor demur, judgment of *nil dicit* will be rendered against them before any other proceedings are had in the case. The record in this case discloses the fact, that the court referred the matter to the clerk for the assessment of damages without first rendering an interlocutory judgment against the defendants for want of a plea, as the law requires. In this we think there is manifest error (see Colorado statute, first session, § 15, p. 279, Stephen's Pleadings, 108).

It is equally apparent that the court erred in rendering judgment for a greater amount than the sum claimed in the

declaration. This is a matter of substance, it being apparent from the record that the court could not legally render such a judgment; from the evidence presented in the record, the proper judgment, so far as the amount is concerned, was entered by the district court; but this was unwarranted by the declaration and consequently illegal. See Stephen's Pleadings, 429; 4 Gilman, 79. The judgment of the district court is reversed, and the cause remanded for further proceedings. *Reversed.*

APPEARANCE — JUDGMENT NIL DICT. — If, after appearance, the defendant fails to plead, judgment *nil dicti* should be rendered against him: *Gomer v. Shiner*, 4 Colo. 247.

LEE v. RALSTON.

PRACTICE — *trial of appeals from justice of the peace.* Upon appeal to the district court from the judgment of a justice of the peace, the trial should be *de novo*, and the district court has no power to review the proceedings of the justice of the peace.*

Error to District Court of Gilpin County.

Mr. C. C. Post, for plaintiff in error.

Mr. H. B. Morse, for defendant in error.

BRADFORD, J. This was an action of assumpsit commenced by Silas Ralston, the plaintiff below, on the 28th day of December, 1861, before H. D. Bristol, a justice of the peace of Gilpin county, against Wm. L. Lee and others, composing the Black Hawk Mill Co., and, on the 3d day of January, A. D. 1862, judgment was rendered against the said William L. Lee, the defendant, served with process, for the sum of \$48.75, and costs, from which judgment of the justice of the peace the defendant Lee appealed to the district court of Gilpin county; and afterward, at the April term, A. D. 1862, of said court, the cause came on to be heard, and the record shows the following proceedings to have been had in said court, to wit:

* *Lee v. Dalley* and *Lee v. Furgo*, decided at this term, were to the same point.

“SILAS RALSTON }
v. } Appeal from justice of the peace.
WILLIAM L. LEE. }

And now this case came on to be heard, and the plaintiff appeared by his attorney, and the defendant, although solemnly called, came not; and no other proceedings being had, on motion of the plaintiff, it is considered that the judgment of the justice's court, for \$48.75, be affirmed, and that the plaintiff recover of and from the defendant the said sum, and his costs and charges in this behalf expended, as well in the justice's court below as in this, and that he have execution therefor.”

Which said judgment has been removed to this court by writ of error.

The plaintiff in error assigns the following errors, viz.: 1st. That the district court, not being a court of review, could not affirm or review the judgment of the justice's court. 2d. That the trial of said cause should have been *de novo*, and the court could not render judgment unless evidence was adduced to warrant it. 3d. The court erred in rendering judgment against William Lee alone, when the suit was brought against a firm of which he was a member.

In order to dispose of this cause in this court, we only deem it necessary to consider the second error assigned. By the act of our legislature, concerning justices of the peace and constables, it is provided, that, upon all trials of appeal before the district court, the court shall hear and determine the cause in a summary way, according to the justice of the case (see § 46); and it is further provided by section 48 of said act, that the rights of the parties shall be the same as in original actions. A fair construction put upon these sections leads us to the conclusion that causes brought up by appeal from justices' courts shall be tried *de novo*, and the judgment below furnishes no evidence to sustain the correctness of the decision of the justice. It consequently follows, that, when the cause is tried in the district court, its decision not being controlled by the decision below, the judgment must be rendered in accord-

ance with evidence adduced on the trial in the district court. The record in this case plainly showing that no evidence was produced and no trial had in the district court, the judgment of the court below must be reversed and the cause remanded for further proceedings.

Reversed.

ARMOR v. LYON et al.

DECREE—what is final. An order overruling a demurrer to a bill in chancery is not a final decree in the cause.

APPEAL will not lie from an interlocutory order. An appeal cannot be prosecuted from an order overruling a demurrer to a bill in chancery.

Appeal from District Court, Gilpin County.

APPELLANT demurred to the bill filed in the district court by appellees, and his demurrer was overruled. He then appealed to this court. Appellees now moved to dismiss the appeal, upon the ground that no final decree had been entered in the cause.

HARDING, C. J. This appeal must be dismissed, for the reason assigned. *Dismissed.*

WRIT OF ERROR—FINAL JUDGMENT.—An appeal or writ of error does not lie from an interlocutory order, but only from a final judgment or decree; and a judgment on demurrer is not final: *Andrews v. Loveland*, 1 Colo. 10.

GIBSON v. SMITH.

DEFAULT cannot be taken while demurrer is pending. It is error to enter a judgment by default against a defendant who has a demurrer on file which has not been disposed of.

Error to District Court, Arapahoe County.

Mr. J. BRIGHT SMITH, for plaintiff in error.

Mr. L. B. FRANOE, for defendant in error.

HARDING, C. J. At the March term, 1863, of the district court of Arapahoe county, David Smith recovered against

the plaintiff in error a judgment for the sum of \$509, and costs of suit taxed at \$19. A default was taken against said Gibson, and the damages assessed by a jury who returned their verdict for the damages above named, upon which the court rendered judgment. It appears from the record that before default was entered against Gibson, the defendant in the district court, that he had appeared and filed a general demurrer to the plaintiff's declaration, which was then on file, and upon which no decision of the court had been had.

On the 14th day of April, 1863, a writ of error issued from this court on behalf of Gibson, and this case is before us for our action.

The whole case turns upon the first error which is assigned in plaintiff's brief and is as follows:

That the said court erred in giving judgment by default against the said Gibson, he having appeared and pleaded to the declaration previous thereto by general demurrer, upon which no decision whatever appears to have been given. 4 Scam. 53, 54.

We think that it is clear, that the district court committed an error in entering judgment by default against the defendant in the court below, when he had appeared to the action and filed his demurrer to the plaintiff's declaration, and when such demurrer was undisposed of, and in impaneling a jury to assess the damages.

Per curiam. The judgment is reversed for further proceedings in the district court, with costs, etc. *Reversed.*

JUDGMENT NIL DICT — PENDING ISSUES. — Where there are issues pending, judgment *nil dict* is irregular: *Taylor v. McLaughlin*, 2 Colo. 375. In *San Juan & St. L. S. & M. Co. v. Finch*, 3 Colo. 222, where the principal case is also cited to this point, it is held error to rule plaintiff to plead to cross-bills, while a demurrer thereto is pending.

ANDREWS v. LOVELAND et al.

JUDGMENT upon demurrer not final. A judgment sustaining a demurrer is not final.

WRIT OF ERROR will not lie from interlocutory judgment. An appeal or writ of error will not lie from an interlocutory judgment.

Error to District Court, Jefferson County.

Messrs. J. BRIGHT SMITH and JAS. MACDONALD, for plaintiff in error.

Mr. G. W. PURKINS, for defendant in error.

HARDING, C. J. This is an action of assumpsit commenced in the district court and tried at the March term, 1862.

The abstract shows the following state of facts. The plaintiff in error filed his declaration against the defendants in the court below, which contained four counts.

1st. That plaintiff had recovered a judgment against the defendants in the district court for Jefferson county, in said territory, under the late provisional government, for \$311 and costs of suit and interest thereon accruing, amounting in all to the sum of \$410.37, which still remained due and unpaid, for which defendants were liable, and which they had promised to pay.

Second count set forth a promissory note, made by the defendants to the plaintiff, for the sum of \$324, which they had promised to pay, etc.

Third count claimed \$47.50 interest on an account stated between the parties.

Fourth count set up a general promise and breach.

To this declaration defendant Loveland filed a demurrer, alleging that the matters and things in the petition were not sufficient in law to maintain the action, etc.

The court sustained the demurrer, to which ruling of the court plaintiff excepted and sued out a writ of error from this court. The record in this case is most deficient, and we cannot determine the precise action of the court below from any thing before us. The judgment of the court in sustaining a demurrer is not a final judgment. *Hays v. Caldwell et al.*, 5 Gilm. 33; *Fleece v. Russell*, 13 Ill. 32.

An appeal or writ of error does not lie from an interlocutory decree or judgment. Practice Act, Stat. Colorado, 1st

Sess. 285; *Woodside et al. v. Woodside et al.*, 21 Ill. 207; *Cunningham v. Loomis et al.*, 17 Ill. 555; *Young v. Grundy* 6, Cranch, 51.

There is nothing to lead us to the conclusion that final judgment was rendered in this case in the court below. For this reason this case must be dismissed. We have determined this question at the present term of the court, in the case of *Armor v. Lyon et al.* This case is dismissed at the cost of plaintiff in error without prejudice to his suit in the court below.

Dismissed

TOWNSEND et al. v. WILD et al.

CONSTRUCTION OF STATUTE—*mechanics' lien act of 1861.* The act of 1861, relating to mechanics' liens (1 Sess. 258), is not retrospective.

MECHANICS' LIEN—*prior to November 4, 1861.* A party who furnished materials toward the erection of a building prior to November 4, 1861, cannot have a lien for the value thereof upon the premises benefited.

KANSAS TERRITORY—*law of, not in force here.* Nor can a lien upon the premises benefited be asserted under the mechanics' lien law of the late territory of Kansas for such materials.

Appeal from District Court, Arapahoe County.

Mr. MOSES HALLETT, for appellants.

Mr. G. W. PURKINS, for appellees.

BRADFORD, J. This was a petition for a mechanics' lien, filed in the district court of Arapahoe county on the 7th day of November, A.D. 1861, by J. E. Wild et al., plaintiffs, against the defendants, asking for judgment for the sum of \$262.23, in payment for lumber and material alleged to have been furnished to said Foster, and used in buildings and inclosures upon lots Nos. 5 and 6, in block No. 12, in East Denver, in said county, and praying that said demand may be made a lien upon said lots, and that said lots be sold to satisfy the same; the petition further alleges that, at the

time of furnishing the material, the said Foster was the owner and occupant of said lots, and that, on the 2d day of September, A.D. 1861, the said Eliza Townsend, wife of the said Copeland Townsend, became the purchaser of said lots, and that said Foster then delivered possession of said premises to the appellants, who have retained possession hitherto. At the August term of the district court, A.D. 1862, this cause came on to be heard, and the court ordered a decree entered in accordance with the prayer of the plaintiffs' petition, rendering judgment against all the defendants for the sum of \$262.23 damages, and for costs. From this judgment of the district court the defendants, Copeland Townsend and Eliza Townsend, appealed to this court. The appellants appear in this court upon assignment of ten errors; we will consider only the sixth assignment of error, not deeming it important or necessary to pass upon the other errors assigned. The sixth error assigned is as follows: "There was no law for the proceeding, the materials having been furnished, if any were furnished, before the passage of the law respecting mechanics' liens." The plaintiffs allege in their petition that they furnished the materials used in erecting buildings and inclosures on lots described in their petition to Foster (he then being the owner and occupant of said lots), within one year preceding the filing of said petition, which appears to have been on the 7th day of November, A.D. 1861; they further allege in said petition, that on the 2d day of September, A.D. 1861, Foster sold the premises to Mrs. Eliza Townsend, and then and there delivered possession of the same to the appellants, who retained possession at the time of the commencement of this suit, viz., on the 7th day of November, A.D. 1861.

The organic act of Colorado territory was approved on the 28th day of February, A. D. 1861. On the 4th day of November, A. D. 1861, the act of the legislature of Colorado, entitled "An act creating a lien in favor of mechanics in certain cases," was approved, which was the first law passed by the legislature of Colorado on the subject of

liens to mechanics and to persons furnishing materials used in the erection of buildings. On examination of said act it clearly shows that it was not even intended to be made retrospective, consequently it is clear that the plaintiffs cannot recover, by virtue of the provisions of said act, the premises sought to be affected by the plaintiffs having been conveyed to the appellants on the 2d day of September, 1861, long before the passage of said act, and it does not even appear that the appellant had any notice, either actual or constructive, of plaintiffs' claim upon the premises.

The attorney for the plaintiffs argues that the lien laws passed by the legislature of the territory of Kansas was in force in Colorado, until the passage of a law upon the same subject by the legislature of Colorado. A portion of Colorado territory embracing territory formerly within the limits of Kansas territory. We are unable to see the force of this reasoning. There is no provision in our organic law adopting or putting in force in this territory any portion of the laws of the late territory of Kansas, or any other laws excepting the constitution and laws of the United States.

This court being clearly of the opinion that, at the time of the purchase by the appellants of the premises upon which the plaintiffs claim a lien, there was no lien law in force in this territory, the judgment of the district court must be reversed, and the cause remanded for further proceedings.

Reversed.

McNASSER v. SHERRY.

PRACTICE—upon overruling a demurrer. Upon overruling a demurrer to a declaration if the defendant does not plead, further judgment of *ad idem* should be entered and a jury should be impaneled to assess damages. In such case it is error to swear the jury to try the issue joined.

Appeal from District Court, Arapahoe County.

Mr. AMOS STECK, for appellant.

Mr. G. W. PERKINS, for appellee.

HARDING, C. J. This is an appeal from the judgment of the district court of Arapahoe county.

There is but a single question for us to decide. At the August term, 1862, of said court, the appellee recovered judgment in said district court for the sum of \$296.75 in damages and costs, and this appeal is prosecuted to this court to reverse said judgment.

It appears from the record that a demurrer had been filed by defendant in the court below, which was overruled, to which ruling an exception was taken. That afterward a jury was impaneled and sworn, well and truly to try the issue joined, etc. These facts are made apparent to us from the bill of exceptions which is contained in the record. After the finding of the verdict by the jury a motion was made to set aside the verdict on the ground that the jury had been improperly sworn. It is clear that this fact was brought to the mind of the court, and yet, disregarding the motion, judgment was rendered on the verdict.

That is the error which is presented to us for our determination. There might have been another objection urged, but we will content ourselves by passing on the one before us.

When the jury was sworn to well and truly try the issue joined, etc., there was no issue joined in the case then on hearing. Upon the overruling of the demurrer, and the defendant failing to file a plea to the action, the proper practice would have been to have entered a judgment of *nihil dicit*, and then have impaneled a jury to assess damages, and not to well and truly try the issue joined, when no issue had been joined in the pleadings.

Per curiam. The judgment of the district court is reversed, with costs. Case remanded for further proceedings.

Reversed.

APPEARANCE—JUDGMENT NIL DICT. — If, after appearance, the defendant fails to plead judgment *nihil dicit* should be rendered against him: *Gower v. Shiner*, 4 Colo. 247.

WIER v. BRADFORD.

PRACTICE—*demurrer should be heard.* A demurrer to a complaint for forcible entry and detainer should be heard and determined.

PRACTICE—*motion to dismiss should be heard.* So, also, a motion to dismiss, filed by leave of the court, should be heard and determined.

POSSESSION OF LAND—*in action for forcible entry.* In an action for forcible entry on lands, the plaintiff must show that he was in actual possession of the lands at the time of the alleged entry. Constructive possession is not sufficient to support the action.

Appeal from District Court, Gilpin County.

Messrs. BOWEN & MACDONALD, for appellant.

Mr. AMOS STECK, for appellee.

HARDING, C. J. This is an action for forcible entry and detainer, commenced by Bradford against Wier on the 20th day of April, 1862, before a justice of the peace of Arapahoe county. A judgment was rendered against the defendant, who appealed to the district court of said county. The case was taken to Gilpin county on change of venue, and tried at the March term thereof, 1863, by jury. Verdict in favor of plaintiff and judgment rendered on the same. An appeal was taken by defendant to this court, and the case is before us on the record, which is presented to us.

The complaint filed before the justice, and on which the case was tried in the district court without amendment, is as follows in substance: That the plaintiff was lawfully possessed of certain premises (describing them) in the county of Arapahoe, on the 20th day of February, 1862; that the defendant forcibly entered and detained the possession thereof to the damage of plaintiff \$100. There is another allegation in the complaint, as follows: That the legal right to the possession of said premises is in the plaintiff, and that the defendant holds over after demand made in writing, and that the plaintiff claims damages in the sum of \$100.

Before considering the error assigned, upon which we are

asked to reverse the judgment of the court, it becomes necessary to notice the statute under which this action is authorized :

SECTION 1. "No person or persons shall hereafter make any entry into lands, tenements or other possessions, but in cases where entry is given by law, and in such cases not with strong hand nor with multitude of people, but only in a peaceable manner, and if any person from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by fine."

The eleventh section of said act authorizes the complainant to recover against the defendant treble damages in an action of trespass, after conviction of the forcible entry and detainer aforesaid.

The twenty-second section provides that all matters in excuse, justification or evidence of the allegations in the complaint, shall be pleaded specially, or notice thereof given with the plea of general issue. Stat. 1 Sess., p. 251.

We will not notice here in this connection the proceeding on the trial before the justice of the peace. We do not sit here to take cognizance of matters arising in their courts, but from the record before us it seems that this cause was tried on the same papers in the district court as in the justice court, without amendment.

The defendant filed his demurrer in the district court to the complaint, as follows : 1st, assigning a misjoinder of actions ; 2d, that it is not averred that the plaintiff was in possession of the premises ; 3d, that the force is not averred to have been done with a strong hand ; 4th, that the plaintiff claims damages in the sum of \$100 ; 5th, that in the second count, assigning unlawful detainer, no contract is averred, and other insufficiencies.

On motion of the plaintiff, this demurrer, as it is called, was stricken from the files of the cause, to which the defendant excepted. The defendant obtained leave of the court to file a motion to dismiss plaintiff's action, and the motion was filed. Plaintiff moved the court to strike this motion to dismiss from the files of the cause also, which

motion was sustained, to which the defendant excepted; the case went to the jury, who returned a verdict in favor of the plaintiff, and the court rendered judgment. Defendant filed a motion for a new trial, which was overruled, and to which ruling of the court the defendant excepted. The defendant appealed to this court, and has assigned in his brief and abstract ten errors, upon which he relies for the reversal of the judgment of the district court. We will not notice all of them, but only such as must determine our action in this case. These are included in Nos. 1, 2 and 6 in defendant's brief, and are as follows: 1. That the said court erred in sustaining the motion of plaintiff to strike the demurrer filed by the defendant from the files of the cause, without consideration or decision upon the merits of the said demurrer. 2. That the said court erred in sustaining the motion made by the plaintiff to strike from the files of this cause the motion made by defendant to dismiss the said suit, without consideration, etc.

We have no doubt but that the court below erred in striking from the files of this cause the paper called a demurrer and the motion to dismiss plaintiff's suit, under the circumstances which are manifest to us. There is no rule of practice which can tolerate such a proceeding on the part of a court. There may arise cases where such a practice is justifiable and proper, but this is not such a case. The questions which the paper called a demurrer raised had never been decided by the court or acted on in this case. No matter how informally these questions may have been presented to the court, it, nevertheless, was the duty of the court to sustain or overrule the demurrer. So with the motion to dismiss plaintiff's action. After leave had been granted by the court to defendant to file his motion, it was then too late to object that the motion came too late, and it was the duty of the court to pass upon the merits of the motion, and not to strike it from the files. If this practice could be tolerated, it might lead to great abuses, and might become very convenient for any incompetent judge to hide his ignorance of the principles upon which he was

called upon to act. No matter whether or no the demurrer was sustainable, that does not alter the case. We will therefore give no opinion on that subject.

The sixth error assigned is as follows: The court erred in refusing to instruct the jury upon the issues joined, at the request of the defendant, as follows: That, to sustain the complaint in this case, the jury must find that the plaintiff was in the actual, not constructive, possession of the premises in question, and that the defendant, by an unlawful and forcible entry, actually dispossessed the plaintiff. 14 U. S. Digest, 320, §§ 13, 14 and 15; 8 Eng. 448.

We think that the above instruction was in accordance with the authorities on that subject, and that it ought to have been given by the court. The act of the legislature above cited must receive a construction consistent with itself and with the jurisdiction of justices of the peace. If all cases of entering into the possession of lands and tenements, where the title is in dispute, could be brought within the meaning of the act; if so broad a construction is put upon it as seems to have been contended for, it would give justices a jurisdiction totally repugnant to the limitations placed upon them by the organic act and the laws of this territory, which limit their jurisdiction. If the justices may try all cases where the defendant is found in the peaceable possession of land, without regard to the mode by which he gained possession, then, indeed, a proceeding in his court would supersede the necessity of prosecuting an action of ejectment in the district court.

There might be given many more reasons why the judgment of the district court must be reversed, but the above are sufficient.

The judgment of the court below is reversed, with costs. Case is remanded for further proceedings.

Reversed.

DORSETT v. CREW.

JURISDICTION — service of process. It is error to enter judgment against parties who have not been served with process.

INSTRUCTIONS should be written. Instructions to the jury should be written, and the court should not orally qualify or modify them.

VERDICT EXCESSIVE. Where the verdict of the jury was for \$221.66, and was expressed to be for the amount of a note, without interest, and it appeared that the note was for \$221 only: *Held*, that it was error to receive and enter judgment on the verdict.

Appeal from District Court, Arapahoe County.

Mr. J. Q. CHARLES, for appellant.

Mr. MOSES HALLETT, for appellee.

HARDING, C. J. This is an appeal from the judgment of the district court of Arapahoe county. On the 3d of June, 1862, the appellee filed his affidavit in attachment against James L. Dorsett, G. B. Reed and F. Dorsett, junior, in aid of an action of assumpsit against the persons last named, commenced the same day. The cause of action consisted of a certain note made by the above-named defendants to the said Crew, on the 11th day of August, 1860, and payable three months from date, for the sum of \$221. On the 4th of August, 1862, a summons issued against G. B. Reed, James L. Dorsett and F. Dorsett, jun., returnable to August term, 1862, of the said district court. There was no return of sheriff on the summons. On the fifth of August a writ of attachment issued against the property of James L. Dorsett alone, returnable to August term of said court.

On the 6th of August, 1862, the writ of attachment was returned executed June 3, 1862, by attaching three brown horse mules and one brown mare mule, the property of James L. Dorsett. On the 25th July, 1862, the plaintiff filed his declaration herein, containing two counts: 1. Count on the promissory note; 2. Common count for goods, wares, etc., and for work and labor, money had and received

ad damnum \$300. Plaintiff also filed copy of note sued on in declaration.

At the August term of said court, the defendant, James L. Dorsett, appeared and filed a motion to dismiss the suit for want of a sufficient affidavit. The motion was overruled and an exception taken. Said J. L. Dorsett then filed his plea in abatement, denying the allegations set forth in the affidavit. Issue joined on said plea by the plaintiff and cause tried by a jury.

The court gave *oral* instructions to the jury, and made *oral* explanations to the written instructions given to the jury.

The jury rendered the following verdict: "*J. H. Crew v. G. B. Reed, James L. Dorsett and F. Dorsett, Jr.* We, the jury in the above-entitled cause, find verdict for plaintiff. Amount, \$221.66 of note, without interest. C. H. Martin, foreman." The court rendered judgment on the verdict of the jury against all the defendants for the sum of \$221.66.

On the 6th day of September, 1862, during the same term of said court, and two days after the entering of the judgment, the said James L. Dorsett, who was the only one of the defendants who had appeared or who had been served with process, made a motion for a new trial, and set down in his said motion, among others, the following reasons. There are seven causes assigned why a new trial should be granted, but it is necessary to notice only the following: 1. The verdict is contrary to the law and the evidence; 4. Because the court gave oral instructions and also oral explanations of his own written instructions; 7. And for other good and sufficient reasons.

This motion was accompanied by the affidavit of the said James L. Dorsett, for the purpose of supporting the same. This affidavit set forth the fact that the court gave the *oral* instructions above mentioned to the jury, and that the court also gave oral explanations, etc., etc.

This motion was overruled and exceptions taken. An appeal was prayed for, and it was ordered that the same be

allowed by defendant filing his bill of exceptions together with his bond for \$600, in twenty days. The bill of exceptions was duly preferred and signed in vacation. Also the bond was filed, and this case is now before us for our action.

As was remarked above, we decline considering all the reasons set down by the appellant in his motion for a new trial. We will advert to the error assigned on behalf of appellant, and on which he relies for the reversion of the judgment of the court below. But in doing this we will not consider in their order all the errors assigned, for the reason that we have not the authorities before us, which would enable us to treat each one of them in detail; neither does it become necessary to arrive at a just conclusion in determining our final action in the premises. We will, therefore, refer to the third, fifth and seventh errors assigned. They are as follows: 3d. The court erred in overruling the motion for new trial; 5th. The court erred in giving *oral* instructions and in explaining *orally* his written instructions; 7th. The court erred in receiving the verdict, and in rendering judgment for more than was claimed in the affidavit and declaration.

The evidence upon which the jury found their verdict is contained in the bill of exceptions, although, perhaps, the bill of exceptions is technically deficient in not stating that this was all the evidence offered in the trial of the case, and, if the court below had refused a new trial upon the ground that the evidence did not warrant the finding of the jury, we should not feel disposed to interfere, for the reason that it is the peculiar province of the jury to find the facts from the evidence, and where there is conflicting evidence on both sides of the case, the court will not disturb the verdict or grant a new trial, unless it is apparent that great injustice would be done the opposite party in refusing the same. It is manifest that there was evidence on both sides upon which the jury could make their finding. But the question arises, did the court below err in receiving the verdict of the jury in this case? We think that it did. The verdict is against all the defendants, or, at least, it would seem that

the court below so considered it, for judgment was rendered against all the defendants. Was this proper? It does not appear that service was ever had on any one of them but James L. Dorsett; neither does it appear from the record that either of the other defendants ever appeared, either by himself or any other person, and answered to the complaint. The judgment is personal, and not *in rem*. The property of James L. Dorsett had been levied on in attachment, but it does not appear that any service had ever been made on Reed and Dorsett, Jun., by which they could be considered as before the court. The authorities are clear on this subject. This was an action of assumpsit on the note for \$221, and which was signed by all the defendants in the court below. The writ of attachment was in aid of the action of assumpsit, but, unless the defendants had been legally served with process, no personal judgment could be rendered against them, unless they entered their appearance upon the trial, which would have been a waiving of the process. It must be remembered that in a proceeding *in rem* the judgment of the court only subjects the property attached to the payment of the defendant's debts, unless, as before observed, personal service has been had on the defendant, or other steps have been taken which are equivalent to the same. Under these circumstances, we think that the court erred in overruling the motion for a new trial.

5. The next error which we shall notice is No. 5, in the series set down in the appellant's brief, and is as follows: The court erred in giving *oral* instructions and by explaining *orally* his written instructions. If we had found nothing else wrong in the record of this case, this would be a fatal error upon which the judgment of the court below must be reversed.

By the statute of this territory (1st Sess. 282, § 28), we find the following provision: "The district court in all cases, both civil and criminal, shall only instruct the petit jury as to the law of the case, and such instruction shall be reduced to writing, and may be taken by the jury in their retirement and returned by them with their verdict," etc.

The court in this committed a palpable error. It will not do for appellee to say that we are not advised as to what these oral instructions were; that they may have been in favor of the defendant, etc. Nothing would reconcile this practice of the court but the express consent of the parties that the court might so instruct. We do not know what effect these *oral* instructions may have had on the mind of the jury, neither did it become necessary for the defendant to embody in his bill of exceptions these instructions. If the court proceeded to so instruct, in violation of an express statute, it was in the power of either party to take advantage of the error so committed by the court. We will not give a direct opinion as to what may be construed by this court as the *consent* of the parties, assuming that such a case was now before us involving that question. If the court should proceed to instruct the jury *orally* over the objection and protest of one of the parties, the other party sitting by and making no objection, then, in such a case, the particular circumstances might modify our ruling. But there is nothing of the kind here; the facts stand out clearly in the bill of exceptions, that the court in this instance did what it had no right to do on the hearing and trial of a suit.

We now proceed to the last error which we will notice in this connection.

7. That is as follows: "The court erred in receiving the verdict and in rendering judgment in this case for more than was claimed in the affidavit and declaration."

The note, which is mentioned in the verdict of the jury, is the same note mentioned in the affidavit and declaration on which this action was based. The verdict of the jury was clearly wrong, from the internal evidence which it bore on its face. The amount claimed in the affidavit was \$221. No matter what might be claimed in the *ad damnum*. If it is clear that the jury only intended to find that the amount due the plaintiff was the face of the note, without interest, which we think is the case, there should have been no mistaking their intentions. The excess is but a small sum indeed, but it was the duty of the plaintiff and not

the defendant to see that the verdict was corrected at the proper time, and when these facts were brought to the notice of the court, it became the duty of the court to send the jury back to their room for the purpose of returning a correct verdict. We do not remember an instance where the court refused to have the verdict of the jury corrected for the reason that the excess was a trifling sum. The plaintiff in this case claimed in his declaration the amount of the note sued on, with such other amount as the jury might find due him not exceeding \$300.

The jury only found the amount of the note without interest, and fixed the sum at \$221.66. How they could find the amount of sixty-six cents over and above the note, when the note was found to be due without interest, is not known to us. The verdict was clearly wrong from the statement contained in the body of the same. Therefore the verdict was wrong for two reasons; 1, the excess over the face of the note, and in the second place it was against all the defendants, or, if we are mistaken in this, then the court could not enter judgment against all of the defendants. The reason why is stated in the former part of this opinion. There are other errors assigned by appellant which are worthy of notice, but, for reasons above given, we cannot examine them in detail here. We think that the authorities cited by appellant, and many of those also by the appellee, bear us out in arriving at the conclusion to which we have come, that the judgment of the court below must be reversed, which is done accordingly, with costs, and this cause is remanded for further proceedings. *Reversed.*

INSTRUCTIONS TO JURY SHOULD BE WRITTEN and the court should not orally qualify or modify them: *State v. Potter*, 15 Kan. 316. A violation of this statutory requisite is substantial error: *Bradway v. Waddell*, 95 Ind. 175, citing the principal case.

TURNER v. HAHN.

TROVER — *demand and refusal.* In the action of trover, proof of demand and refusal is made for the purpose of showing a conversion of the property by defendant, and, when the plaintiff is able to show such fact by other evidence, he need not resort to such proof.

NEW TRIAL—*verdict according to evidence.* The verdict of the jury in this case was according to the evidence, and a new trial was denied.

PRACTICE—*construction of a rule of court.* A rule of court, which requires that affidavits in support of a motion shall be served by copy upon the opposite party twenty-four hours before the hearing, does not comprehend affidavits read at the hearing on behalf of the party who resists the motion.

JUROR—*alienage of.* A verdict will not be set aside on account of the alienage of one of the jurors to whom no objection was made at the trial.

Appeal from District Court, Gilpin County.

At the trial G. E. Guinn testified on behalf of the plaintiff, that on 9th of September, 1865, he sold and delivered to plaintiff seven head of beef cattle, one of which was a blue roan steer about four years old, which would weigh twelve hundred pounds gross, and six hundred pounds net, worth about \$100. On the eleventh of September he understood the blue roan steer had broken out and was gone; that he inquired for the steer and noticed for him; that he purchased the steer of Gartin, a ranchman, in Boulder county about the 1st of August, 1865, and kept possession of him until he sold him to plaintiff; when he purchased the steer he was branded on left hip with letter F, and had his left ear cropt; witness branded him on left shoulder with the letter F. About the last of November, or first of December, 1865, witness saw the steer at defendant's slaughter-house in Central City; witness went with plaintiff to defendant's shop that night, and had a conversation with defendant about the steer; defendant said he purchased the steer 15th August, 1865, of Gartin, and that he branded all the cattle purchased of Gartin on the loins with the letter F. Plaintiff and defendant agreed to go the next morning and see the steer; witness and plaintiff went up the next day about 9 o'clock, A. M. Defendant said there was no need of his going, and told plaintiff he would not go; witness saw the hide and head of said steer in defendant's slaughter-house, and found the same brands on it; witness testified that it was the hide of the blue-roan steer; defendant purchased cattle of Gartin about two weeks after witness did; the

steer was of a peculiar color ; never saw one before or since of such a color.

Defendant read the deposition of James B. Tourtellot, who testified that, on 6th of September, 1865, he took a steer from Gartin's ranch for defendant, and afterward turned him over to defendant ; that the steer was a brindle with staggy horns ; that on the 3d of September, 1865, Turner, the defendant, turned over to him to ranch, fourteen head of cattle, one of which was a roan or reddish roan steer, branded F on left hip, and F on left side between the hip and shoulder blade, pretty well up on the back ; that he returned the steer to defendant, in the latter part of September or first of October, 1865.

Thomas Peacock testified, on behalf of defendant, that Tourtellot delivered the roan steer spoken of in his deposition on the 16th of October, 1865 ; that the steer was taken to Blackhawk, and thence to the Elk meadow ranch to pasture ; that the steer was of a blue roan color, about four years old, staggish horns, weighed eight or nine hundred pounds gross ; was branded just behind left foreshoulder, pretty high upon the back with letter F, had a circle on left hip with letter in it ; could not tell what the letter was ; steer would dress about four hundred pounds ; next saw the steer on the Elk meadow ranch two weeks afterward ; did not see the steer again until I saw him at the slaughter-house ; I suppose that is the time spoken of by Guinn ; knows it was the same steer delivered to defendant 16th October, 1865, by Tourtellot.

George Ritter, on behalf of defendant, testified, that on the 19th of October, 1865, he took four head of cattle to the Elk meadow ranch, and delivered them to Henry Ripley for defendant, the cattle were turned over to him by Thomas Peacock ; one was a blue roan steer, marked F on left hip, and F right back of shoulder, four or five inches from back bone ; he looked to be about four years old.

Henry Ripley, on behalf of defendant, testified, that he was the owner of the Elk Meadow ranch ; that on the 18th of October, 1865, he received from George Ritter four head

of cattle to ranch and herd for defendant; that one was a roan steer; that on the 20th day of November, 1865, he drove the steer, together with other cattle, to defendant at Central City, and put the steer in defendant's close-pen at slaughter-house.

William Feld, on behalf of defendant, testified, that he saw the blue roan steer in the slaughter-pen, and that the steer, when killed, weighed four hundred and four pounds; that the steer was killed at defendant's slaughter-house at night, eight or ten o'clock; that he did not see any marks on the steer.

At the hearing of the motion for a new trial the counsel for defendant below read affidavits to show that Cyrille Harpin, one of the jurymen who sat at the trial, was not a citizen of the United States, and that he could not speak, write, read or understand the English language, except a few common and simple words, and that said Harpin was a citizen of Great Britain; that neither the defendant below nor his counsel had any knowledge of Harpin's alienage or of his ignorance of the English language until after the trial.

Counsel for plaintiff below offered affidavits to show that Harpin was well enough acquainted with the English language to converse therein, and that he did converse with his fellow jurors about the cause, and that they discovered in him no lack of understanding or of capacity to comprehend the same; that, during the progress of the trial, defendant's counsel was informed that Harpin was not a citizen.

To these affidavits counsel for defendant below objected, that copies had not been served upon him according to the following rule of court:

"In all motions, not being motions for continuance and not of course, twenty-four hours' notice of hearing shall be given, and such notice shall be in writing, and shall specify the objections and points raised by the motion, and, if the motion shall be founded upon affidavits, copies of such affidavits shall be furnished with the motion and notice."

The court allowed the affidavits to be read.

Mr. L. C. ROCKWELL, for appellant.

Mr. S. B. HAHN, for appellee.

HALLETT, C. J. This was an action of trover and conversion, in which there was judgment in favor of the appellee in the court below for the sum of \$60 and costs. We are asked to reverse this judgment for several causes, the first of which is that improper instructions were given to the jury upon the trial in the district court. The objection to these instructions appears to be that they are so framed that the jury were at liberty to find for the appellee, in the absence of testimony showing a demand by him for the property, the value of which he sought to recover, and a refusal by the appellant to deliver it. Upon this point it is only necessary to say that, in actions of this kind, proof of demand and refusal is made for the purpose of showing a conversion of the property by the defendant, and, when the plaintiff is able to show such fact by other evidence, he need not resort to proof of demand and refusal. 1 Chitty's Plead. 157; *Tompkins v. Hale*, 3 Wend. 406.

In this case there was evidence tending to show that the appellant had killed the steer, the value of which the appellee was seeking to recover, and, if the jury believed this evidence, proof of demand and refusal was not at all necessary. It is also urged that the evidence is not sufficient to sustain the verdict; but we are unable to adopt the views of the appellant. We are entirely satisfied that the jury decided the case correctly. After the trial in the district court the appellant filed several affidavits showing that one Harpin, a juror who sat upon the trial, was an alien, and that he understood the English language but imperfectly; that the appellant and his counsel had no knowledge of these facts until after the trial. For this and other reasons, the appellant moved the district court to set aside the verdict and grant a new trial, which motion was denied. Upon the hearing of this motion the appellee produced the affidavit of one Geriaux, in which the deponent stated that during the trial of the cause he informed the counsel for

appellant of the facts before mentioned, touching the alienage and ignorance of Harpin, and also the affidavits of six of the jurors who sat upon the trial, in which they deposed that Harpin, while in the jury room, conversed freely about the evidence, and appeared to understand it perfectly, and they discovered no incapacity in him. To the reading of these affidavits, presented by the appellee, the appellant objected, alleging that, under a rule of the court which is set out in the bill of exceptions, he should have been served with copies of the affidavits twenty-four hours before the hearing, but the court permitted them to be read. Obviously the rule applies only to affidavits designed to be read in support of a motion, and, as these affidavits were offered for the purpose of resisting a motion, the case is not within the terms of the rule. It is clear that Harpin was sufficiently acquainted with the English language to enable him to comprehend the evidence and act intelligently upon it, and it is equally clear that he was an alien. We are then to consider whether the fact that Harpin was an alien is sufficient to avoid the verdict, and we think that it is not. In the case of *Queen v. Hepburn*, 7 Cranch, 297, it was objected that one of the jurors was not a resident of the county in which the cause was tried, and Chief Justice MARSHALL, speaking for the court, said "Whatever might have been the weight of this exception, if taken in time, the court cannot sustain it now, the exception ought to have been made before the juror was sworn." This language is fully applicable to the case under consideration. Parties have the right to interrogate persons who are called to sit as jurors, for the purpose of ascertaining their qualifications before they are sworn, and if this is not done the right to challenge is waived. *Hollingsworth v. Duane*, 4 Dall. 353; *Greenup v. Stoker*, 3 Gilm. 219.

We find no error in this record, and therefore the judgment of the district court is affirmed, with costs.

JUROR — ALIENAGE — CHALLENGE. — Although alienage is a good ground of objection to a juror, if he is not challenged on this ground, but is allowed to be sworn, the objection is considered as waived (*Jones v. People*, 2 Colo. 354); and in such case the verdict will not be set aside for this reason: *State v. Pritchard*, 15 Nev. 98, both citing the principal case.

SMITH et al. v. Cisson.

PRACTICE — *exception to ruling of court.* Error cannot be assigned upon the ruling of the court in giving an instruction to the jury, unless an exception to such ruling was entered at the time it was made.

EVIDENCE *as to identity of parties is for the jury.* Whether witnesses who use the surnames of parties to the suit refer to the parties, or to some other persons of the same name, is a question for the jury. If there is a doubt as to the identity of a person named by a witness, it is easily solved upon cross-examination, and, if the party, in whose favor the doubt will operate, fails to apply the test, there is strong ground for believing that he does not desire to dissipate the doubt.

PRESUMPTION *in support of judgment of court below.* In an action against two defendants named Smith, the record did not disclose whether the parties were sued as copartners or otherwise. At the trial the defendants put in an account in which they used the name of "Smith Bro.," and a receipt in which they were styled "P. Smith & Co." Upon this evidence it will be presumed that the defendants were sued as copartners.

COPARTNERS *are bound by the act of one.* A contract by one of several copartners, in relation to the partnership business, is binding upon the firm.

NEW TRIAL — *where evidence is conflicting.* Where evidence is conflicting, and there is evidence upon which the verdict may stand, a new trial will not be granted, although another verdict might well have been given.

Appeal from District Court, Clear Creek County.

At the trial below counsel for appellant asked for an instruction to the jury which the court declined to give, but no exception was taken to the ruling of the court.

Appellee sued appellants before a justice of the peace, and filed an account for three months' rent of a blacksmith shop, amounting to \$45, and for work done as a blacksmith, amounting to \$19.25, and also for damages in respect to the non-fulfillment of a contract relating to the rent of a blacksmith shop and tools, amounting to \$269.50; the defendants put in an account for board, cash and other items, amounting to \$155; in this account the defendants were styled "Smith Bro." The defendants also put in a receipt, covering several small sums of money, in which the defendants were styled "P. Smith & Co." At the trial the plaintiff called Richard Rose who testified: I was called

to witness a bargain between Mr. Smith and Cisson. Smith rented shop and tools to Cisson for \$15 per month; Cisson to sharpen mining tools for Smith, and, as part of the consideration, to keep the shop open for the accommodation of the public, that the reputation of the shop might not go down. Cisson was to have the shop until the first of March; contract was made in the last of October or first of November, A. D. 1866; Cisson was to sharpen the mining tools of Smith; it was mentioned such tools as Mr. Smith or his brother might use prospecting or other mining tools. There was an account between Mr. Smith and Cisson, in which Mr. Smith owed Cisson \$45, this was to be allowed Cisson or three months rent; can't say whether or not this was the balance due from Smith to Cisson; don't know about Smith taking the tools; I know some tools were brought into Mr. Smith's butcher shop.

John D. Harris testified, that he rented the shop to Smith; that in November or December he notified Smith that he wished to occupy the shop; Smith told him he wished he would put Cisson out. Witness stated that he found the shop locked, drew the staple, and put out the tools.

Frank De La Mar testified, that Cisson commenced to occupy the shop in September or October; about the time Cisson commenced occupying it, I heard Mr. Smith say that he had rented him the shop for five months; that the shop, tools, profit and all was worth \$7 per day.

George Cisson, the plaintiff below, testified, that the items in his account were correct.

Peter J. Smith, one of the defendants below, gave testimony as to the state of accounts between the parties, and stated that, according to his books, the balance due him from Cisson was \$41.

The jury found for the plaintiff, and assessed his damages at \$73.56, and judgment was rendered on the verdict.

Messrs. ROYLE & BUTLER, for appellants.

Messrs. POST & MORGAN, for appellee.

HALLETT, C. J. The appellants seek to reverse this judgment because the court below refused to give an instruction asked by them, and because the evidence is not sufficient to support the verdict. As to the first point, the appellants did not except to the ruling of the court in refusing to give the jury the instruction asked by them at the time such ruling was made, and, therefore, they cannot be heard. *Armstrong v. Mock*, 17 Ill. 166.

The witnesses who testified upon the trial below related the facts touching the renting of a blacksmith shop and other business transactions between Mr. Smith and Mr. Cisson, without giving the names of the parties more fully, and it is urged that it does not appear which one of the appellants was intended to be named by the witnesses, or indeed whether the witnesses intended to name either of the appellants.

We cannot doubt that the witnesses referred to one of the appellants when they spoke of Mr. Smith. Upon the stand witnesses use the language of ordinary conversation, and to require them to adopt a more perspicuous diction is neither practicable nor desirable. It is hard to believe that a witness may be produced in open court, and that he may there, in the presence of the parties, plaintiff and defendant, detail the circumstances of a business transaction between the plaintiff and a person of the surname of the defendant, without disclosing the fact that the defendant in the suit is not the person referred to by the witness, if such fact exists. Oftentimes the names of parties are used by witnesses without giving the full name, but in such way as to leave no doubt in the mind of the hearer as to the person designated by the witness. If there is doubt as to the identity of a person named by a witness, it is easily solved upon cross-examination, and, if the party in whose favor the doubt will operate fails to apply the test, there is strong ground for believing that he does not desire to dissipate the doubt. We think that the jury, in this cause, were at liberty to determine, as they did determine, that the witnesses, when speaking of Mr. Smith, referred to one of the

appellants. A more difficult question is presented concerning the joint liability of the appellants to the appellee in this action.

The testimony refers to but one of the appellants, and unless the act of this one is binding upon the other, the verdict cannot be sustained. It must be borne in mind that this action was originally commenced before a justice of the peace, and there are no written pleadings from which we may learn the character of the suit. For aught that appears the appellants were charged as partners, in which case the joint liability would be established, *prima facie*, unless denied by plea in abatement, and it is not claimed that such plea was interposed. *Warren v. Chambers et al.*, 12 Ill. 124.

Upon this point the witnesses give no light, but there is, in the bill of exceptions, an account and receipts which it is said the appellants presented and relied upon in the trial of the cause. In the account the appellants style themselves "Smith Bro.," and they charge the appellee an item of rent for a shop which appears to have been the blacksmith shop mentioned by the appellee's witnesses. The receipt also appears to have been given by the appellee to the appellants, to acknowledge payment of some of the items for which this suit was brought, and therein the appellants are styled "P. Smith & Co." One of the appellants, Peter J. Smith, having made the preliminary affidavit required by statute, testified in the cause respecting some of the items in the account. Now it appears from these papers that the appellants were seeking to establish a demand against the appellee in a copartnership name, and also to establish the payment by them as copartners of a portion of the appellee's demand, and we think in this way they admitted, not only that they were charged in the suit as copartners, but also that they were in fact copartners in business. *Macfarland et al. v. Lewis et al.*, 2 Scam. 344; *Rymer v. Cook*, cited in 22 Eng. Com. Law, 479, in note.

The copartnership being thus established, the contract of one was obligatory upon both of the appellants, and the

joint liability is sufficiently shown ; as to the damages we see that the evidence is conflicting, and we think that another verdict might well have been given by the jury, but as there is evidence upon which this verdict may stand, we cannot disturb it.

The judgment of the district court is affirmed, with costs
Affirmed.

VERDICT — WEIGHT OF EVIDENCE. — Where evidence is conflicting, and the verdict is not manifestly against the weight of evidence, the verdict will not be disturbed: *Barker v. Hawley*, 4 Colo. 227; *Denver S. P. & P. R. Co. v. Driscoll*, 12 Colo. 525.

MURDOCK v. TOWNSEND.

PRACTICE in supreme court. A defendant failed to join in error as required by rule of court, and the judgment was for that reason reversed.

Error to District Court, Arapahoe County.

The chief justice did not participate in the decision.

GORSLINE, J. A rule having been entered in this cause requiring the defendant in error to join in error, and the said defendant having failed to conform to the requirements of said rule, the judgment in this cause must be reversed and cause remanded.

Reversed.

ANDERSON v. SLOAN.

BILL OF EXCEPTIONS — when necessary. A motion for a new trial, and a motion to vacate a judgment, and affidavits in support thereof should be preserved in the record by bill of exceptions.

SHERIFF'S RETURN — amendment of. A sheriff may amend his return to a summons by leave of the district court, after the record of the cause has been removed into this court.

PRACTICE — affidavits irregularly made. Affidavits sworn to before the attorney of the party making them should not be received.

Error to District Court, Arapahoe County.

Mr. ALFRED SAYRE, for plaintiff in error.

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Mr. J. Q. CHARLES, for defendant in error.

The chief justice did not sit in this case.

GORSLINE, J. This was an action of trespass commenced by Sloan against Anderson and four others in the district court of Arapahoe county, but service of the summons was only had upon Anderson. The summons was returnable on the first Tuesday of December, 1865, being the first day of the December term, and was returned by the officer as served on Anderson, December 13, 1865. The cause was continued to the March term, at which term the default of the defendant was taken, and the plaintiff's damages assessed by a jury at \$1,200; upon which final judgment was entered. At the same term the defendant Anderson moved the court for a new trial, and also to vacate the judgment for reasons given, and which motions were based upon affidavits. These motions were overruled. As the decision of the court in overruling the motion for a new trial, and the reasons assigned by the defendant for vacating the judgment, and also the affidavit presented are not preserved in a bill of exceptions, they form no part of the record, and cannot be considered in this court. *Van Landingham v. Fellows et al.*, 1 Scam. 233. At the December term, 1866, of the district court, the plaintiff moved that the sheriff have leave to amend his return, so that it should appear that the summons was served on the 30th day of November, 1865, instead of December 13, 1865. This motion was granted, and the return was amended accordingly. The record, as amended, was returned into this court at the adjourned July term, 1867. It is urged that the district court erred in allowing the sheriff to amend his return after writ of error sued out from this court. We think not. The cases are numerous where the misprisions of officers are allowed to be amended a long time after judgment and even when they were out of office. *Moore v. Purple*, 3 Gilm. 149; *Leonard et al. v. Hughill*, 2 Scam. 361.

We conclude that there is no error in the record, and the judgment of the district court must be affirmed.

Several of the affidavits used on the hearing of the motions in the district court were sworn to before the attorney of the party making them. This practice is wrong, and the court should have rejected them.

The judgment of the district court is affirmed. *Affirmed.*

BILL OF EXCEPTIONS, WHEN NECESSARY. — Papers not part of the record must be made such by bill of exceptions, to be considered on appeal (*Wike v. Campbell*, 5 Colo. 127); and rulings and exceptions not preserved in the bill of exceptions form no part of the record, and cannot be considered on appeal: *Whitney v. Teichfuss*, 11 Colo. 556.

AMENDMENTS TO SHERIFF'S RETURNS are allowed with great liberality: *McClure v. Smith*, 14 Colo. 301.

AFFIDAVITS SWORN TO BEFORE ATTORNEY of the party making them cannot be received in evidence: *Martin v. Skekan*, 2 Colo. 618.

FRANKLIN v. UNITED STATES.

CONSTRUCTION of section 3 of act of Congress of 1790 relating to crimes. The Territory of Colorado is not a place or district of country under the sole and exclusive jurisdiction of the United States within the meaning of section 3 of the act of Congress of 1790. 1 Stat. at Large, 113.

JURISDICTION — averment as to, in indictment for murder under act of Congress
An indictment based upon section 3 of the act of Congress of 1790, in which it is alleged that the murder was committed "at the said county of Gilpin" without further description of the place, and without any averment as to the jurisdiction of the United States, is not sufficient.

Error to District Court, Gilpin County.

Mr. JOHN W. REMINE, for plaintiff in error.

Mr. GEORGE W. CHAMBERLAIN, United States District Attorney, for the government.

HALLETT, C. J. At the December term, 1864, of the district court of the first judicial district, sitting at Central City, Gilpin county, the plaintiff in error was indicted for murder, tried and convicted of that crime, and sentenced to be executed.

He prosecutes this writ of error to reverse the judgment of the district court, and, together with other causes, he assigns the following as error:

"The court erred in entertaining jurisdiction of the offense charged in the indictment, the said first judicial district of Colorado Territory not being in the sole and exclusive jurisdiction of the United States."

The indictment appears to be founded upon section 3 of "An act for the punishment of certain crimes against the United States," approved April 30, 1790, which is in the following words:

"If any person or persons shall, within any fort, arsenal, dock-yard, magazine, or any other place or district of country, under the sole and exclusive jurisdiction of the United States commit the crime of willful murder, such person or persons, on being thereof convicted, shall suffer death."

The principal question presented in this record is, whether the place where the crime was committed was, at the time of the offense, within the descriptive terms of this act, so as to give the district court jurisdiction of the offense. The indictment sets forth that the crime was committed "at the said county of Gilpin," without further description of the place, and without any averment as to the jurisdiction of the United States. If the act operates in the Territories in the same way as in the several States, and to no greater extent, in other words, if the act operates in this Territory only within forts, arsenals and other places where the United States have exclusive jurisdiction, in virtue of exclusive ownership, it seems to be necessary, under the act, to aver in the indictment and prove upon the trial, that the place where the crime is committed is within the descriptive terms of the statute. *United States v. Cornell*, 2 Mason, 62. As this indictment contains no averment whatever as to the jurisdiction of the United States it is fatally defective, unless the act recited has a more enlarged operation in this territory than in the several States. If, as has been urged, the entire territory is a place or district of country under the sole and exclusive jurisdiction of the United States within the meaning of this act, it ought to be sufficient to allege that the crime was committed in that part of the territory which is within the jurisdiction of the particular court in which the indictment may be presented. If such is the meaning of the law, this, together with the seventh section of the same act, is the law of homicide in

this territory, in force wherever the process of the court runs, and wherever the court has jurisdiction under any law, and, therefore, it is sufficient to allege that the crime was committed within the geographical limits which define the territory, over which the court has jurisdiction; in other words, within the county or counties within and for which the court is sitting. Therefore we must inquire whether this territory is a place or district of country under the sole and exclusive jurisdiction of the United States within the meaning of the law mentioned. We may find an answer to this inquiry in the sixteenth section of the act establishing this territory, which declares "that the constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said territory of Colorado as elsewhere within the United States." Within the several States, section 8 of the act of 1790 provides for punishing murder, where committed in a fort, arsenal, dockyard or the like place, owned by the general government, and the above-mentioned section of the organic act declares it shall have the same force and effect in this territory. It may be suggested that the words "force and effect," used in the organic act, refer to the penal power of the law, and were not designed to limit its operation to places owned by the general government as in the several States. But a law is presumed to be effectual to accomplish its purposes, and therefore it was not necessary to declare what force and effect the act of 1790 should have in this territory, except for the purpose of limiting the places within which it should obtain. If, by the terms of the act, it is in force in the territory, its power is declared in the language of the act itself, and the limitation in the organic act, that it shall have the same force and effect as elsewhere within the United States, can refer only to the places in the territory within which it shall operate. If then, in obedience to the sixteenth section of the organic act, we give section 8 of the act of 1790 the same force and effect in this territory which it has elsewhere in the United States, we shall apply it to murder

committed in forts, arsenals and the like places belonging to the United States and in the Indian country.

We may reach the same conclusion without referring to the sixteenth section of the Organic Act. In all its legislation, congress pursues the authority given in the constitution, and we may refer the section under consideration to the sixteenth clause of section 8, article 1 of that instrument. In that clause of the constitution, congress is invested with exclusive legislative authority over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of congress, become the seat of government of the United States, and like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings.

The description of places in the act is nearly the same as in this clause. The words, "fort, arsenal, dock-yard and magazine," are found in the act and in the constitution, and the words, "other place or district of country," occurring in the act, but not in the constitution, were probably inserted out of abundant caution, or probably they refer to the district of Columbia, which, at the time of this enactment, had no existence but was in contemplation. Of these words, the *Supreme Court in United States v. Bevans*, 3 Wheat. 390, say: "Congress might have omitted in its enumeration some similar place within its exclusive jurisdiction, which was not comprehended by any of the terms employed, to which some other name might be given; and, therefore, the words 'other place or district of country' were added." Beyond doubt, this law was enacted in execution of the power conferred in this clause of the constitution. Now there is nothing concerning the territories of the United States in this clause; it refers only to the federal seat of government, and to forts, arsenals, etc. The power to govern the territories of the United States is not derived from this clause of the constitution; that power is conferred by the clause of the constitution which enables congress to

make all needful rules and regulations respecting the territory belonging to the United States, or it arises out of the general right of sovereignty, which exists in the federal government. *American Insurance Co. v. Canter*, 1 Pet. 511. The law we are discussing is not more comprehensive than the clause of the constitution upon which it rests, and therefore this territory, as a territory, is not within its descriptive terms.

In several enactments, congress has shown its concurrence in this view. By act of June 30, 1834, section 25 (4 Stat. 733), it is declared :

“That so much of the laws of the United States, as provides for the punishment of crimes, committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country, provided, the same shall not extend to crimes committed by one Indian, against the person or property of another Indian.”

The Indian country at that time comprised the greater part of the national territory, and congress found it necessary to extend the section we are considering to that country. If the territory of the United States had been within the terms of the law, it would have been in force in the Indian country before the act of 1834, and that enactment would have been unnecessary. The ordinance of 1787, for the government of the North West Territory, establishing the first of the territorial governments, contains the following clauses :

“The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to congress from time to time; which laws shall be of force in the district until the organization of the general assembly therein, unless disapproved by congress, but afterward the legislature shall have authority to alter them as they shall think fit.”

“For the prevention of crimes and injuries, the laws to be adopted shall have force in all parts of the district, and for the

execution of process, criminal and civil, the governor shall make proper divisions thereof, and he shall proceed from time to time, as circumstance may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships; subject, however, to such alterations as may hereafter be made by the legislature."

Ample power was conferred upon the North West Territory to enact a full code of civil and criminal laws, subject only to the limitations contained in the ordinance itself. If the power should be abused, congress could disapprove the laws enacted, the right to do so being expressly reserved in the ordinance. By act of August 7, 1789 (1 Stat. 51), after the present constitution was adopted, congress continued this ordinance in force, but did not restrict the powers of the territorial government, and, therefore, those powers remained as before, with some changes not material to our present inquiry. This ordinance subsequently became the organic law of Illinois, Indiana, Michigan, Mississippi, and Alabama Territories, which were established after the act of 1790 was passed. The language of the ordinance above set forth, undoubtedly conferred authority to enact the law of homicide, and from this it sufficiently appears that congress did not propose to exercise that authority directly and by its own act. Congress certainly did not intend to confer upon these territories authority to do that which it purposed to do or had done itself, and which, being done by congress, could not be modified or in any manner affected by the territories. If the law under consideration was the law of homicide in Illinois and the other territories last named, why should congress confer upon those territories authority to legislate upon that subject? Any law enacted by either of those territories in virtue of such authority in that case, so far as it should correspond with the federal law, would have been unavailing, and so far as in conflict with the federal law, it would have been void because of its repugnance thereto. Indeed, we cannot conceive that congress would confer

upon any territory authority to legislate upon any subject upon which it had previously spoken in such territory. The fact that authority is given to a territory to enact laws upon any subject is convincing proof that, in the opinion of congress, no federal law obtains in such territory upon such subject. From the fact that congress conferred upon Illinois and the other territories last named power to enact a law of homicide, we may fairly infer that, in the opinion of that body, the act of 1790 did not provide such law for the government of those territories.

Again, in an act respecting Florida Territory (4 Stat. 164) in defining the jurisdiction of the superior courts of that territory, it is declared that they "shall have and exercise original and exclusive jurisdiction of all crimes and offenses committed against the laws of said territory, where the punishment shall be death." In this country murder is commonly punished with death, and we do no violence to language when we say that that crime was referred to in the clause we have cited. If so, the law of homicide in that territory was provided, not by the act of 1790, but by act of the territory. It appears to us that congress has always acted in the belief that the territory of the United States is not a place or district of country under the sole and exclusive jurisdiction of the United States, within the meaning of the law under consideration. An examination of the laws of the United States respecting the territories discloses the theory upon which congress has always acted, which is, that in the exercise of its undoubted right to govern the territories, that body, deeming it inconvenient or inexpedient to provide municipal laws for the territories, directly and by its own act, erected territorial governments, and delegated to them authority to enact such laws. *Leitensdorfer v. Webb*, 20 How. 176. Usually all restrictions upon the powers of a territorial government are found in the organic law by which it is established, but sometimes, as in the law punishing bigamy in the territories, and the law prohibiting slavery and some other acts, this rule has not been followed. In every instance in which congress has

provided a law for the government of the territories by its own act, the intention that such law shall operate within the territories is clearly expressed. Ample governmental powers being conferred upon the territories wherein congress withholds authority, or revokes the authority which it has before conferred, the intention so to do is plainly expressed.

Since the ordinance of 1787 was disused, the language in which legislative power has been conferred upon territories is similar to that found in our own act, which is :

“ The legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act.”

More comprehensive language than this could not have been used, and we cannot doubt that it was designed to confer as full authority as that used in the ordinance. Unquestionably the powers conferred upon territories recently established are as full and complete as were those of the territories established under the ordinance. As the power to legislate upon the subject of homicide was conferred by the ordinance, so also it is conferred by our own act, and this, as we have seen, excludes the notion that the law of homicide in this territory is to be found in the act of 1790. Whenever congress shall determine to enact municipal laws for the territories, upon any subject, we believe that as heretofore the intention so to do will be clearly expressed ; that congress has not yet entered upon this work is entirely certain. We can find no law of homicide provided by congress to be enforced in this territory ; whenever such law shall be enacted, it will be the duty of all officers of justice to obey and enforce its provisions.

The act of 1790 operates within forts, arsenals and like places within this territory, because such places are described in that act ; and in the Indian country, because it is there made effectual by the act of 1834, and also because the sixteenth section of our organic act declares it shall have the same force and effect in all these places as

elsewhere within the United States, but we cannot say that the entire territory is a place or district of country under the sole and exclusive jurisdiction of the United States, as described therein. As the laws of congress can be better enforced than those of the territory, we would be glad to adopt a different view if it were possible to do so, but we cannot indulge our wishes or preferences in opposition to the law. It was said at the bar that, inasmuch as the greater part of this territory, including the county of Gilpin, was formerly Indian country, and at that time the act of 1790 was enforced therein, that act has remained in force notwithstanding the territory has ceased to be Indian country. It is not necessary to demonstrate the fallacy of this proposition. As the law attached because of the character of the territory, whenever the territory was divested of that character, it thereupon ceased to operate therein. It was also said that, at the time of the offense, Gilpin county was in fact in the Indian country. If so, the fact should have been averred in the indictment, and, in the absence of such averment, the court could not take jurisdiction upon that ground.

Because there is no averment in this indictment as to the jurisdiction of the United States in the place where the crime was committed, the judgment of the district court is reversed.

Reversed.

RESTRICTIONS ON TERRITORIAL POWERS are usually found in the organic law by which it is established, but sometimes, as in the case of laws punishing bigamy and slavery, this rule has not been followed; *Reynolds v. People*, 1 Colo. 181.

CASS v. DAVIS.

JURISDICTION of district and probate courts. In civil cases, where the debt or sum claimed does not exceed \$2,000, district and probate courts are of concurrent jurisdiction.

STATUTE repugnant to Organic Act. Sections 4, 5, 6, and 7, of the act of 1865, relating to probate courts (4 Sess. 98), which provide for appeals from probate to district courts, are repugnant to the Organic Act, and therefore inoperative and void.

APPEAL from probate to district court. The supreme court alone has revisory jurisdiction of the proceedings of probate courts, and an appeal will not lie from a judgment of a probate court to a district court.

Error to District Court, Arapahoe County.

DAVIS obtained judgment against Cass in the probate court of Arapahoe county, and the latter appealed to the district court, where the appeal was dismissed. The action of the district court was assigned for error.

The chief justice did not participate in the decision.

Mr. J. Q. CHARLES, for plaintiff in error.

Mr. ALFRED SAYRE, for defendant in error.

The chief justice did not sit in this case.

GORSLINE, J. The only question involved in this case is, whether appeals can be taken from the probate to the district courts. The cause has been very elaborately and ably argued, and is one, as relating to the appellate jurisdiction of the district courts, of very general interest. By section 9 of the original Organic Act, it was provided, that the judicial power of the territory should be vested in a supreme court, district courts, probate courts, and in justices of the peace, and in the same section it is further provided "that the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of the justices of the peace, shall be as limited by law," with the proviso, that probate courts and justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or when the debt or sum claimed shall exceed \$100. It also provided, that writs of error, bills of exceptions and appeal, should be allowed from the district court to the supreme court under such regulations as shall be prescribed by law. It is contended by the plaintiff in error, that by the clause giving jurisdiction to the several courts, and that clause in the Organic Act extending the legislative power to all rightful subjects of legislation, consistent with the constitution of the United States and the Organic Act, that the legislature had the power to allow

appeals from the probate to the district court. To this conclusion we can see no reasonable ground of objection. There was nothing in the letter or spirit of the act to prohibit it — it would have been a rightful subject of legislation, and there can be no doubt, but that the legislature, if it saw fit, could have conferred that jurisdiction upon the district courts. In the year 1862, the territorial legislature memorialized congress to increase the jurisdiction of the probate courts. In 1863, congress, in answer to this memorial, passed an amendment to the Organic Act, which effected a radical change in our judicial system, at least, so far as the jurisdiction of probate courts is concerned. By the third section of the amendment it is enacted, that the probate courts shall not have jurisdiction in any matter in controversy in cases where the debt or sum claimed shall exceed the sum of \$2,000, and in the same section it is further enacted, that the supreme, district, and probate courts respectively, shall possess chancery as well as common-law jurisdiction, and authority for the redress of all wrongs committed against the laws of the territory, affecting persons or property.

It will be seen from these enactments that the district and probate courts have concurrent jurisdiction in all civil cases where the amount in controversy does not exceed the sum of \$2,000, at least in those places where the legislature see proper to confer the jurisdiction upon them. It is said that under these amendments the legislature can provide for appeals from probate to district courts. Possibly it may be so, but can any one suppose that it was the intention of congress so to legislate that appeals could be taken from one court to another of concurrent jurisdiction? There may be such a judicial system in some of the States, but I know of none. Supposing that the legislature should confer the increased jurisdiction contemplated by the amendment to the Organic Act upon all of the probate courts in the territory, what would hinder the legislature from providing for appeals from the district courts to the probate courts in all cases when the amount in controversy did not

exceed the sum of \$2,000? The courts would have concurrent common-law and chancery jurisdiction, and I can perceive nothing to prevent the legislature from so providing if it thought proper, and yet I can hardly believe that it was the intention of congress to permit that appeals might be taken from a court of unlimited jurisdiction to one of a limited jurisdiction. It is further enacted, in the third amendment to the Organic Act, that writs of error, bills of exceptions and appeal, shall be allowed from the final decisions of the district and probate courts to the supreme court, under such regulations as shall be prescribed by law. It is contended by the counsel for the plaintiff in error that, because there are no negative words or words of prohibition in this clause, that there is nothing to prevent the legislature to provide for appeals in a manner or to courts different from that specified in the act.

But, in view of the extended jurisdiction conferred upon the probate courts in the same section, could such have been the intention of congress? The language of the act strikes me as equally strong and prohibitory, as if it read that writs of error and appeals should be allowed from the final decisions of the district and probate courts to the supreme court, *and to no other*. We have been referred to the cases of *Jackson v. Kemble*, 18 Ill. 580; *Burns v. Henderson*, 20 id. 264; and *Harrison v. Doyle*, 11 Wis. 283, as sustaining the doctrine that, when the constitutions of Illinois and Wisconsin had provided that the appellate jurisdiction should remain in one court, still it was competent for the legislature of those States to provide that appeals might be taken to another and different court. By the constitution of Illinois it is provided: "That the circuit courts shall have jurisdiction in all cases at law and equity and in all cases of appeals from all inferior courts." By another section it provides: "That the jurisdiction of the county courts shall extend to all probate and such other jurisdiction as the general assembly may confer in civil cases." Under this last section of the constitution, the legislature enacted that all appeals from decisions of

justices of the peace and police magistrates in Peoria county should be taken to the county court of that county.

In passing upon the cases referred to, the court say, that the word "shall," in the act of the legislature, should be construed to mean "may," in order that there should be no conflict between the act and the constitution, and then held, that, under the constitution and the law, appeals might be taken both to the circuit court and the county court of that county. It will be observed that, although the constitution conferred appellate jurisdiction on the circuit courts in all cases, still it also provided that the legislature might confer such jurisdiction upon the county courts as it deemed proper. One clause of the constitution was certainly as binding as the other, and the power given to the legislative assembly, to regulate the jurisdiction of county courts, was as great as that by which the jurisdiction of the circuit courts was provided for. I do not see that these authorities sustain the doctrine claimed for them.

The constitution of Wisconsin provides, that the supreme court shall have appellate jurisdiction only, and shall also have a general superintending control over all inferior courts. It also provides, that the circuit courts shall have appellate jurisdiction from all inferior courts and tribunals and a supervisory control over the same. In *Harrison v. Doyle*, above referred to, an appeal was taken from the county court of Milwaukee county to the supreme court, and it was urged, that the appeal should have been taken to the circuit court instead of the supreme court. The court held, that, as the constitution provided that the supreme court should have appellate jurisdiction co-extensive with the State, and the superintending control over all inferior courts, that the appeal was well taken. They held still further, that it was competent for the legislature to provide for the removal of causes by appeal from the county to the circuit court. Undoubtedly, if the legislature of that State had so provided, appeals could have been taken either to the circuit, or directly to the supreme

court. The constitution conferred appellate jurisdiction upon both courts, but it seems the legislature had not provided the manner of removing causes by appeal to the circuit court. This case certainly does not support the doctrine claimed for it, neither is it like the one at bar. Both in Wisconsin and Illinois, the appellate jurisdiction was expressly given or permitted to be given to two separate courts; by the Organic Act of the territory it is vested in the supreme court.

But there is authority, and that of the very highest, to support the view which we have taken as to the construction to be given to the third amendment to the Organic Act.

The constitution of the United States, in its distribution of powers, declares that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party." "In all other cases the supreme court shall have appellate jurisdiction." It will be noticed, that neither in the grant of original jurisdiction nor in that of appellate jurisdiction are there negative words or words of restriction or prohibition. By an act of congress the supreme court was authorized to issue writs of mandamus in certain cases therein specified. In *Marburg v. Madison*, 1 Cranch, 137 (Curtis edition), an application was made to the supreme court for mandamus under the law of congress above referred to. It was urged in that case, as it is in this, that there being no negative or restrictive words in the grant of jurisdiction, it was in the power of the legislature to assign jurisdiction to the court in other cases than those specified in the constitution. I can see but little difference in this case and in the case at bar. The constitution in its grant of jurisdiction contained no negative or restrictive words. The Organic Act of the territory in its grant of appellate jurisdiction contains none. Upon that part of the case Chief Justice MARSHALL says: "Affirmative words are often in their operation negative of other objects than those affirmed, and in this case a negative or exclusive sense must be given to them, or they have no operation at

all." The court in that case held, notwithstanding the law of congress authorizing it, that, under the constitution, it had no power to issue a writ of mandamus.

We think the judgment of the district court must be affirmed.

Judgment affirmed, with costs.

Affirmed.

JURISDICTION — PROBATE AND COUNTY COURTS — APPEAL — WRIT OF ERROR AND REVIEW: *Vance v. Rockwell*, 3 Colo. 242; *Osby v. Raymond*, 1 Colo. 277; *Loveland v. Sears*, 1 Colo. 195; *In re Rogers*, 14 Colo. 19, 20; *Liss v. Wilcoxon*, 2 Colo. 9; *McClure v. Sanford*, 3 Colo. 516, do not apply to the organization of the judicial system under the State constitution; and that district courts now have jurisdiction to review proceedings of the county courts: *In re Rogers*, 14 Colo. 20.

CHRISTIAN v. TUCKER.

EVIDENCE — *not pertinent to the issue.* If evidence not pertinent to the issue is given to the jury, the court may upon motion withdraw it.

INSTRUCTIONS — *not applicable to the evidence.* Instructions, which cannot be applied to the evidence, should not be given to the jury.

Appeal from District Court, Arapahoe County.

At the trial Thomas Maxwell testified that the plaintiff worked for defendant, at \$45 per month, from November 10, 1865, to January 8, 1866.

William Thompson testified to the same facts, whereupon plaintiff rested. The defendant then called John Wanless, who testified as follows: "I know the defendant Christian; his wagon-master was arrested about the time testified to by the other witnesses; Tucker, the plaintiff, was arrested in December; he was arrested on the report of the wagon-master of Christian; wagon-master said two men in the train had started the report about the Indians; wagon-master told me who they were, but I do not think he told their names; he admitted he knew the report about Indians was false; I do not know who started the report."

The defendant asked said witness: "Do you know any thing further with regard to Tucker's connection with this report that caused the arrest?" The plaintiff objected to this question; the court sustained the objection; to which ruling of the court the defendant excepted.

Plaintiff moved to strike out the evidence of Wanless, which motion was sustained. The defendant asked the court to give to the jury the following instructions:

“1st. If the jury believe from all the evidence that the plaintiff in this case, while in the employment of Christian, conducted himself in such an improper manner in the discharge of his duties that Christian sustained damages on account thereof, these damages are a valid and good set-off against the demand of Tucker. 2d. A greater degree of caution and prudence was necessary on the part of Tucker in the discharge of his duties in such times and places as appear in the evidence in this case, than in ordinary times and places.” And the instructions were not given.

Messrs. MILLER & MARKHAM, for appellant.

Mr. G. W. PURKINS, for appellee.

HALLETT, C. J. The appellee sued the appellant before a justice of the peace, to recover the value of services by him rendered in driving a team for the appellant, and obtained a judgment for \$87. The appellant appealed to the district court, in which another trial was had, resulting in a judgment in favor of the appellee for the same sum. We have reviewed the proceedings of the district court in this cause, and we find no error therein.

The evidence of Wanless was not pertinent to the issue, and the court very properly withdrew it from the consideration of the jury. The question proposed to Wanless assumed the existence of a fact not shown by the testimony previously introduced, and, if this were not so, we fail to discover any connection between the subject-matter of the inquiry and the issue, which was being tried. The instructions asked by the appellant could not have been applied to the evidence given to the jury, and the court rightly rejected them.

The judgment of the district court is affirmed, with costs.

Affirmed.

COOK v. HUGHES.

BILL OF EXCEPTIONS — *when necessary.* The copy of a note attached to a declaration and inserted in the transcript of the record by the clerk is no part of the record. It should be embodied in a bill of exceptions.

PRESUMPTION in support of judgment. This court will presume that the evidence in the court below was sufficient to support the declaration, unless the contrary appear.

Error to District Court, Arapahoe County.

Messrs. PURKINS & COOK, for plaintiff in error.

Mr. GEO. F. CROOKER, for defendant in error.

HALLETT, C. J. This was an action of assumpsit brought by the defendant in error against the plaintiff in error, to the March term, 1867, of the district court of Arapahoe county. The plaintiff below declared upon a bank check for the sum of \$800, made by the defendant below on the 27th day of December, 1866. The plaintiff in error did not appear in the court below, and there was judgment against him by default for the amount of the check. It is said that the proceedings of the district court were erroneous, for the reason that the check upon which the judgment was rendered was dated December 27, 1867, was not due at the commencement of the suit, and was not correctly described in the declaration. The check given in evidence is not before us, and, therefore, we cannot consider the questions here raised. The copy attached to the declaration, and that inserted in the transcript by the clerk, form no part of the record, and there is no bill of exceptions. *Martin v. Ehrenfels*, 24 Ill. 188; *Franey v. True*, 26 id. 184.

The declaration describes a check due and payable at the commencement of the suit, and, as the contrary does not appear, we presume that the evidence supported the allegations of the declaration. The judgment of the district court is affirmed, with costs.

Affirmed.

JUDGMENT, PRESUMPTIONS SUPPORTING. — Unless evidence is preserved in the record, the court will presume that it supports the judgment: *Peas v. Truitt*, 2 Colo. 495; *Martino v. Kidenbeck*, 2 Colo. 603.

CLARK v. RUSSELL.

CONSTRUCTION OF CONTRACT — *interest on promissory note.* Upon a note payable in thirty days, "with ten per cent interest per month," interest was allowed at the rate specified, until maturity, and, after maturity, at the rate of ten per cent per annum.

Error to District Court, Gilpin County.

Mr. L. C. ROCKWELL, for plaintiff in error.

Messrs. JOHNSON & TELLER, for defendant in error.

HALLETT, C. J. This action was brought upon a promissory note, of which the following is a copy :

"\$95.27. Thirty days after date, I promise to pay A. S. Carpenter, or order, the sum of ninety-five dollars, 27-100, for value received, with ten per cent interest per month.

"B. O. RUSSELL,
"THOMAS SMITH."

Nevada, K. T., November, 26, 1860.

There was judgment below for the plaintiff, and the court in assessing the damages computed interest at ten per cent per month, from the date of the note until it fell due, and, after the note was due, at the rate of ten per cent per annum. This is assigned as error, the plaintiff alleging, that he is, by the terms of the note, entitled to interest at the rate therein specified, from the date of the note up to the time the judgment was entered. In the absence of any agreement, the legal rate of interest in this territory is ten per cent per annum, and, as the plaintiff claims a higher rate, namely, ten per cent per month, of course he rests his claim upon the language of the note.

We cannot distinguish this case from *Brewster v. Wakefield*, 22 How. (U. S.) 118. The Minnesota act referred to in that case is substantially the same as our own, except as to the rate of interest in the absence of agreement, and the facts in that case raised the question we are now considering. The supreme court, speaking of the notes upon which

that action was founded, and which, as to the stipulation for interest, were the same as the note upon which this action is founded, say: "The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract." This lays down the correct rule adopted by the district court in computing the interest in this case, and no error was committed by that court.

The judgment of the district court is affirmed, with costs.

Affirmed.

REMINGTON et al. v. SMITH.

JURISDICTION OF PROBATE COURTS in equity. Probate courts were deprived of equity jurisdiction by the act of February 8, 1865 (4 Sess. 97), and a decree rendered after that date, in a cause which was pending at the time the repealing act was passed, was reversed.

Error to Probate Court, Jefferson County.

The chief justice did not sit in this case.

Mr. ALFRED SAYRE, for plaintiffs in error.

Mr. S. E. BROWNE, for defendant in error.

GORSLINE, J. This is a suit in equity commenced by bill filed in the probate court of Jefferson county, on the 25th day of November, 1864. By the Organic Act, and by a law of the territorial legislature, approved March 11, 1864, the probate court of Jefferson county was clothed with equity jurisdiction concurrent with that of the district court, where the debt or sum claimed did not exceed the sum of \$2,000. A decree was rendered in favor of the complainant, agreeably to the prayer of the bill, on the 7th day of June, 1865. Various causes are assigned for error, but I think it necessary to notice but one. By an act of the legislature, approved February 8, 1865, the equity juris-

diction of the probate courts was taken away, except in certain cases therein specified. This case does not come within the limitation expressed, and after the passage of the act all proceedings in the probate court should have ceased, as its jurisdiction was gone. *Butler v. Palmer*, 1 Hill, 324; *Illinois & Michigan Canal v. City of Chicago*, 14 Ill. 334.

The decree of the probate court must be reversed. *Reversed.*

REPEAL OF STATUTE — EFFECT ON PENDING ACTIONS. — Judicial proceedings, pending at the time of the repeal of a statute upon which they are based, fall with the repeal: *Harrison v. Smith*, 2 Colo. 627.

PROBATE COURTS — WRIT OF ERROR. — The principal case is cited as an example of the exercise, by the supreme court, of its right on error to review the proceedings of probate courts, sitting in equity: *Vance v. Rockwell*, 3 Colo. 244.

TODD et al. v. SIMONTON.

PRACTICE IN CHANCERY — bill to enforce vendor's lien — decree. A contract for the sale of land was made, but the land was not conveyed. Upon bill filed by the vendor to enforce a lien for the purchase-money, it was error to decree a sale of the land.

The proper practice in such case is to require the vendee to pay the money due upon the contract within a specified time, or in default thereof that he be foreclosed of all equity of redemption in the premises.

Appeal from District Court, Arapahoe County.

The chief justice did not sit in this case.

Mr. J. Q. CHARLES, for appellant.

Mr. ALFRED SAYRE, for appellee.

GORSLINE, J. The complainant in the court below, Thomas H. Simonton, filed his bill, in which it is stated that, on the 28th day of January, 1861, he entered into a written contract with the defendant Todd, by which he agreed to sell to Todd a tract of land situated in the counties of Arapahoe and Jefferson, and containing about 160 acres, for the sum of \$1,200, which was to be paid on or before the 1st day of September, 1861, when the complainant was to execute to Todd a good and sufficient deed in fee simple for the premises, and Todd was to take immediate possession of the claim; that, on or about the 25th day of November, 1861, Todd, with intent to cheat and defraud the

complainant, pretended to sell and convey said premises to the defendant, Albert Stout, and that Stout had full notice of the manner in which Todd had acquired possession of the premises and of the title of the complainant thereto. The bill further states, that the defendant Todd went into possession of the land, and remained in possession until he sold to Stout, when he took possession of the same. The bill further states, that the sum of \$1,200, which was agreed to be paid for the purchase of said premises, has not been paid, but is still due. The bill prays, among other things, that the defendants be decreed to pay to complainant the amount found to be due him on the contract, or, in default thereof, that he be decreed to have a lien on the premises for said amount, and that, in default of the payment of the sum found to be due the complainant, the premises, or that portion situated in the county of Arapahoe, be sold under the order of the court, and the proceeds applied to the payment of the amount found due to complainant.

To this bill the defendants demurred, which demurrer was overruled; but, as the principal cause of demurrer is the same as the principal errors assigned, we will consider them together. The defendants answered, admitting most of the statements in the bill, but denying all knowledge on the part of Stout of the manner in which Todd had acquired possession of the claim, also denying that the complainant had any right or title to the premises, and admitting that the said sum of \$1,200 had not been paid.

To this answer there was a replication, and proofs were taken before a master which we think unnecessary to notice. The decree of the district court was in accordance with the prayer of the bill, that the complainant have a lien on the premises, and that, in default of payment of the amount found due on the contract and the costs of suit, the premises be sold, and out of the proceeds of the sale the complainant's debt and the costs be paid, and the surplus, if any, be paid to the defendant Stout, and that the master should execute and deliver to the purchaser, at such sale, a good and sufficient conveyance of the premises which

should operate to convey all the right, title and interest of the defendants in and to the same.

This decree, we think, was erroneous. The relation of the parties to this contract is analogous to that of equitable mortgagor and mortgagee, and there can be no doubt that a court of chancery has jurisdiction to relieve the vendor as well as the vendee. In a contract of this nature, the lien which the vendor has is in the nature of a mortgage. 1 Wash. on Real Prop. 540. As the title did not pass to the vendee by the contract, but remained in the vendor, there was really nothing to sell, and the purchaser at the master's sale would obtain nothing. The proper decree in such cases is, that the vendee pay the money due upon the contract in some time to be specified in the decree, or, in default thereof, that he be foreclosed of all equity of redemption in the premises. 5 Wis. 598. There were other questions touching the title to the premises which we have not examined, thinking, perhaps, that, as the tenure by which lands are held has been changed since the making of this contract, it has become unnecessary.

Decree reversed and cause remanded.

Reversed.

FITZGERALD v. THE PEOPLE.

VENUE, CHANGE OF — *sufficiency of petition.* Where several counties are attached for judicial purposes, a petition for change of venue, founded upon prejudice of the inhabitants, must show that such prejudice exists in all of the counties so attached.

SAME — *second application.* A second application in the same cause, for change of venue, is addressed to the discretion of the court, and error cannot be assigned upon refusal to grant it.

JUROR — *competency of.* A juror having expressed himself strongly against the accused before trial, the fact was brought to the attention of the court upon motion for a new trial. *Held*, that a new trial should have been allowed.

Error to District Court, Arapahoe County.

INDICTMENT for murder upon which the prisoner was found guilty. The counties of Weld and Douglas were attached to the county of Arapahoe for judicial purposes. Previous to the trial in the court below, the prisoner moved for a change of venue, upon a petition setting up that the inhabitants of Arapahoe county were prejudiced against him, but no mention of the counties of Douglas and Weld was made in this petition. The motion was denied, and the prisoner then filed an amended petition, in which he alleged that the inhabitants of all the counties above named were prejudiced against him.

The motion for new trial was supported by the affidavit of Geo. Shallcross, of which the material part is given in the opinion of the court.

Messrs. PURKINS & COOK, for plaintiff in error.

Mr. V. D. MARKHAM, for defendants in error.

EYSTER, J. (after stating the facts). On his first assignment of error the plaintiff avers that there was error in the refusal of the court below to allow him a change of venue on his first petition and affidavit. Upon an examination of his petition, we find, that he sets out *only*, that there is such a prejudice in the minds of the people of *Arapahoe County* against him, that he cannot there expect a fair and impartial trial. If there had been then no other counties attached to Arapahoe county for judicial purposes, this petition and affidavit would have been sufficient, and it would have been error in the court below to have refused to grant it. But at that time the counties of Weld and Douglas were attached to the county of Arapahoe for judicial purposes and, in pursuance of law, jurors were drawn from those counties as well as from Arapahoe county to make up the panel of jurors, and although his petition complied with the letter of the law, we do not think it complied with its spirit, and we can see

no error in the action of the court below in that behalf. The next assignment of error is, we think, equally groundless. After the refusal of the court below to allow a change of venue, on the first petition presented, for the grounds above stated, the plaintiff in error filed a second and amended petition for a change of venue, in which he supplied the omission of his former petition, by adding thereto the counties of Douglas and Weld, and alleged the existence of the prejudice complained of in his first petition. This was only an amendment of his first petition. A change of venue under our statute, when properly applied for, is a matter of right, and is of course. The second application was addressed to the discretion of the court, and, we think, was properly so addressed, and we can see no error in its refusal in this instance to grant the motion.

The third and last error is of a more important character. That the court below erred in denying the motion for a new trial, when it was shown that one of the jurors who sat upon the trial was biased and prejudiced against the plaintiff in error, and had formed and expressed an opinion of his guilt before he took his oath and seat as a juror.

This exception, under all the circumstances in this case, we think is a good one, and on it this judgment must be reversed. Trial by jury is of most ancient origin. It has always, in all ages and countries where it has been adopted and used, been esteemed and held to be one of the most cherished and carefully guarded rights of the people. In *magna charta* the right of trial by jury was as earnestly and as determinedly insisted upon as the great right of *habeas corpus*, and the people of England were no less jealous and watchful in guarding and protecting the purity of the jury box than they were determined and earnest in asserting it as a great popular right. It is, in the words of an eminent English author, "the palladium of the civil rights of the people," and it is the boast of her people that their parliaments and their courts have always directed their best efforts to maintain its purity. In our own land

of boasted liberty, trial by jury is one of the great constitutional land-marks, and any violation of the purity of its sacred precincts is looked upon by all as a great crime. Common custom and the sanction of the law permits a party in a suit to have a juror solemnly sworn to make true answers to such questions as may be asked of him touching his competency as a juror; and, before he is permitted to be sworn as a juror in the particular cause, he is required, under the solemnity of an oath, to answer all such reasonable and proper questions as may be put to him touching his interest, bias or affection in the cause, as to the parties. If, upon such examination, it appears that the juror is, from any cause, under any influence of fear, favor or affection, or that he has in any way and on any cause made up an opinion as to the merits of the cause, he is justly and properly set aside by the court as an incompetent juror in that cause.

An examination of the facts complained of in this cause reveals to us that the juror, William Morgan (to whom objection was made), was in the neighborhood of the place where the homicide occurred at the time of its occurrence, and that he had heard from different parties a narration of the facts in the case. He declares that, from what he had heard of the transaction, he had formed and expressed an opinion as to the guilt or innocence of the accused. The juror, on being further interrogated, stated, that he thought he could give the prisoner a fair trial, and, to a further question, he answered that he could give the accused a fair and impartial trial without being influenced by that opinion. Whether the refusal to permit this juror, under such circumstances, to be set aside for cause, was error to reverse the judgment, we will not here decide, but, coupled with what was made apparent to the court on the motion for a new trial by the affidavit of Shallcross, we think that there was error in the court below in refusing to allow the plaintiff's motion. Shallcross swears that, on the morning of the day of the trial and before the jury were impaneled in the cause, "I heard William Morgan express strong conviction

of the defendant's guilt; one of the expressions he used was this: 'I would hang the son of a bitch on the evidence I already have, unless stronger testimony than I have heard could be brought in his favor,' and numerous other sentiments of a like import that I cannot now remember."

Such expressions, we think, exhibit malignity and vindictiveness on the part of the juror toward the accused, inconsistent with the purity required in the jury box, and we think that when the defendant stood before the court with that uncontradicted affidavit in his hand, and from the verge of the grave appealed for a trial in his cause by an impartial jury, it was his right to be heard, and the refusal to grant him that right was such error as requires us to reverse the judgment of the court below, which is done, and the cause is remanded and a new trial awarded.

Reversed.

GILE v. THE PEOPLE.

INSTRUCTIONS must be written. Instructions to the jury must be written, and it is error to give them orally.

INDICTMENT. SURPLUSAGE. An indictment for assault with intent to murder in which the word "*feloniously*" is unnecessarily used, is good.

Error to District Court, Arapahoe County.

HALLET, C. J., did not participate in the decision.

Mr. GEO. F. CROCKER, for plaintiff in error.

Mr. J. Q. CHARLES, for defendants in error.

GORSLINE, J. The plaintiff in error was indicted at the December term, 1865, of the district court of Arapahoe county, under section 48 of the Laws of 1861, on page 298, for an assault with intent to commit murder, which was embraced in the first count of the indictment, and also for an assault with a deadly weapon, with intent to inflict a bodily

injury, which was contained in two separate counts. The cause was tried at the same term before Justice Gale, then the presiding judge, and a jury. The defendant was convicted under the second and third counts, and acquitted under the first count. There were a great number of instructions asked for by the defendant (twenty-two in number), which could only have been intended to mystify and perplex the jury. This is a practice which cannot be too strongly condemned. We regret that we cannot affirm the judgment of the district court, for we think, from the evidence given on the trial, that the assault was an aggravated one, and without any considerable provocation, and that substantial justice was done.

But the bill of exceptions shows that, after the court had given instructions to the jury in writing, he further gave them some instructions orally. The statute of 1861, page 282, section 28, provides, "that the district court in all cases, both civil and criminal, shall only instruct the petit jury as to the law of the case, and such instructions shall be reduced to writing, and may be taken by the jury in their retirement.

This statute is mandatory, and we must submit to it so long as the legislature suffers it to remain a law. *Ray v. Wooters*, 19 Ill. 82. It is urged by the counsel for the plaintiff in error that the instructions were not given verbally to the jury, but that the court read to the jury from the statute the definition of malice. Even if that could obviate the difficulty, still the record does not so allege the fact to be, for it states that the instructions were given orally, and that the defendant below excepted for that reason. One object of the statute doubtless is that the jury may have all the instructions before them when they retire to consider their verdict, and in that view it can make but little difference whether instructions are given orally or read from a book, for, in either case, they would be equally liable to forget them.

The defendant below moved the court to arrest the judgment, because the indictment charged in the second and

third counts that the assault was made feloniously, whereas by the statute such assault is only made a misdemeanor.

The statute does declare that such an assault shall be adjudged a high misdemeanor. It is said in the books that every felony includes a high misdemeanor, but probably the converse of the proposition would not be true. However, the word "feloniously" may be regarded as surplusage, and not vitiate the indictment. *Hess v. State of Ohio*, 5 Ham. 12.

The judgment of the district court is reversed and the cause remanded. *Reversed.*

INSTRUCTIONS TO JURY MUST BE WRITTEN, and it is error to give them orally: *Bradney v. Waddell*, 93 Ind. 175; *State v. Potter*, 15 Kan. 316, citing the principal case.

FORD GOLD MINING CO. v. LANGFORD et al.

PRACTICE IN LIEN CASES. Under the Mechanics' Lien Act of 1864 (3d Secs. 102), all creditors interested in the premises to be charged may have their claims adjusted in one suit.

The better practice for creditors, who seek to establish a lien in a pending suit, is to file a bill in the nature of a cross-bill setting forth the facts respecting the lien in the same way as if the bill were original, and making the debtor and all other parties to the suit defendants therein.

In whatever way creditors, who are defendants in the bill, are allowed to assert their demands, they must observe the same strictness in pleading that is required of the party who institutes the suit.

If a defendant creditor sets up a lien in his answer, an opportunity should be afforded the debtor and all other parties to the suit to resist his demand.

If the debtor and the other parties fail to answer his allegations within the time fixed by the court, there should be an order taking the answer as confessed, and the subsequent proceedings should be the same as upon a bill.

ANSWERS INSUFFICIENT. The answers in this case are insufficient to support the decree in not showing, 1st. The time when the contracts were made; 2d. The kind of labor performed; 3d. The quantity of materials furnished; and they contain no prayer for relief.

ANSWER without oath. It may be doubtful whether complainants can deprive defendants of the benefit of their oaths in this proceeding. But if the oath is waived and the answer is put in without oath, there is no ground for complaint.

Although the sufficiency of the bill was not questioned, the decree was wholly reversed, in order that the district court might have full control of the cause.

Error to District Court, Gilpin County.

Messrs. REMINE & HULETT, for plaintiff in error.

Mr. E. T. WELLS, for defendants in error.

HALLETT, C. J. Langford, Marshall and the Lees commenced proceedings in the district court of Gilpin county to enforce a mechanics' lien upon certain property of the plaintiff in error. Under a charge that they had, or claimed to have, some interest in the premises or a lien thereon, several persons were made defendants in the bill with the plaintiff in error, and the oaths of defendants to their answers were waived. Some of the defendants answered under oath, and others without oath, responding to the allegations of the bill, and asserting liens upon the premises therein described. The bill was taken as confessed, and a decree was entered in favor of the complainants therein and in favor of those defendants who, in their answers, claimed liens upon the premises, establishing such liens.

It is assigned for error that there was no service upon the plaintiff in error in the court below, but this was not relied upon in argument, and we have not discovered any defect in the service.

Other questions are presented by the assignment of errors, but we shall notice those only which relate to the sufficiency of the pleadings.

This proceeding is founded upon the act of 1864, to create a lien in favor of mechanics and others in certain cases. By the twenty-fifth section of the act it appears that, in suits instituted under its provisions, all persons interested in the property charged with the lien may be made parties, and if they are not made parties, by the nineteenth section they may, on application to the court at any time before judgment, become parties. By the twenty-fourth section, creditors are allowed to contest each other's right as to the lien and as to the amount due, and, by the tenth section, lien creditors are to share *pro rata* in the proceeds of the property, and the court is to ascertain what amount shall be paid to each.

From these and other provisions of the act, it appears that all creditors who are interested in the premises to be charged with a lien may have their claims adjusted in one suit. The party who initiates the proceeding is required to commence by bill or petition containing a brief statement of the contract or agreement out of which the lien arises, a description of the premises subject to the lien, the amount claimed to be due, and all facts necessary to establish the lien under the act. In what way creditors, who are made defendants to the bill, or who become parties to the suit upon their own application, are to proceed to establish their demands, is not pointed out by the statute.

In the State of Illinois, under a statute containing provisions similar to those we are considering, it seems that lien creditors are allowed to assert their demands in a suit pending by answer and by what is singularly and, perhaps, inappropriately called a bill of interpleader. *Power et al. v. McCord et al.*, 36 Ill. 214; *Martin et al. v. Eversal et al.*, id. 222.

In whatever way lien creditors, who are made defendants in the bill, are allowed to assert their demands, it seems to us that they ought to be held to the same strictness in pleading that is required of the party who institutes the suit. All creditors ought to stand upon the same footing, and, whether they are complainants or defendants, they should establish their demands according to the statute. Perhaps the pleading adopted by a creditor who seeks to establish a lien in a pending suit is not material to the rights of the several parties in interest, but we think that much confusion may be avoided by requiring every such creditor to file a bill in the nature of a cross-bill, setting forth the facts respecting the lien in the same way as if the bill were original, and making the debtor and all other parties to the suit defendants therein. In this mode of proceeding an opportunity would be given the debtor and all other parties to contest the petitioner's right to recover, and this opportunity must be given in whatever way the claim is asserted. We are not prepared to say that a defendant, who is a lien creditor, may not present his lien in his answer,

but if he do so, as to the lien, his answer must be substantially a bill. He must set forth the facts upon which he relies to establish his lien with the same particularity as if the proceedings had been instituted by him. He must require the debtor and the other parties to the suit to answer his answer, and he must regularly pray for the relief which he seeks. If the debtor and the other parties fail to answer his allegations within the time fixed by the court, there should be an order taking the answer in which the lien is set up as confessed, and the subsequent proceedings should be the same as upon a bill. In no other way can an opportunity be given the debtor and the other parties interested in the premises to resist the demand which the petitioner seeks to establish, and the right so to resist is secured to them by the statute and rests upon the principles of justice.

The defendants, who sought to establish liens in this action, have not, in their answers, stated sufficient facts to sustain the decree. In no instance is the time when the contract or agreement was made stated in the answer. In those cases in which the parties claim a lien for labor performed, there is a general allegation that labor was performed in erecting and constructing the mill. This is not sufficient. The court should be informed whether the party labored as carpenter, mason or otherwise, in order that it may be seen whether he is entitled to a lien. In the answer of Bell & Scott, the quantity of fire-brick clay and tile furnished by them is not stated. There is no prayer for relief in these answers. The parties ask that the court will protect their rights, but they do not ask that their liens may be established, that the amounts due them may be ascertained, or that the premises may be sold. Possibly a careful examination would reveal other defects in these answers, but it is unnecessary to look further. It does not appear that any opportunity was given the plaintiff in error to contest the liens set up in these answers. These defendants, who claimed liens, equally with the complainants in the bill, were seeking to establish demands against the plaintiff in error. Nominally defendants, they were, in

fact, complainants, and should have been regarded as complainants in so far as their action was adverse to the plaintiff in error.

It is assigned for error, that some of the answers of defendants were put in without oath. Under this statute, it may be doubtful whether complainants, by waiving the oath of defendants to their answer, can deprive defendants of the benefit of their oath if the defendants put in their answer under oath. If complainants waive the oath, and defendants accept the waiver by putting in the answer without oath, it is difficult to perceive upon what principle the proceedings can be regarded as erroneous. By consent of parties, an answer may be put in without oath, but an order of the court should be obtained for that purpose. 1 Daniel's Ch. Prac. (3d Am. ed.) 748. No order of the court, allowing the defendants to answer without oath, was obtained in this cause, but, as the court received and acted upon the answers, probably we should not, for that reason alone, reverse the decree. What we have said upon this point applies to those portions of the answers only which are responsive to the complainant's bill. We have seen that, in so far as the answers relate to the liens of the defendants, they are in the nature of bills of complaint. Now the statute does not require that the bill shall be sworn to, and when the lien is set up in another pleading, there is no greater reason why the pleading should be under oath than when the lien is set up in a bill.

Because of the insufficiency of the answers in respect to the substantial allegations therein, this decree must be reversed. No question is made in the assignment of error as to the sufficiency of the bill, and we are asked to affirm the decree as to the complainants therein. We think that the cause should be fully under the control of the court below, that the rights of all parties may be adjusted, and therefore the decree is wholly reversed and the cause remanded for further proceedings according to the views herein expressed.

Reversed.

JONES et al. v. STEVENS.

PRACTICE — APPEARANCE cures defective summons. Defendants who appear and move a continuance of the cause waive defects in the summons.

PRACTICE — DAMAGES must be assessed by jury in certain cases. In an action of trespass to recover damages for diverting water from an irrigating ditch, if the defendants are defaulted, the damages must be assessed by a jury.

Error to Probate Court, Jefferson County.

HALLETT, C. J., did not participate in the decision.

Mr. J. B. SMITH and Mr. G. F. CROOKER, for plaintiffs in error.

Mr. ALFRED SAYRE, for defendant in error.

Per CURIAM. The defendant in error, who was the plaintiff below, brought his action to the January term, 1865.

At that term, the defendants below appeared and moved the court to continue the case upon affidavit filed, which continuance was granted at the costs of the applicants. At the February term following, the plaintiffs in error filed a motion to dismiss the cause, which was overruled by the court. The case was then continued at the instance of the court. At the April term following, the attorneys of Jones came and withdrew their appearance, whereupon the attorney of Stevens took judgment for want of a plea, and the court proceeded to assess the damages without having summoned a jury for that purpose.

It is claimed by the plaintiffs in error, that the original writ having been signed by A. O. Patterson, as deputy to the county clerk, Carpenter, is void because no deputy was authorized to act in this behalf as clerk of the probate court. We do not think it necessary to inquire into this question, because whether the process was void or voidable only, inasmuch as the plaintiffs appeared in the cause and moved a continuance of the case, they must be held to have waived any irregularity in the process. The purpose of

process, like that of a summons, is to bring the parties into court and advise them in brief of the nature of the proceedings against them. It is essential that objection be made to the process at the earliest time when they shall appear in court in response to the summons. If they can take any other steps in the cause, and claim afterward to object to the validity of the process, they can do so through all the stages of the cause up to the time of the verdict, until the error or irregularity will be cured by the verdict. Here they moved a continuance upon affidavit and it was allowed.

In the interval between the terms of the court, an *alias* summons might have been obtained, and the parties brought into court by process not liable to the objection insisted upon. The case in 6 Blackf. 557, appears to have been decided upon the ground that a voluntary appearance can be withdrawn at any time, a doctrine condemned by a majority of the court in *Dana et al. v. Adams*, 13 Ill. 693. In this case the appearance was withdrawn, and we are urged to presume that the withdrawal was with the leave of the court. But we incline to think that there was no leave of the court given in the premises, but that the court recorded the withdrawal as a faithful record of the proceedings, without either assenting or denying the right of withdrawal. The defendants below took all the responsibilities of their own act, and not having asked the leave of the court to withdraw their appearance, it must be presumed they did it at their own responsibility as to the consequences.

In the case of *Easton et al. v. Altum*, 1 Scam. 250, and authorities there cited, it is held, that whether the writ be void or not, the defendant took such steps that he was regularly in court whether there was process or not.

The next point claimed as error is, that the court proceeded after judgment, in default of a plea, to assess the plaintiff's damages without a *venire* for a jury. In all cases at common law, where judgment is entered upon default, a writ of inquiry was necessary to ascertain the measure of damages due to the party complainant. Our

statute, section 6, acts of 1861, page 279, so changed the common-law rule as to permit the clerk to assess the damages in cases where the action is brought upon an instrument in writing for the payment of money only, and when the damages rest in computation. In this case the suit was brought to recover damages in an action of trespass on the case for obstructing and diverting a water-course or ditch from the lands of Isaac Stevens. The act of the legislative assembly of 1864, section 6, page 118, provides, that the probate courts shall be governed by the rules of practice prescribed for the district courts, and the rule of practice in the assessment of damages in the district court by the clerk is limited to cases where the action is brought upon a penal bond or an instrument of writing for the payment of money only, resting in computation.

But it is claimed that, by the tenth section of the act concerning probate courts and justices of the peace in certain counties (page 119, Sess. Laws of 1864), that no jurors shall be summoned to the terms of the probate courts as is required before the district courts, but that, in all cases, if either party shall demand a jury, a *venire* shall issue as in cases before justices of the peace.

We cannot think that this section can be construed to authorize the assessment of damages by the clerk or the court in any other cases except when the damages rest in computation as heretofore mentioned. It was obviously the duty of Stevens to demand a jury in a case where the clerk, or the court acting as its own clerk, could not assess the damages by the practice or rules of the common law. Stevens, not having demanded a jury, as he had a right to do, to assess the damages, and the court, without authority by statute or common law, having done so, is clearly error.

The probate court, by the terms of the amendatory act of 3d March, 1863, possessed full common-law jurisdiction. A *venire* to the sheriff to have a jury to assess the damages of Stevens, according to the practice of the courts of common law, was the true mode of procedure in this case, because the defendant, Jones, could not be taken to have

waived the assessment by a jury, inasmuch as he was not present in court contesting the case. The act of 1864, tenth section, only provides that no jurors shall be summoned to the *terms* of the probate court, etc. We think that, in the absence of the defendants, Stevens should have demanded a jury, not in virtue of the tenth section aforesaid, but under the practice of the district courts, as is provided in section 15 of the practice act, and that, without that demand, it was the duty of the court to have awarded the *venire*. When both parties are present in court, and neither demand a jury to assess the damages, and defendants tacitly submit to the finding of the court without objection, is quite another question.

By the Court. Judgment reversed with costs, and cause remanded. *Reversed.*

GENERAL VOLUNTARY APPEARANCE WAIVES all objections to the summons and return and to jurisdiction over the person of defendant: *Union Pac. Ry. Co. v. De Buak*, 12 Colo. 286.

DAMAGES — ASSESSMENT BY JURY.— In an action for damages the court should swear a jury to assess the damages where the defendant makes default (*Colorado Springs Ch. v. Hewitt*, 3 Colo. 278), or after issued joined, fails to appear at the trial (*Taylor v. McLaughlin*, 2 Colo. 376); they should not be assessed by the court: *Gallup v. Witter*, 1 Colo. 293.

KURTZ v. SIMONTON.

BILL OF EXCEPTIONS — *when necessary.* Instructions to the jury and a motion for new trial must be preserved in the record by bill of exceptions, and, if not so preserved, error cannot be assigned upon them.

Error to District Court, Arapahoe County.

THE chief justice did not participate in the decision of this cause.

Mr. S. E. BROWNE, for plaintiff in error.

Mr. ALFRED SAYRE and Mr. JOHN F. BOSTWICK, for defendant in error.

GORSLINE, J. There are various errors assigned by the counsel for the plaintiff in error, but they all, except the last, are to instructions given by the court to the jury, or for refusal to instruct as requested. The last error assigned is for overruling the motion for a new trial. As these different causes, assigned as errors, have not been properly

presented by a bill of exceptions, signed and sealed by the judge before whom the cause was tried, they become no part of the record, and cannot be considered in this court. In *Thompson v. Riggs*, 5 Wall. 663, which is a case very similar to this, the whole doctrine in regard to bills of exceptions is very clearly and forcibly stated. As it is presumed, *prima facie*, that the judgment is correct, it must be affirmed.

Affirmed.

LANGLEY et al. v. GRILL et al.

RECORD of verdict of jury. A copy of the verdict of a jury, inserted in the transcript of the record, will not be received to contradict the record of the verdict given in the proceedings of the court.

SHERIFF'S RETURN. A return to a summons "I have duly served the within by reading the same to the within-named John C. Bruce and John H. Langley not found in my county, as I am therein commanded," is ambiguous, and should not be received.

CONSTRUCTION of the word "defendants." The word "defendants," used in the record of a judgment in a cause where there are two defendants, will be regarded as referring to both of them, although one of them has not been served with process.

JUDGMENT against party not served. It is error to enter judgment against a party not served with process.

JUDGMENT — partial reversal. A judgment will not be reversed in part and affirmed in part.

Error to District Court, Gilpin County.

Messrs. REMINE & HULETT, for plaintiffs in error.

Mr. L. C. ROCKWELL, for defendants in error.

HALLETT, C. J. This was an action of covenant, commenced by the defendants in error against the plaintiffs in error, in the district court of Gilpin county.

The sheriff's return upon the summons is as follows:

"I have duly served the within by reading the same to the within-named John C. Bruce and John H. Langley not found in my county, as I am therein commanded."

At the July term, 1866, of the district court, Bruce was defaulted, and, upon a subsequent day of the term, the damages were assessed by a jury and judgment entered against the *defendants*, without naming either of them, and the word "defendants" being in the plural number.

The first of the errors assigned questions the regularity of the verdict, alleging that it was given in another cause. The verdict set forth in the proceedings of the court, which we must regard as the true verdict, appears to have been given in the cause, and this is sufficient. The clerk has inserted in the transcript what he calls a full copy of the verdict, to which, evidently, the objection of the plaintiff in error is directed. This copy is in no way authenticated. The record gives the verdict and we cannot receive the copy for the purpose of contradicting the record.

It is also assigned for error that the court below had not jurisdiction of the person of Langley. There was no appearance by the defendants in that court, and we must therefore look at the return upon the summons to determine this question. It is difficult to ascertain from this return whether the sheriff served the summons upon both Langley and Bruce or upon either one of them. It is first stated that service was made upon both defendants, and to this are added the words "not found in my county," which seem to contradict what is before stated. An officer, to whom process is directed, is required to state clearly and explicitly the time and manner of executing it, and a return such as this, which leaves the mind in doubt as to what has been done by the officer, should not be received. Assuming, however, as the parties in this cause have assumed in argument, that this return shows service upon Bruce and that Langley was not found, is the judgment of the district court erroneous? It is said that this is to be regarded as a judgment against Bruce alone, but we are unable to assent to this proposition.

The judgment stands against the *defendants*, and we know of no rule of construction which will allow us to say that the word "defendants" includes but one. This judg-

ment certainly stands against both of the defendants, and a judgment against two, when one only is served with process, is erroneous. *Swift et al. v. Green et al.*, 20 Ill. 173. The weight of authority is against the doctrine laid down in some of the cases cited by defendants in error, that a judgment may be reversed in part and affirmed in part. *Arnold et al. v. Sanford*, 14 Johns. 417.

The judgment of the district court is reversed, and the cause is remanded.

Reversed.

CHENEY v. BARBER.

EVIDENCE — *CONTRACT must be proved as laid.* Where money was to be paid upon the sale of certain mining property, the plaintiff must show that the property has been sold before he can recover.

Appeal from District Court, Gilpin County.

THE action was assumpsit upon the following instrument:

“\$600.

Four months after date, for value received, we jointly and severally promise to pay J. E. Barber, or order, six hundred dollars.

October 3d, 1863.

WILLIAM S. ROCKWELL.

HAZEN CHENEY, Su'ty.”

“In consideration of the above sum, being without interest, we promise and agree that should William S. Rockwell, one of the signers hereto, effect a sale, at the east or elsewhere, of certain mining property on the Bobtail lode, and receive his pay therefor, that we will pay an additional six hundred dollars.

October 3d, 1863.

WILLIAM S. ROCKWELL.

HAZEN CHENEY, Su'ty.”

In the first count of the declaration, it was alleged that the property referred to in the second part of the agreement was sixty-six and two-thirds feet off the east end of claim No. 1, and twenty feet off the west end of claim No. 2, east of Discovery claim on the Bobtail lode, and that Rockwell had made sale of the property and received pay therefor.

In the second count it was alleged that the property referred to in the second part of the agreement was sixty-six and two-thirds feet off the east end of claim No. 1, east of Discovery claim on said Bobtail lode, and that Rockwell had sold it and received pay therefor. There was judgment for the plaintiff below against Cheney, who alone had been served with process.

Messrs. W. S. and L. C. ROCKWELL, for appellant.

Messrs. JOHNSON & TELLER, for appellee.

HALLETT, C. J. The appellee declared for two sums of \$600 each, one of which was payable if Rockwell should sell certain premises on the Bobtail lode, which are described in the declaration. There is no evidence that these premises were sold. One witness swears that Rockwell had property on the Bobtail lode to sell for several parties, and another testifies to an admission by appellant that some property on the Bobtail lode had been sold, but it does not appear that the premises described in the declaration were sold. The contract should have been proved as laid. The judgment of the district court is reversed, with costs, and the cause remanded for a new trial. *Reversed.*

VARIANCE — ALLEGATION AND PROOF.— A contract must be proved as laid. Thus, where an express contract is declared on, the parties cannot abandon it and resort to an implied contract: *Robinson C. M. Co. v. Johnson*, 13 Colo. 264.

KINNEAR, Adm'r of STROPE, v. TUCKER et al.

BILL OF EXCEPTIONS — *defective*. If evidence, offered by a defendant to disprove the plaintiff's case, is excluded by the court, the bill of exceptions should contain the evidence given on behalf of the plaintiff, in order that this court may determine the relevancy of the evidence so excluded.

PRESUMPTION in favor of judgment. It must be shown affirmatively that the district court erred; this court will not presume it.

Error to District Court, Jefferson County.

DEFENDANTS in error sued Strobe in the district court of Jefferson county, and declared specially upon a failure to

return certain cattle, and added the common counts. Upon the trial below, Strobe offered in evidence certain orders and receipts for cattle, signed by one or both of the defendants in error. The evidence given on behalf of defendants in error in the court below was not embodied in the bill of exceptions.

Mr. L. B. FRANCE, for plaintiff in error.

Messrs. J. BRIGHT SMITH and GEORGE F. CROOKER, for defendants in error.

HALLETT, C. J. We are asked to reverse this judgment because the district court improperly excluded from the jury certain evidence offered by the defendant in that court. There is nothing in the bill of exceptions, except the evidence, which was offered and rejected.

As all the evidence given upon the trial below is not before us, we are unable to say whether the evidence contained in the bill of exceptions was properly excluded. It must be shown affirmatively that the court below erred; we cannot presume it. *Ballance v. Leonard*, 37 Ill. 43.

The judgment of the district court is affirmed, with costs.
Affirmed.

ANTHONY v. ESTABROOK.

AGENT — *what declarations will bind principal.* Declarations of an agent are not admissible in evidence against his principal if made after the transaction to which they refer.

Where a horse was hired to go a journey and died on the way, declarations of the driver, who was the agent of the hirer, made after the death of the horse and after the driver had returned from the journey, are not admissible to charge the hirer.

Appeal from District Court, Arapahoe County.

ACTION on the case to recover the value of a horse.

There was evidence to the effect that appellee kept a livery stable in Denver, and that appellant hired a team from him

to be driven to Box Elder, a distance of nineteen miles from Denver, and return. That appellant put William T. Shortridge in charge of the team, who drove it to Living Springs, which was much farther from Denver than Box Elder.

Alexander Davidson, a witness introduced by appellee, testified to declaration made by Shortridge as follows: "He said they were a good team and that he lost one of the horses; that he died on the road side; he said he died this side of Living Springs, as he was returning from Living Springs.

Shortridge made this statement to me, I think, the second day after he went out with the team. It was after he got back. I do not know it was the same day he got back."

On cross-examination the witness stated: "Shortridge told me something about the horse taking sick and bloating up. He said he took all the care of the horse he could."

Duncan Merritt, a witness on behalf of appellee, testified: "I heard conversation between Mr. Shortridge, on his return, and plaintiff. Estabrook asked Shortridge how came the horse to die, and he told him Anthony told him it was a good team and to put them through, and Shortridge said he was drinking and it did not make any difference with him, that Anthony was responsible. Shortridge said he drove that evening to Living Springs. He said he left the horse on the side of the road dead as he started back."

The verdict was for the plaintiff below.

Mr. J. BRIGHT SMITH and Mr. GEORGE F. CROOKER, for appellant.

Messrs. CHARLES & ELBERT, for appellee.

HALLETT, C. J. It is clear that the declarations of an agent, if introduced for the purpose of binding his principal, must have been made at the time of the transaction to which they relate, and not afterward. *Fairlee v. Hastings*, 10 Vesey, 123; *Corbin v. Adams*, 6 Cush. 93; *Luby v. Hudson River R. R. Co.*, 17 N. Y. 181.

It appears that Shortridge was employed to go a journey

for appellant, for which purpose a team was hired by the latter from appellee. After an absence of two days, Shortridge returned with but one of the horses which he had taken away, saying that the missing horse had died on the road, and giving some incidents of the trip. Evidence of these declarations of Shortridge was admitted in the court below for the purpose of charging appellant, and, we think, improperly admitted. The horse died during the journey of Shortridge, and these declarations were not made until after his return, and therefore they were not contemporaneous with the loss of the horse to which they referred. With the death of the horse the liability of the appellant, if any exists, became fixed, and he is not to be charged upon any statements made by Shortridge after that event took place. The rule governing this question, and the principles upon which it rests, are so fully declared in the cases above cited that any discussion of it here would be out of place.

It is objected that the evidence does not support the declaration, inasmuch as it shows a hiring of two horses and a buggy, whereas the declaration speaks of the hiring of one horse only. It is to be observed that the third count of the declaration contains no mention of any hiring whatever, but in that count it is simply alleged that the defendant had the care of a certain other horse, etc. For aught that appears, the evidence was given under the third count, to which we perceive no objection. For the reason first stated, however, the judgment must be reversed, with costs, and the cause will be remanded.

Reversed.

PATON v. THE PEOPLE.

STATUTE INOPERATIVE. The thirteenth section of the act of 1861 (1 Sess. 71), concerning licenses, was never effectual for any purpose.

LICENSE, general law not affected by charter of Black Hawk. The act incorporating the city of Black Hawk, and conferring power upon the authorities

of that city to license the sale of spirituous liquors (3 Sess. 228), does not affect the act of 1861 (1 Sess. 69) as amended, which confers like power upon the board of county commissioners.

LICENSE issued by city no defense to prosecution under general law. In an indictment, under the act of 1861 concerning licenses, for selling spirituous liquors without license within the limits of the city of Black Hawk, a license issued under the charter and ordinances of that city cannot be shown in defense.

Appeal from District Court, Gilpin County.

THE act of 1861, section 8 (1 Sess. 70), provides that the board of county commissioners may grant licenses to keep saloons, hotels, public houses or groceries upon conditions named, and section 12 defines a grocery to be a place where spirituous or vinous liquors are retailed by less quantities than one quart. Section 2 of the act of 1862 (2 Sess. 78) provides a penalty for carrying on the business named without such license. The act incorporating the city of Black Hawk (3 Sess. 233) contained, among other powers conferred on the city council, the following :

“SECTION 45. To license, restrain, regulate, prohibit and suppress tippling houses, gambling houses, bawdy houses and other disorderly houses, and the selling and giving away of any intoxicating or malt liquors by any person within the city, except by any person duly licensed.”

The thirteenth section of the act of 1861 (1 Sess. 71) was repealed by the act of 1866 (5 Sess. 66), and is as follows :

“SECTION 13. The president and trustees of incorporated towns shall have the exclusive privilege of granting licenses to saloons or groceries within their incorporated limits, and all sums of money which may be received for licenses granted as aforesaid, shall be paid into the county treasury.”

Mr. L. C. ROCKWELL and Mr. E. T. WELLS, for appellant.

Mr. HUGH BUTLER, for the people.

Mr. Justice GORSLINE dissented.

HALLETT, C. J. Appellant was indicted in the district court of Gilpin county for selling spirituous liquors in quantities of less than one quart without license, in violation of the act of 1861 concerning licenses, as amended by the acts of 1862 and 1866. It appears that the selling occurred in the city of Black Hawk, and, upon the trial in the court below, the matters charged in the indictment being admitted, the appellant sought to defend by showing that he held license to vend spirituous liquors, issued by the corporate authorities of that city. This evidence was rejected, and the ruling of the court is assigned for error.

We agree with the counsel for both parties, that the thirteenth section of the act of 1861 was never effectual for any purpose in this territory. Incorporated towns, having presidents and trustees, were never known to our laws, and that section was always insignificant. A license is defined to be a right given by some competent authority to do an act, which, without such authority, would be illegal, and to license one to do an act is simply to remove the legal restraint operating upon him respecting that act. By the act of 1861, the citizens of Gilpin county were placed under legal restraint in the matter of selling intoxicating liquors from which they could relieve themselves by obtaining license to sell from the board of commissioners of that county. This inhibition rested upon the citizens of Black Hawk equally with other citizens of the county. By the act of 1864, incorporating the city of Black Hawk, the corporate authorities of that city were invested with power to license, restrain, regulate, prohibit and suppress the selling and giving away of intoxicating and malt liquors within the city. The city authorities were not required to execute this power in any particular manner, or at all. They could suppress the sale of intoxicating drinks, or impose hard terms, or ignore the subject and leave the traffic open to all. The corporation was invested with discretionary power over the subject, and we are told that this is not consistent with the provisions of the act of 1861. We cannot adopt this view. It is difficult to believe that the legislative assembly, by

conferring upon the city of Black Hawk power which might or might not be exerted by that city, intended to revoke the positive provisions of the act of 1861. If the act incorporating the city of Black Hawk displaced the act of 1861 as to that city, and the corporation should decline to exert its power, then the vending of intoxicating liquors would be open to all the turbulent and lawless not less than the order-loving, well-intentioned citizen. Again, the power to license is not declared to be exclusively vested in the city, and no reason is perceived why the restraint operating upon the citizen may not be removable in the discretion of two distinct bodies. If one can be restrained from selling intoxicating liquors until he shall obtain permission from the corporation of Black Hawk, he certainly may be additionally required to obtain permission from the county commissioners of Gilpin county. In another, and, perhaps, a broader view of this subject, we observe that the power to license the vending of merchandise is exercised mainly for the purpose of raising revenue. It is true that the granting of liquor licenses is made discretionary, doubtless with a view to enable the authorities to keep the traffic from bad hands, but, nevertheless, the payment of money is only required for revenue purposes. The granting license upon payment of a sum of money is one method of collecting taxes. License Tax Cases, 5 Wal. (U. S.) 463.

The act of 1861 enabled the county of Gilpin to collect certain revenue by licensing the sale of intoxicating drinks. By and by, in 1864, a new corporation was created within the county of Gilpin and called Black Hawk, to the existence of which revenue was necessary, and here again the power to license was conferred. The needs of the county of Gilpin were not diminished by erecting the city of Black Hawk, and we do not discover that the legislature intended to deprive the county of any of its revenue. The cases of *Sloan v. The State*, 8 Blackf. 361, and *Harrison v. The State*, 9 Mis. 526, support these views. The case of *Woodward v. Turnbull*, 3 Scam. 1, is in conflict with those last named, but *Gardner v. The People*, 20 Ill. 430, is distinguishable

from the case under consideration. In that case, the city of Monmouth had not exercised the licensing power, and it was decided that the accused was amenable to the general law.

The court say, that the act incorporating the city of Monmouth gives the city the exclusive right to license the sale of spirituous liquors. Now, if the city had exclusive power to license the sale of spirituous liquors within the city, how could the county have any authority in the premises? If the city alone had power to license, it seems to us that the county could not, nor could any other body take cognizance of the subject. Yet the court thought that the accused was amenable to the general law. Again, the court say that if the city authorities should grant license, the holder would be protected from the penalty of the general law. But why? If the general law was operative within the city of Monmouth, would its operation be suspended by the action of the city authorities giving license pursuant to the charter and ordinances? It seems to us that the act of the city authorities could in no way affect the operation of the general law, and that law, if enforcable at all within the city, should be enforced without regard to the action of the city authorities. But we agree with that court that the general law was not repealed by the city charter, and the judgment was reversed upon another ground.

The judgment of the district court is affirmed, with costs.

LIQUOR LAWS — LICENSE. — Where the legislature confers exclusive authority on a municipality to issue licenses to sell liquor, the license is a clear defense to any prosecution for selling it: *Hertzner v. People*, 4 Colo. 47; *Heinzen v. State*, 11 Colo. 243. These cases are clearly distinguishable from the principal case, as there the authority was not exclusive.

ORMAN et al. v. KEITH et al.

APPEAL — not based upon bill of exceptions. An appeal may be prosecuted without bill of exceptions; imperfections in the latter cannot be alleged in support of a motion to dismiss.

APPEAL BOND — approval in vacation. An appeal bond cannot be approved in vacation without an order of court, and the approval of the clerk of the district court, given in vacation without such order, is inoperative.

APPEAL BOND — approval not amendable. The omission to procure the bond to be approved according to law cannot be supplied by amendment.

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Appeal from District Court, Arapahoe County.

UPON motion to dismiss the appeal,

Mr. L. B. FRANCE, in support of the motion.

Mr. S. E. BROWNE, *contra*.

PER CURIAM. Appellees move to dismiss this appeal because of alleged imperfections in the bill of exceptions, and because the appeal bond was approved by the clerk of the court below in vacation, there being no order of that court authorizing such approval. Inasmuch as appellants were entitled to prosecute an appeal from the judgment of the district court, whether there was any exception to any of the proceedings in that court or not, we cannot, upon this motion, consider the first objection.

As to the appeal bond, we think that there should be an order of the district court directing the clerk to approve the bond. The statute (3 Sess. 116) declares that the clerk may approve the bond, provided the order allowing the appeal shall so direct. In this case, the order allowing the appeal contains no such direction, and the act of the clerk approving the bond, in the absence of such provision, is inoperative. Nor can appellants be allowed to file a new bond in this court under that provision of the statute which authorizes defective appeal bonds to be amended in the discretion of the court. This appeal bond is not defective, but appellants failed to obtain the approval of the bond by the district court as the law directs, and for this reason the appeal must be dismissed, with costs.

Appeal dismissed.

ORMAN et al. v. KEITH et al.

PRACTICE — *when to file bill of exceptions.* A bill of exceptions, filed in vacation, there being no order of court to authorize it, is no part of the record.

Mr. S. E. BROWNE, for Orman and Jewett, presented a transcript of the record and moved that the writ of error be made a supersedeas. The errors assigned referred to the evidence given at the trial below, and this evidence was contained in a bill of exceptions filed in vacation. There was no order of court authorizing the bill to be filed in vacation pursuant to the statute. 4 Sess. 92.

Per CURIAM. We think that a bill of exceptions should be filed in term time unless there is an order of court allowing it to be filed in vacation. In this case there was no such order and no bill of exceptions filed in term time, and therefore we cannot notice the errors assigned. The motion for supersedeas is denied. *Motion denied.*

BILL OF EXCEPTIONS — TIME FOR FILING.— A bill of exceptions cannot be filed after the term has passed, in the absence of an order for that purpose: *Pickard v. Snellings*, 3 Colo. 113.

POLLOCK et al. v. THE PEOPLE.

APPEAL — in quo warranto proceeding. Under the act of 1861 concerning proceedings in cases of *quo warranto* (1 Sess. 351), an appeal lies in all cases from the judgment of the district court to this court, upon such terms as the district court shall prescribe.

The district court may, in its discretion, allow an appeal without prescribing terms.

But if terms are prescribed, they must be such as relate to the subject-matter of the controversy.

APPEAL BOND without conditions. To require a bond to be given, without prescribing conditions to the bond, is ineffectual, and the case is to be regarded as an appeal allowed without terms.

In such case failure to execute a bond, as required by the order of the district court, cannot be alleged as ground for dismissing the appeal.

Appeal from District Court, Arapahoe County.

UPON motion to dismiss the appeals.

This was an information, in the nature of a *quo warranto*, against appellants for having usurped and intruded into the corporate offices of the city of Central. Separate appeals were prayed by the defendants below, and the appeals were allowed upon the defendants giving bonds in

sums that were specified, but nothing was prescribed as to the conditions of such bonds.

Mr. WILLARD TELLER, in support of the motion.

Mr. E. WAKELEY and Mr. C. C. Post, *contra*.

HALLERT, C. J. The appellees move to dismiss this appeal because it was irregularly taken, not being allowed by law, and, if properly allowed, that appellants have not taken the necessary steps to perfect it. As to both points, it will be necessary to consider the first clause of the fifth section of the act concerning proceedings in cases of *quo warranto* (Stat. 1861, p. 352) which reads as follows:

“Appeals may be taken from the decision of the district court upon such terms as the said district court shall prescribe.”

It is said, that if this clause be read in connection with the forty-first section of the Practice Act (Stat. 1861, p. 285) which provides for appeals where the judgment appealed from amounts to \$20, exclusive of costs, or relates to a franchise or freehold, it will be seen that no appeal can be taken from the judgment of the district court respecting the title to an office in a case arising under the act from which the clause is taken, but such appeal can be taken only when the right to a franchise is involved.

Whether these sections ought or ought not to be construed together as acts *in pari materia*, seems to us not material, for, if we so construe them, we fail to deduce from them the conclusion that the clause of section 5, before recited, is restricted to cases respecting the right to a franchise. By section 41 of the practice act, an appeal is given from the judgment of the district court when the same relates to a franchise, and, therefore, there was an appeal in such cases, before the enactment of the act, concerning proceedings in cases of *quo warranto*; and if the clause, before recited, of section 5 of that act had never been incorporated therein, an appeal might, nevertheless, have been prosecuted from such judgments under the pro-

visions of section 41 of the practice act. We are not at liberty to say that the clause of section 5, which we have given above, serves no purpose; that those are idle words adopted by the legislative assembly without any intention to alter or modify the law as it stood at the time of that enactment. It is presumable that the legislative assembly intended to enlarge the remedy by giving an appeal where none was given before.

Furthermore, this act concerning proceedings in cases of *quo warranto* relates to a special remedy applicable to certain classes of cases, and without any words of limitation, the legislative assembly have said that appeals may be taken from decisions of the district court under the act. The language of the clause giving the appeal is general, and we cannot apply it to one class of cases mentioned in the act and exclude another class of those cases from its operation. This construction appears to have been adopted without objection in the State of Illinois from whence we obtained this statute. It is the practice in that State to prosecute appeals in cases of this kind. *Dickson v. The People*, 17 Ill. 191; *The People v. Ridgley et al.*, 21 id. 65; *Donnelly v. The People*, 11 id. 552.

As to the steps taken by the appellants to bring this cause into this court, we doubt whether we can consider any irregularity relating thereto. We have seen that the district court was empowered to prescribe the terms upon which the appeal should be taken. Undoubtedly the district court had the power to allow the appeal without the giving of a bond, the payment of costs, or the doing any other act by the appellants usually done in cases of this kind. The district court was authorized to prescribe the terms upon which the appeal should be taken, in other words, to declare whether any and what acts should be performed by the appellants before they should be permitted to bring the record into this court. It cannot be doubted that the terms thus to be prescribed are for the protection of the party who obtains the judgment from which the appeal is prosecuted. The district court cannot prescribe

the doing of some act altogether disconnected from the suit as the condition upon which the appeal shall be allowed, but the terms given must relate to the subject-matter of the controversy. Now, in this case, the appellants prayed an appeal which was allowed upon the giving of bonds by the appellants, but nothing was prescribed by the district court as to the conditions of the bonds so to be given. The appellants were not required to prosecute their appeal effectually and without delay, to pay costs, to abide the judgment of the district court or of this court, or to do any other act before coming into this court. The district court required nothing of them except that they give bonds in certain sums.

Now the giving of bonds without conditions, or with conditions not prescribed by the court, was an ineffectual proceeding, and it is not material whether the appellants did or did not comply with the order of the court. The district court had no power to order the appellants to give bonds subject to no conditions, for, if such bonds would be valid, the appellants could relieve themselves of their obligation only by paying the entire penalties to the people. This cause stands as upon an appeal allowed by the district court without prescribing terms, and, as the act of that court, in allowing the appeal with or without terms, was discretionary, we cannot revise its action.

The motions to dismiss are denied.

Motions denied.

FREAS v. TOWNSEND.

PRACTICE — APPEAL — *when prayed for.* An appeal from a district court to this court must be prayed for within three days after judgment is rendered.

Appeal from District Court, Gilpin County.

UPON motion to dismiss the appeal.

Mr. L. C. ROCKWELL, for appellant.

Messrs. JOHNSON & TELLER, for appellee.

Per CURIAM. This is an appeal from the judgment of the district court of Gilpin county, and is now before this court on a motion to quash the appeal, for the reason that the appeal was not prayed for in the court below in the time prescribed by the statute.

The appellee in this court, who was the plaintiff below, brought an action of assumpsit in the district court of Gilpin county against Lorenzo M. Freas. By agreement or stipulation the cause was tried by the court below without a jury; and the court, after hearing the evidence, rendered a judgment against the defendant, and in favor of the plaintiff. This judgment was rendered and entered of record on the 10th day of August, A. D. 1867, and on the same day the defendant, by his counsel, moved for a new trial and filed his reasons therefor. On the 17th day of August, A. D. 1867, this motion was argued and overruled by the court. The appellant then prayed for an appeal which was allowed by the court and the cause on that appeal was brought into this court. The appellee now moves the court to quash the appeal for the reason that it was not prayed for within the time prescribed by law.

The forty-first section of the act of the legislature, passed 1861 (Laws of 1861, page 285), allowing appeals, provides that the appeal be prayed for within three days after the time of rendering the judgment or decree. It is true that on the 10th of August, A. D. 1867, the day the judgment was entered, there was a motion for a new trial, but we think the defendant should at the same time, or within the three days from that time, have prayed for his appeal. There was nothing inconsistent in the two motions. This he did not do. He did not pray for the appeal until after the time allowed by law for such prayer: and the motion is sustained. The appeal is dismissed. *Dismissed.*

APPEAL, WHEN MUST BE PRAYED FOR. - An appeal prayed from the district court nine days after rendition of judgment was held not in time. A pending motion for vacation of judgment and a new trial does not relieve the party from the statutory requirement of praying an appeal within three days: *Duaring v. Nelson*, 6 Colo. 40.

SEARS v. ANDREWS et al.

VERDICT IN REPLEVIN—sufficiency. If the jury find the issues for the plaintiffs, and assess their damages at \$10, probably the verdict would not answer all issues in an action of replevin; but it is sufficient to determine some issues in that action, as, for instance, an issue joined upon plea of property in defendant or a stranger.

PRESUMPTION in support of proceedings of district court—verdict. Where there are no written pleadings, and the record does not disclose the issue tried, the verdict being sufficient as to some issues which may arise in that form of action, the court will presume that it is responsive to the issue which was tried.

Appeal from District Court, Gilpin County.

REPLEVIN by appellees against appellant before a justice of peace, and appeal to the district court. In the latter court, the jury returned the following: "We the jury in the above-entitled cause find for plaintiff and assess the damages at \$10 (ten dollars)."

The court rendered judgment upon this verdict in favor of the plaintiffs below, for possession of the property, and for the damages and costs.

Mr. L. C. ROCKWELL, for appellant.

Messrs. POST & MORGAN, for appellees.

HALLETT, C. J. The only question presented for our consideration in this case is the sufficiency of the verdict of the jury to sustain the judgment of the district court. The action was brought before a justice of the peace and removed into the district court by appeal. There are no written pleadings or other evidence of the issue tried in the record, and therefore we are unable to ascertain what that issue was. Probably this verdict would not answer all the issues which may arise in an action of replevin, but it seems to us to be responsive to some issues which may arise in that action. For instance, if the issue was upon a plea of property in the defendant or in a stranger, this verdict, though informal, is sufficient to show that the issue was

found for the plaintiffs below and that damages for detaining the property were assessed at \$10. "If a verdict can be concluded out of the findings to the point in issue, the court shall work and mould it into form according to the real justice of the case." *Hawks v. Crofton*, 2 Burr, 698. As the issue tried in the court below is not given, we are to presume that it was determined by this verdict, for all presumptions are in favor of the regularity of the proceedings. *Hunt v. Bennett*, 4 Greene (Iowa), 512, cited by appellant's counsel, is not in point, whatever may be said of it in the digests. It is not difficult to find cases in which verdicts less formal than this have been sustained. *Jarrard v. Harper*, 42 Ill. 457.

The judgment of the district court is affirmed, with costs.
Affirmed.

SOPRIS v. TRUAX.

REPLEVIN — *wrongful taking — demand and refusal.* In replevin it is necessary to show a wrongful taking or detention of the property in controversy, and it is erroneous to instruct the jury that the only matter in dispute is the ownership of the property.

PLEADING IN REPLEVIN — *fraud.* The rule which requires that fraud be specially pleaded does not apply to the action of replevin.

INSTRUCTIONS — *as to facts.* Instructions to the jury should be confined to the law of the case, leaving the facts to be determined by the jury.

PRACTICE — *motion to restore competency of witness.* A motion for leave to file a new bond, in order to obtain the testimony of a surety in the original bond, should be based upon affidavit showing the materiality of the testimony which is to be obtained.

Error to Probate Court, Arapahoe County.

THE instructions given at the trial, which are referred to in the opinion of the court, are as follows :

"1st. That the only matter in dispute in this case is the ownership of the property in question.

2d. That fraud can never be presumed ; that fraud must not only be alleged in the pleadings in specific terms, but it

must be proved, and the jury are instructed that there is no allegation of fraud in any of the pleadings that make up the issue to be tried in this case.

5th. That evidence, tending to show that James W. Truax was occasionally in possession of some of the property in dispute, or had used the same at different times, is not sufficient proof of ownership in him, particularly when there is evidence uncontradicted that the property belonged to the plaintiff."

The third instruction asked by the plaintiff in error, and refused by the court, is as follows:

"That unless the jury find from the evidence that the plaintiff demanded the property from the defendant, mentioned in the second count of the declaration, they must find for the defendant on said second count."

Mr. ALFRED SAYRE, for plaintiff in error.

Mr. L. B. FRANCE, for defendant in error.

HALLETT, C. J. This was an action of replevin, the first count in the declaration being for taking, and the second count for detaining, the property in controversy. Upon the trial in the court below, there was no evidence whatever to show a taking of the property as alleged in the first count, or a detention as alleged in the second count. The evidence was directed to the question of the ownership of the property, and if it should be conceded that the plaintiff below established her title, she was, nevertheless, bound to demand the possession of the property before she commenced suit. *Ingalls v. Bulkley*, 13 Ill. 315.

The third instruction asked by the plaintiff in error and refused by the court should have been given, and the first instruction given for defendant in error should have been refused. The ownership of the property was not the only matter in dispute upon the trial of the cause. We are at a loss to determine what question of fraud arose upon the trial in the court below, to which the second instruction, given on behalf of the defendant in error, could be applied.

But, if there was such question, it was not correct to say that the pleadings must disclose it. The rule which requires fraud to be specially pleaded does not apply to the action of replevin. The instruction was calculated to mislead the jury and should not have been given.

By the fifth instruction for the plaintiff below, the jury were plainly told that certain evidence was not sufficient to establish a disputed fact, and this was followed by a declaration that the evidence introduced by the plaintiff below, upon the same point, was uncontradicted. It is generally known among members of the legal profession at this day, that the jury are the judges of the weight and sufficiency of testimony, and that the court must allow them to determine the facts in all cases. Nevertheless, we will direct attention to the twenty-eighth (28) section of our practice act, by which courts are confined to the law of the case when instructing juries, and to one authority upon this point. *Bond et al. v. The People*, 39 Ill. 26.

The defendant below desired to call one of his sureties upon the replevin bond as a witness in the cause, and moved the court for leave to file a new bond with a view to relieve the surety of incompetency because of his liability on the bond. This motion was not supported by affidavit, and therefore the court was not advised as to the materiality of the testimony of the surety, and error cannot be assigned upon the denial of the motion. We do not think it necessary to examine the testimony upon the trial in the court below and the objections thereto, as the judgment must be reversed for error in giving and refusing instructions.

The judgment of the probate court is reversed, with costs, and the case is remanded for a new trial. *Reversed.*

REPLEVIN — PLEADING FRAUD. — In replevin, fraud need not be specially pleaded: *Bensch v. Wagner*, 12 Colo. 536.

WORRALL v. HARE.

ABATEMENT *plea in attachment cases.* The plea traversing the facts set forth in an affidavit for attachment is a plea in abatement.

JUDGMENT upon such plea. Under the act of 1861 (1 Sess. 204) as amended by the act of 1864 (3 Sess. 43), if issue of fact joined upon such plea be found for the plaintiff, the judgment is *quod recuperet*.

Error to District Court, Gilpin County.

Mr. L. C. ROCKWELL, for plaintiff in error.

Messrs. ROYLE & BUTLER and Mr. I. N. WILCOXEN, for defendant in error.

HALLETT, C. J. This was an attachment suit brought by the defendant in error against the plaintiff in error to recover money due on a promissory note. The plaintiff in error traversed the facts set out in the affidavit upon which the attachment was issued, and upon the issue thus formed a trial was had, which resulted in a verdict for the defendant in error. The jury called to try this issue assessed damages against the plaintiff in error, and the court rendered judgment against him for the amount thereof. Some of the questions raised by the assignment of errors cannot be noticed, for the reason, that no bill of exceptions was taken upon the trial of the cause. It is claimed, however, that upon the trial of the issue joined upon the plea traversing the allegations of the affidavit, the jury improperly assessed damages against the plaintiff in error, and that the district court erred in entering final judgment upon the verdict, and this objection we will consider. The question is to be determined by the character of the plea, upon which issue was joined.

If it is a plea in abatement there was no error in rendering judgment *quod recuperet* upon the verdict of the jury for the plaintiff below. *Myers et al. v. Hunter et al.*, 20 Ohio, 381.

The act upon which this suit is founded gave to defendants the right to traverse the allegations contained in the attachment affidavit, in the following words:

“That in case any plea in abatement traversing the facts in the affidavit shall be filed, and a trial shall be thereon had, if the issue shall be found for the defendant, the attachment shall be quashed

and the property attached shall be released from such attachment and restored to the possession of the defendant, and the garnishees, if any, shall be discharged, but the writ of attachment in cases commenced by attachment, shall, nevertheless, stand as a summons and the cause shall proceed to trial and judgment, as if originally commenced by summons." 1 Sess. Laws, p. 204; 3 id. p. 43.

In another clause of the act, the officer, to whom the writ was directed, was required to serve the writ upon the defendant therein, and it has always been held here and elsewhere, so far as we are informed, that by such service, when made, the defendant was notified of the pendency of the suit, and the court obtained jurisdiction of his person. The writ of attachment, when served upon the defendant and levied upon his property, performed the office of a summons in bringing the defendant into court, and also the especial function of a writ of attachment in securing property for satisfying any judgment that might be obtained in the cause. By the terms of the clause above recited, the effect of the plea traversing the allegations in the affidavit, if sustained upon trial, was to abate the operation of the writ, so far as the property of the defendant and garnishees were affected by it, but it did not affect the writ in its office as a summons.

Whenever the plea was found to be true, the writ was diminished of its authority touching the property of the defendant, but, nevertheless, it was to stand as a summons, and the cause was to proceed to trial and judgment as if commenced by summons. The object and effect of the plea then was to lessen the operation of the writ, in part to abate it, and therefore we think the plea is properly called in the act, a plea in abatement.

In the clause before recited, all after the word "quashed" was added by the amendment of 1864. Of course before that amendment, when the verdict was for the defendant, the writ was quashed and the suit was at an end. As it stood prior to that amendment, the statute was the same upon this point as that of Illinois, and it was held, by the supreme court of that State, that the plea traversing the affidavit was

a plea in abatement, and that upon the issue joined thereon the successful plaintiff was entitled to judgment *quod recuperet*. *Boggs v. Bindskoff et al.*, 23 Ill. 67.

The amendment of 1864 diminished the power of the plea but did not change its character. It belonged to the class known as pleas in abatement prior to that amendment, and it remained in that class notwithstanding the amendment. The case of *Leitensdorfer et al. v. Webb*, 20 How. 176, is not an authority against the position here assumed. In that case, the statute upon which the proceeding was founded declares that, if the issue upon any material fact in the affidavit be found for the plaintiff, "the cause shall proceed." Now, if upon verdict for the plaintiff, judgment *quod recuperet* should be entered, the cause would be at an end, and could not, therefore, proceed as the statute requires. Under that statute, the judgment in favor of the plaintiff could only be *respondeat ouster*, because, if *final* judgment should be entered, the cause would not then proceed as the statute requires. Our statute is materially different. It contains no provision as to the course to be pursued when the issue upon the verity of the affidavit is found for the plaintiff, and therefore we are left to the common-law rule which subjects a defendant, who fails to maintain his plea in abatement, to a peremptory judgment, without giving him further opportunity to contest the plaintiff's right of action. Nor does it appear that the question now under consideration was before the court in that case. After the trial of the issue arising upon the affidavit in that case, the defendant, without objection, as it seems, from the plaintiff, pleaded in bar to the action, and a new issue was framed upon which a trial was had. The supreme court held, that the proceedings upon this latter trial only were before them for consideration, and in them no error was found.

Since the trial of this cause in the district court, the practice in cases of this kind has been regulated by statute, and therefore this case cannot become a precedent.

The judgment of the district court is affirmed, with costs.
Affirmed.

CLAYTON v. SMITH.

PRACTICE—*error may be assigned on agreed case.* In a case heard on an agreed statement of facts, it is not necessary to move for a new trial in the court below :

Or to preserve the statement of facts in the record by bill of exceptions :

Or to except to the judgment of the court below :

CONSTRUCTION of revenue law of 1864. As to contracts made after the law of June 30, 1864 (13 Stat. at Large) was passed, the law will presume that the two and one-half per centum, mentioned in section 103 of that act, is included in the rate specified in the contract, and a carrier of goods for hire cannot recover the tax in addition to the contract price.

Error to District Court, Arapahoe County.

Mr. J. BRIGHT SMITH and Mr. GEORGE F. CROCKER, for plaintiff in error.

Messrs. CHARLES & ELBERT, for defendant in error.

HALLETT, C. J. This was an agreed case, in which the defendant in error, who was also defendant in the court below, obtained judgment for costs. The record shows the stipulation or agreement of the parties and the judgment of the court, no bill of exceptions being taken by either party. We shall first notice some questions of practice presented by defendant in error. It is contended that error cannot be assigned upon the record, because,

1st. There was no motion for a new trial made in the court below.

2d. The parties' statement of facts is not preserved in the record by bill of exceptions.

3d. There was no exception to the judgment of the court below.

As to the first point, if the act of the district court is to be regarded as the trial of a cause by the court without a jury, we have heretofore decided that error may be assigned upon the judgment of the court in such cases, without a motion for new trial being made. But, in this case, no issue of fact was tried, such trial being rendered unnecessary

by the agreement of the parties. The facts were not in dispute, but the parties were unable to agree as to the law arising upon the facts, and, therefore, they called upon the district court to assist them. In respect to the functions of the court, called into exercise by these parties, it was like the case of a demurrer to pleading, in which the demurrant admits the facts alleged against him, and demands the judgment of the court upon them, or, like a special verdict, in which the facts are stated, and the finding is for the plaintiff or defendant, according to the law arising upon those facts. We move for a new trial only when issues of fact have been determined, and, as there was no such issue in this case, such motion would have been irregular. As to the second and third points, the practice adopted in this case has been sanctioned by the supreme court of the United States, and we shall not look for other authority.

In the case of *Stimpson v. Baltimore & Susquehanna R. R. Co.*, 10 How. 345, the question was, "whether, as this case is not brought up either upon express or specific exceptions to the rulings of the circuit court, nor upon any decision of that court, upon a special verdict found by the jury, but comes before us upon an agreed statement between the parties, this court can, in this form, take cognizance thereof?"

And this was resolved in the affirmative. In *Suydam v. Williamson*, 20 How. 429, the practice respecting bills of exception, special verdicts and agreed cases, is elaborately discussed, and the practice pursued in the case at bar is fully approved. There are a great many cases in the reports of the supreme court in which this practice is recognized and approved, of which *Munford v. Wardell*, 6 Wal. 425, is the latest; and we regard the practice as settled in all the courts established by the federal government. The practice in this court should conform to the practice in the supreme court of the United States, as far as practicable, inasmuch as our proceedings may be reviewed in that court. The objections raised by defendant in error cannot be sus-

tained, and, therefore, we proceed to examine the judgment of the court below.

By section 103 of an act to provide means for the support of the government, and for other purposes, approved June 30, 1864, congress levied a tax of two and one-half per centum upon the gross receipts of persons and corporations engaged in transporting passengers and property for hire, and added to the section the following: "Provided, that all such persons, companies and corporations shall have the right to add the duty or tax imposed hereby to their rates of fare, whenever their liability thereto may commence, any limitations which may exist by law or by agreement with any person or company, which may have paid, or be liable to pay, such fare, to the contrary notwithstanding."

In December, 1864, defendant in error delivered to plaintiff in error certain freight, at nine cents per pound; afterward he was taxed on receipt of the freight money the sum of \$482.67 which tax he paid to the government.

The question is, whether, under the act above mentioned, defendant in error may add the amount of the tax paid by him to the contract price of nine cents per pound.

The doubt arises upon the proper construction of the clause given above; and we think it may be removed by careful consideration of the language of the law. In the first place it is to be observed, that the parties taxed have the right to add the duty or tax to their *rates of fare*; by which we understand that the carriers were authorized to increase their ordinary and customary charges for carrying by so much as would be necessary to meet this tax upon the gross amount received. This is not authority to collect two and one-half per centum upon the amount received in an isolated case, but rather an authority to advance the *rates of fare*, so that the aggregate amount received for all services performed by the parties as carriers shall be two and one-half per centum larger than before the passage of the act. It is to be observed, also, that this right of the carrier to re-imburse the tax paid from the pocket of his employer is to be exercised by adding to *his rates of fare*. He can-

not collect the two and one-half per centum from his employer as a tax, but he may increase his rates of fare, so that the fare shall include the two and one-half per centum. Upon reading further we find that the carriers may add the tax to their rates of fare, "Whenever their liability thereto may commence, any limitations which may exist by law or by agreement," etc.

The tax is upon the gross receipts of the parties, from which it seems that they are not liable to the tax until the money actually comes into their hands. If, however, we say that the act authorizes carriers to add the tax to their rates of fare *when their liability commences*, and that liability does not arise until the fare has been paid, we shall involve ourselves in an irrational attempt to increase the fare after it has been extinguished by payment. In the nature of things the right to increase the fare by the amount of the tax must precede the payment of the fare. We conclude, therefore, that the words "whenever their liability thereto may commence" refer not to the receipt of the money by the carrier, but to some other time. At the time the act was passed, the price to be charged by many carriers for transporting passengers and property was regulated by law, while many others had entered into contracts which were yet unfulfilled. It was to these cases that the clause under consideration was intended to apply. The explanatory language with which the clause concludes is not susceptible of a different construction.

In construing contracts, we consider the law operative at the time of making the contract, upon the presumption that the parties themselves looked to that law as their rule of conduct. When, as in this case, the contract was made after the passage of the law, the presumption is that the parties had knowledge of the law, and availed themselves of its provisions. Now, the first part of the clause we are considering authorizes the carrier to add the tax to his rates of fare, and this must be done, if done at all, before the fare is fixed by the contract. As to contracts made before the enactment, this would not be true, because the carrier,

not having been apprised of the tax at the time of making the contract, had no opportunity to protect himself by increasing his rates.

But, in contracts made subsequently to the enactment, the presumption is, that the carrier has advanced his rates so as to meet the tax. Indeed, he needed not the authority of an act of congress to enable him to increase his rates, except the rates were prescribed by law or limited by contract at the date of the act. After the carrier was informed of the tax, if his rates of fare were to be regulated by himself, he could, without the aid of this law, provide against the duty imposed upon him, and, if human experience is to be trusted, he needed no suggestion upon that point.

Therefore, as to voluntary agreements, it will be seen that the clause we are considering is significant only when applied to agreements existing at the date of the act.

In this case the contract was made in December, 1864, several months after the act of congress took effect. The law presumes that the defendant in error established his price for carrying the goods of the plaintiff in error with a view to the payment of the tax levied by congress, and therefore he cannot be permitted to collect the amount of the tax in addition to his charge of nine cents per pound. If he did not fix his rates high enough to cover the tax, he had the power to do so, and cannot complain of the omission.

The judgment of the district court is reversed, with costs, and judgment will be entered in this court in favor of the plaintiff in error and against the defendant in error for the sum of \$482.67.

Reversed.

AGREED CASE — BILL OF EXCEPTIONS. — When a case is heard on an agreed state of facts no exception to the judgment below is necessary: *George v. Tufts*, 5 Colo. 161.

DUNTON v. MONTOTO.

PLEADINGS — *must be in the English language.* Pleadings in probate courts must be in the English language.

Error to Probate Court, Las Animas County.

Mr. A. A. BRADFORD, for plaintiff in error.

Mr. G. W. MILLER, for defendant in error.

Assumpsit by defendant in error against plaintiff in error.

EYSTER, J. Quite a number of errors are assigned by the plaintiff in error. We do not wish to review the whole of them. It is enough to say, that the declaration in the case was in the Spanish language. It is not to be tolerated in this country, that judicial proceedings should be in any other than the adopted language of the nation. To argue this proposition would be useless, and for this reason, the judgment of the court below is reversed.

We cannot after an examination send this cause to the probate court for a new trial. The whole record and proceedings are so utterly at variance with the known rules of practice, that we feel compelled to order, that the entire proceeding be dismissed from the docket of the probate judge, and judgment will be so entered. *Reversed.*

ENGLISH LANGUAGE — PROCEEDINGS IN. — The doctrine of the principal case, that all judicial proceedings must be in the English language, must be limited to the declaration that all pleadings must be in English: *Trim v. Simpson*, 5 Colo. 69.

WOODBURY et al. v. GRIMES et al.

ACT REPEALED. The act of 1864 (3 Sess. 102), relating to mechanic's liens, was repealed by the act of 1867 (6 Sess. 75) upon the same subject.

EFFECT of repeal of mechanic's lien law. Liens existing under the act of 1864 fell when that act was repealed, unless within the saving clause of the 28th section of the act of 1867.

CONSTITUTIONAL LAW — mechanic's lien. Liens established by the act of 1864 are not protected from legislative interference by the clause of the constitution of the United States which relates to the obligation of contracts.

Error to District Court, Gilpin County.

SECTION 28 of the act of 1867 (6 Sess. 81) is as follows:

"That 'An act creating a lien in favor of mechanics and others,' approved March 11, 1864, and all other acts or parts of acts incon-

sistent with, or in conflict with, this act, be and the same are hereby repealed ; but nothing contained in this section shall be so construed as to affect any proceeding now pending in any of the courts of this territory under the provisions of the act hereby repealed."

This act was approved January 11, 1867.

The bill was filed March 20, 1867, and it was alleged in the bill that the cause of action accrued December 10, 1866.

Mr. E. T. WELLS, for plaintiffs in error.

Mr. A. MARSH, for defendants in error.

HALLETT, C. J. The plaintiffs in error seek to establish a mechanic's lien, upon certain premises of the defendant Grimes, under the act of 1864. That act was repealed by the act of 1867, and the principal question presented in this record is, concerning the effect of such repeal upon liens founded upon the act first mentioned. In the first place, it is contended that the legislative assembly, in repealing the act of 1864, did not intend to divest liens which arose under that act, upon the ground that the repealing act is substantially the same as the original act. It is true that many of the provisions of the first act are incorporated in the act of 1867, but these provisions relate mainly to proceedings for enforcing the lien, and not to the lien itself. The opening section of the two acts in which the lien is given differs in language and in substance. The act of 1864 prescribes the quantity of land to be affected by the lien, while the act of 1867 fixes no limit ; the former act gives a lien to sub-contractors, and requires a statement of the amount due, together with a description of the property, to be filed with the recorder of the county, points upon which the later act is silent. The former act contains no reference to lode mining claims, upon which a lien is given by the act of 1867. Perhaps other differences might be pointed out, but we think it is sufficient to show that there are substantial differences. When a law is re-enacted in the same language, or in language which is substantially the same, the new act taking effect simultaneously with the repeal of the

old, we may well enough say that the law, though displaced and instantly replaced, has suffered no interruption. And this is what we understand the supreme court to say in *Steamship Co. v. Joliffe*, 2 Wall. 450. But when the legislative assembly, upon a subject which has previously received its attention, frames a new law identical with the first in some features, but differing from it widely in others, and expressly repeals the first act, it would be an extraordinary exercise of judicial power to declare the first act in force notwithstanding such repeal. It is not sufficient that the repealed and repealing acts should have points of identity, but the latter must be substantially the same as the former. The repealing section of the act of 1867 contained a clause, "That nothing contained in this section shall be so construed as to affect any proceeding now pending in any of the courts of this territory, under the provisions of the act hereby repealed." With this language before us, we are certainly at liberty to believe that the legislative assembly thought it necessary to protect parties, who had instituted proceedings under the act of 1864, from the effect of the repeal of that act. Now this is not at all consistent with the notion that the legislature designed that the act should remain in force as to all cases which arose under it, for "*expressio unius est exclusio alterius*." If a saving clause was necessary to protect those who had commenced proceedings under the act of 1864 from the effect of the repeal, why was it not necessary as to those who had not commenced such proceedings? We cannot answer this question in any way that will support the theory of the plaintiffs in error, that the legislature intended to continue the act as to cases which arose under it. As this is a question of intent, we may certainly look to the language of the act for the purpose of ascertaining the intention, and we think no one can read the twenty-eighth section of the act of 1867 without being convinced that the legislative assembly intended to repeal the act of 1864 to all intents and purposes, except as to cases in which proceedings to enforce the lien were pending in some court. It is also urged that

liens founded upon the act of 1864 are contracts protected from hostile legislation by the constitution of the United States, and therefore the lien in this case was not in any way affected by the repeal of that act. It was said in *Bronson v. Kinzie*: "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right;" and we have appreciated this difficulty in our efforts to arrive at a correct conclusion in this case. It is, indeed, "manifest that the obligation of a contract and the rights of a party under it may, in effect, be destroyed by denying a remedy altogether, or may be seriously impaired by burdening the proceedings with new conditions and restrictions so as to make the remedy hardly worth pursuing." Bearing in mind that "whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract," we proceed to inquire whether the act of 1864 gave a remedy, of which the legislative assembly could deprive the plaintiffs in error without impairing the obligation of the contract. In the first place, it is noticeable that the act does not establish contracts between parties, but gives a remedy upon contracts made without its aid. Its first words are: "Any person to whom a debt is due for labor performed or material furnished and actually used in the erection, construction, alteration or repair of any house, mill, building or structure." Now a debt cannot be due except upon a contract, express or implied, and, therefore, the act assumes the existence of a contract, but does not create it. Furthermore, the common law gives an action to recover the value of labor and material furnished, and, therefore, in every case of lien under the statute there was a perfect contract and a common-law remedy to enforce it independent of the statute. We are, then, authorized to say that the act of 1864 gave a new and additional remedy in a familiar class of cases. If we contrast this new remedy with the pre-existing common-law remedy, we shall find that the debtor

was equally bound to pay his creditor under both of them ; in other words, the statute did not increase or diminish the obligation to pay previously resting upon the debtor. The statute enabled the creditor to appropriate the land upon which he labored, and placed his materials, together with the structure which he erected, to the payment of his debt, but it did not add to the legal liability of the debtor arising from the contract to pay his creditor. Both before and after the passage of the act, the common law gave to the creditor the right to resort to the property of the debtor for the purpose of satisfying his demand, so that, in this respect, the new remedy was not different from the old. But there was one, and but one, essential difference between the two remedies. Under the statute, a lien upon the property benefited by the labor and materials of the creditor arose contemporaneously with the contract, preventing alienation by the debtor to the prejudice of the creditor, and giving to the creditor a preference over all other creditors of the debtor who should subsequently acquire liens upon that property, while, by the law as it existed before the statute, no such lien was established until judgment was obtained. Now it is plain that the statute was important to the lien creditor only in case of a contest with the grantees or creditors of the debtor, and that it did not essentially change the relations between the debtor and creditor. The statute gave to the lien creditor a preference over the grantees and creditors of the debtor who had not, at the date of the contract, acquired a lien upon the property, but it did not subject the property of the debtor to the payment of the lien creditor's demand in any degree or manner more advantageous to the creditor than the general law. The statute did no more than prescribe a rule of priority and preference among creditors and incumbrancers, which was different from that given by the general law. Now we understand that legislative interference among the creditors and grantees of a debtor, which has the effect to postpone one for the benefit of another, is not prohibited by the constitution. It was said in *Jackson v.*

Lamphire, 3 Pet. 290, and repeated with approbation in *McCracken v. Heyward*, 2 How. 613: "It is within the undoubted power of State legislatures to pass recording acts by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time, and the power is the same whether the deed is dated before or after the passage of the recording act; though the effect of such a law is to render the prior deed fraudulent and void as against a subsequent purchaser, it is not a law impairing the obligation of contracts." The act of 1864 stands upon a similar principle. It postponed creditors and grantees of the debtor to the mechanic and material man, but it did not touch the obligations of the contract. In a struggle between creditors and grantees it might be decisive of the contest, but it did not affect the relation of debtor and creditor.

The counsel for plaintiffs in error has, with much industry and ability, drawn from the decisions of the supreme court many passages which appear to sustain his views. It must not be forgotten, however, that the language of each case was spoken with reference to the points before the court. We find, in the reports of that court, no case like the one under consideration. In *Bronson v. Kinzie*, no question arose between contesting claimants, and the law imposed new conditions and restrictions upon the sale of the mortgaged property for the benefit of the mortgagor. So, in *McCracken v. Heyward*, 2 How. 608, new conditions and restrictions were prescribed respecting the sale of property under judgments at law for the benefit of the debtor. In the case at bar, as we have seen, the act of 1864 established a preference between creditors and grantees, but did not affect the debtor. In *Steamship Co. v. Joliffe*, 2 Wall. 450, the statute alone gave the right and the remedy, and it was declared to be within the constitutional provision. If subject to repeal, the creditor's demand would have fallen with the statute, and nothing would have been left to him. In the case at bar, it was only the creditor's preference over other creditors and grantees of his debtor which rested upon

the statute, and that, as we have seen, was within legislative control. As the act of 1864 established a rule respecting the administration and distribution of a debtor's property, we think it was not secured to the plaintiff in error by any constitutional provision. After it was repealed, a substantial remedy against the debtor Grimes, according to the course of justice as it existed at the time the contract was made, was left to the plaintiffs in error, and this was sufficient to satisfy the constitutional requirement. *Cooley's Limitations*, 286; *Stocking v. Hunt*, 3 Denio, 274; *Conkey v. Hart*, 14 N. Y. 22. The plaintiffs in error also aver that their lien has been restored by an act passed in the year 1868. It is not necessary to consider the effect of this restoring act, for the reason that it was not passed until long after these proceedings were commenced. At the time when this petition was filed, the act upon which it was founded was inoperative, and, therefore, the petition was properly dismissed. The decree of the district court is affirmed with costs.

Affirmed.

MECHANICS' LIENS FALL WITH REPEAL of the statute upon which they are founded: *Parrott v. Tucker Lumber Co.* 2 Colo. 473.

CRANDALL v. STERLING GOLD MINING Co.

JUDICIAL NOTICE — *laws of Kansas Territory.* If the laws of the late territory of Kansas, relating to the descent of real estate, were at any time in force in this territory, they are to be judicially noticed, and need not be proved at the trial.

KANSAS TERRITORY, laws of, relating to descent of real estate. In November, 1860, there were three statutes in Kansas relating to the descent of real estate. By the first, the widow had one-half the real estate of her deceased husband, the other half going to the children of the marriage and of the husband. By the second, she had one-half in value of the realty to be set apart to her under the direction of the court. By the third, she was endowed of the third part of all the lands whereof her husband was seized, of an estate of inheritance during coverture. She was required to elect between these acts within six months after the death of her husband.

ELECTION — *effect of widow's failure to make.* In ejectment by a widow claiming as heir to her deceased husband's estate, under the first of the acts

mentioned, it did not appear that she had declared her election to take under that statute within the time prescribed. *Held*, that she could not recover.

Appeal from District Court, Gilpin County.

Mr. E. T. WELLS, for appellant.

Messrs. JOHNSON & TELLER, for appellee.

HALLETT, C. J. The plaintiff alleges that her husband, in his life-time, was seized of an interest in a claim on the Bobtail Lode, in Gilpin county, to one-half of which she became entitled upon his death, which occurred in the month of November, 1860. She avers that, in November, 1860, the premises in controversy were within the limits of the late territory of Kansas, and that, by a law of that territory, upon the death of her husband she became entitled to the estate, which she now seeks to recover. Upon the trial in the court below, no evidence was offered to show that Kansas territory included within its boundaries the district of country now known as the county of Gilpin, and probably the district court was required to take judicial notice of that fact, if it exists. We shall not consider this interesting question, nor shall we consider another question of greater interest which relates to the force and effect of the laws of Kansas territory in a case of this kind. We shall pass these and other questions presented in this record, and place our decision upon ground which is entirely satisfactory to us.

Assuming, *argumenti gratia*, that the district of country now known as the county of Gilpin was, at the death of plaintiff's husband in November, 1860, in the territory of Kansas, and that the law of descent of that territory is to be applied to this case, we propose to inquire whether, by that law, the plaintiff is invested with any estate in the premises in controversy. Upon the trial in the court below, the plaintiff gave in evidence the law of Kansas territory, approved February 7, 1859, upon which she relies; another act, entitled "An act relating to dower," approved Feb-

ruary 27, 1860, affecting that upon which the plaintiff relies, was not given in evidence, and, therefore, we must first ascertain whether we can consider the act of 1860 in connection with the former law. Upon this point it is to be observed that these laws are not foreign to our territory in the sense in which the laws of one State or territory are said to be foreign to every other State and territory. We say that laws are foreign when they emanate from a jurisdiction territorially distinct and separate from our own. As to the premises in controversy, the jurisdiction of the territory of Kansas was coincident with our own, but precedent in the order of time. If the plaintiff had sought her remedy immediately after the alleged devolution of this estate, the forum in which she would have appeared and the law governing the case were provided by the territory of Kansas, and, in that event, no proof of the law would have been required. Since then the forum has been changed, but, upon the theory of the plaintiff, the law remains the same. We are told that the law of descent of Kansas territory is to be applied to all cases that arose within her boundaries while she held dominion. If so, it is to be as fully and as generally applied to such cases as is our own law to cases arising within our territory since the organization thereof, and the first is as much a part of our general law as the last. With respect to the point under consideration, we may say that these Kansas laws, if effectual as claimed by the plaintiff, stand upon the same footing as those acts of our own assembly, which have been repealed, if rights have accrued under them, whenever those rights are questioned, they are the subject of judicial cognizance in the same manner as if still in force. The case of *United States v. Turner et al.*, 11 How. 663, is instructive upon this point. In the district court of Louisiana a question arose concerning the validity of an instrument under the laws of Spain, in force in the province of Louisiana before the purchase, and counsel moved for an issue upon the points to be tried by a jury. This motion was denied, and the ruling was sanctioned by the supreme

court in language which, with a change of names, may be applied to the point we are considering.

“The Spanish laws which formerly prevailed in Louisiana, and upon which the titles of land in that State depend, must be judicially noticed and expounded by the court like the laws affecting titles to real property in any other State. They are questions of law and not questions of fact, and are always so regarded and treated in the courts of Louisiana.”

The case of *Henthorn v. Doe*, 1 Blackf. 160, is equally to the point. There laws of Virginia, affecting title to real property in Indiana, were judicially recognized by the supreme court of the latter State in a decision which is very convincing upon this point. Upon reason and authority, therefore, we say, that if the law of descent of Kansas territory is to be applied to this case, it lies within the range of judicial information and need not be established by proof, and the act of 1860 is as fully known to us in a legal sense as that which was given in evidence upon the trial in the court below.

The second section of the act of 1860 mentions two acts which, together with the act of 1860, appear to have been in force at the time of the death of plaintiff's husband in November of that year. By the act under which plaintiff claims, which was the eldest of the three, a widow took one-half the real estate of her deceased husband, and the children of the marriage and of the husband took the remaining half. It seems that, under this act, partition of the property among the beneficiaries was not contemplated. Laws Kansas Ter. 1859, p. 565. By the second act the widow became the owner in fee of one-half in value of the realty, to be set apart to her under the direction of the court. Laws Kansas Ter. 1859, p. 381. By the third act, which we have referred to as the act of 1860, the widow was “endowed of the third part of all the lands whereof her husband or any other person to his use was seized of an estate of inheritance at any time during the marriage to which she shall not have relinquished her right of dower, in the man-

ner prescribed by law, to hold and enjoy during her natural life." Laws Kansas Ter. 1860, p. 110.

These several distinct and widely different estates were offered to widows by the laws of Kansas territory, but it was necessary that she should elect between them. If the statute was silent as to election there could be little doubt as to the intention of the law, for obviously the widow could not be allowed to hold under all these acts and thus absorb the estate, leaving nothing for the children. But the statute was not silent upon this point. In the second section of the act of 1860, it was enacted as follows:

"Every widow, within six months from the death of her husband, may, as she may prefer, use for her benefit either the provisions of this act or those of an act entitled, 'An act concerning descent and distributions.' Approved February 8, 1859, or an act entitled, 'An act to protect the rights of married women, and in relation to the liabilities incident to the married contract relation.' Approved February 7, 1859."

We learn from this that the widow could have the benefit of but one of the acts, making provision for her out of the estate of her deceased husband, and that six months were allowed her to determine which of the several acts she would invoke. Under these statutes upon the death of a husband intestate nothing could be done toward vesting his estate in the heirs until the widow should choose between the several laws designed for her use. The widow had only an inchoate right prior to election, for until then the law, ignorant whether she would have a dower estate or an estate in fee, could not operate in her behalf. In justice to the children of the marriage and of the deceased husband the widow ought to have been and was required to make her election at an early day. Moved by such considerations doubtless the legislature of Kansas territory declared that the widow should elect between the several acts, securing to her an interest in her husband's estate within the six months succeeding his death, and this wise limitation is to

be enforced for the repose of estates and because it is the legislative will.

Under statutes and at the common law it has often been decided that a widow failing to elect between dower and a devise shall be held to have accepted the devise. *Pratt v. Felton*, 4 Cush. 175.

But this is upon the ground that a will is effectual unless expressly renounced. It needs no invocation to awaken its transmitting power, but bestows its gift unasked, unless the beneficiary expressly decline it. Not so however here, for the statute of 1860 requires that the widow shall be active in declaring her preference. If we say that in case of non-election she shall have an estate under one of the acts to which we have referred, how shall we choose between the several statutes? We are unable to do it. No one of these statutes could become efficient until its aid was invoked.

If the plaintiff here passively allowed the six months succeeding her husband's death to pass without manifesting by word or act her desire to hold under either one of these acts, she must suffer the loss resulting from her laches. We find no evidence in the record showing that the plaintiff, within the time prescribed by the act of 1860, elected to take the estate she now claims under the act of February 7, 1859. Perhaps the bringing of a suit would show an election, but if so, this suit was not brought until 1866, long after the law, weary of the plaintiff's delay, had turned to other representatives of her deceased husband.

In the absence of evidence upon this point, we think the judgment of the district court was correctly given for the defendant.

The judgment of the district court affirmed, with costs.

Affirmed.

MALONEY v. GRIMES.

ATTACHMENT—*distributing proceeds of attached property among creditors.*

The twenty-sixth section of the attachment act provides for *pro rata* dis-

tribution of the proceeds of attached property among creditors who have sued out writs returnable, and returned to the same term of court.

Where several creditors attached the same property, under writs returnable to different terms of court, the rule of precedence, as modified by statute, requires that they should be classified with reference to the terms of court to which their writs are returnable, and gives preference to the several classes according to priority of service.

If property is attached in several contemporaneous proceedings, whether commenced to the same term or to different terms, and whether the property be sold under process issued in one or all of the suits, the proceeds of the property should be distributed among the several creditors according to the foregoing rules.

SALE OF ATTACHED PROPERTY — *effect of, upon contemporaneous liens.* Where several attachment writs were commenced to different terms of court, and all the suits were levied upon the same property, and all the suits were pending at the same time, and the property was sold under judgments obtained in the suits first commenced: *Held*, that all the creditors were entitled to share in the proceeds of the sale, and the liens of the several attachments upon the attached property were divested by the sale.

SALE OF PROPERTY *upon redemption by judgment creditor does not inure to the benefit of other creditors.* An attaching creditor, having obtained judgment redeemed from a sale made under a judgment obtained in another attachment suit, and caused the premises to be re-sold pursuant to sections 14 and 15, chapter 48, Revised Statutes: *Held*, that other creditors, who had commenced suit by attachment to the same term with the redeeming creditor, were not entitled to share in the proceeds of such re-sale.

Appeal from District Court, Gilpin County.

AN agreed case was submitted to the district court as follows:

“Previous to April term, A. D. 1867, of said court two writs of attachment were issued in favor of Woodbury & Co. and John Tierney, respectively, against the Mammoth Gold Mining Co. of Colorado, both returnable and returned to said term, and both levied upon certain real estate of said corporation. At July term, 1867, judgment was rendered in favor of plaintiffs in each of these causes.

“September 30, 1867, the premises attached were sold upon special execution issued on these two judgments, and Woodbury and Co. became the purchasers. All these proceedings were regular. Previous to July term, A. D. 1867, divers writs of attachment issued against the same Mam-

moth Gold Mining Co., one in favor of Wm. Moller and one in favor of said Dennis Maloney, all returnable to the July term of said court, 1867, all of which were returned to that term levied upon the said real estate before attached at suit of Woodbury & Co. and Tierney. The writ issued in favor of Moller was served upon the agent of the corporation defendant, that in favor of the appellant was returned 'not found' and service by publication was made.

"At the October term of court Moller recovered judgment for \$39,485.36 damages and Maloney for \$205 damages; said judgments still are in full force and unsatisfied. March 30, 1868, the time allowed to the said Mammoth Gold Mining Co. to redeem the lands sold under the executions of Woodbury & Co. and Tierney from such sale having expired, and no such redemption having been made, Moller sued out his special execution upon his judgment and redeemed the premises and afterward procured the appellee to sell the premises on his aforesaid execution. All these proceedings were regular. At the sale on Moller's execution, the premises were sold for the sum of \$20,000, of which, after deducting \$2,520, paid by Moller to redeem from such prior sale, and the costs on the execution, there remains in the hands of said sheriff the sum of \$17,121.93. That it shall be submitted to the district court to determine whether said sum of \$17,121.93 ought to be paid by the sheriff to Moller upon and in satisfaction of his execution, or whether the whole sum of \$20,000, after deducting the redemption-money paid by Moller, ought to be distributed among all the creditors of the corporation, who recovered judgments against said corporation in actions commenced by writs of attachment, returned and returnable to the July term, 1867, of said court. Either party may appeal from any final order made by the district court in pursuance of this stipulation to the supreme court without filing bond, and the supreme court may determine the same questions," etc.

June 26, 1868, appellant applied to the district court for a rule on the clerk to make assessment of the amount due him out of the moneys in the hands of the sheriff, as

appears by the stipulation heretofore filed, and that the sheriff, defendant, etc., be required to pay to him the amount so assessed. This motion was denied, and the sheriff was ordered to pay the moneys in his hands to Moller.

Mr. E. T. WELLS, for appellant.

Messrs. JOHNSON & TELLER, for appellee.

HALLETT, C. J. Appellant's claim to share in the fund in the hands of appellee is based upon the twenty-sixth section of the attachment act. Laws of 1861, p. 210. That section provides for *pro rata* distribution of the proceeds of attached property among creditors who have sued out writs returnable and returned to the same term of court, and levied the same upon such property. It will be observed that this section extends to cases in which the writs are returnable and returned to the same term of court, thus leaving the cases in which the writs are not so returnable to the operation of the general rule, which is, that creditors are entitled to satisfaction out of the proceeds of attached property in the order in point of time in which their writs are levied. Drake on Attachment (2d. ed.), § 231. The effect of the section is to place upon an equal footing all attaching creditors who come into court at the same term; but no provision is made respecting cases in which the writs are returnable to different terms. When several creditors attach the same property under writs returnable to different terms of court, the rule of precedence, as modified by the statute, requires that they should be classified with reference to the terms of court to which their writs are returnable, and gives preference to the several classes according to priority of service. In this view while the creditors, Woodbury and Tierney, who sued at the April term, 1867, of the district court, were upon an equal footing, their lien upon the property attached was superior to the lien of those creditors, of whom appellant was one, who sued at the July term, 1867, of the court. All the creditors, however, attached the same property, and

all of them were entitled to satisfaction out of it, if the proceeds should be sufficient to pay all. In this state of law and fact we plainly see what were the rights of the several creditors respecting the fund realized from the sale of the attached property. In the State of Illinois, under a similar statute, it is the practice to hold the proceeds of attached property for distribution among the creditors according to their several rights. *Warren v. Iscarian Community*, 16 Ill. 114. This seems to be a convenient if not necessary rule, saving the expense of numerous sales, preventing confusion of title as to the property sold, and securing to creditors a just distribution of the fund. Under this rule it is not material whether attached property is sold under process issued in one or another or all of several contemporaneous attachment proceedings, the effect of the sale being to transfer the lien of the attachments from the property to the fund obtained therefrom. However the sale may be made, when the money is brought into court it will be applied to the payment of the several judgments, according to the rule of preference and distribution to which I have referred. Here then were several attachment suits commenced to the April and July terms of court, in the year 1867, the writs being levied upon the same property, and all of the suits pending at the same time. The property was sold, and, as we have seen, all of the creditors, including Moller and the appellant, whose suits were pending contemporaneously, were entitled to share in the proceeds. Woodbury and Tierney were upon equal terms, but, in virtue of the prior service of their writs, they were entitled to be first paid in full. Moller, the appellant and the other creditors who sued at the July term of court, were upon equal terms, but having brought their suits to a term of court, subsequent to a term at which Woodbury and Tierney sued, their liens were subordinate to the liens of the creditors last named.

By the sale of the property the proceedings became fruitful, and the remedy which the creditors sought was obtained. The right to participate in the proceeds of the attached prop-

erty was then enjoyed by the appellant, if any thing remained after paying the Woodbury and Tierney judgments, and if nothing was received by him it was because the proceeds were not greater than the sum of the Woodbury and Tierney judgments, and not from any defect in the law. It matters not that the property was sold upon execution issued upon the judgments of Woodbury and Tierney, the other suits were pending at the time of sale, and all were entitled to participate in the proceeds, giving to each his due share and preference as fixed by law. The appellant, having once enjoyed the right to share in the proceeds of the attached property, cannot again claim that right. With the sale of the property and the distribution of the fund, the attachment proceedings as such ended. If the appellant obtained judgment *in personam*, he may collect it in any way known to the law, but his right so to proceed is secured by the judgment rather than the attachment. Probably one who has obtained judgment *in rem* may redeem the property affected by his judgment from another sale, but if so, the right is secured to him as a judgment creditor, not by the attachment as such. But it is not necessary to decide this point, inasmuch as no question is made touching the regularity of Moller's proceedings, and we are now only concerned with the distribution of the funds received from the sale of the property under his execution.

It appears to be unnecessary to advert to the doctrine often recognized by the supreme court of the State of Illinois, that a redeeming creditor, or the purchaser at the sale made after redemption, is subrogated to the rights of the first purchaser. *McLagan v. Brown*, 11 Ill. 519; *Johnson et al. v. Baker*, 38 id. 98; *Blair et al. v. Chamberlain et al.*, 39 id. 521; *Massey v. Westcott et al.*, 40 id. 160.

It is difficult to harmonize *Turney et al. v. Young*, 22 Ill. 255, with the foregoing cases, but if it is opposed to them it must be regarded as overruled by later decisions. If, according to this doctrine, the purchaser at the sale after redemption acquired a right beginning with the sale under the Woodbury and Tierney judgments, certainly the right

of the appellant to satisfaction from the property was extinguished by the sale last mentioned. In conclusion, it is well to notice that the statute under which the creditor Moller redeemed, and upon which his claim to the money obtained upon sale of the property under his execution is founded (Laws 1861, p. 267, § 15), is not at all ambiguous. The right to redeem is given to "any judgment creditor," without reference to the character of his judgment or the manner in which it was obtained, and whether it is or is not a lien upon the estate to be redeemed. The sole qualification necessary to the right of redeeming is, that the party claiming such right shall be the judgment creditor of the debtor who owned the estate which he seeks to redeem. It is also declared that if the property redeemed shall sell for more than the redemption money and interest, "the excess, over and above the amount of the same, shall be applied as a credit on the execution under which the redemption shall have been made."

If in any case it should be adjudged that there was a charge upon the estate redeemed under this plain declaration of the statute, it is doubtful whether the money obtained by sale after redemption could be applied to the satisfaction of such charge. I am inclined to think that the law holds out to every judgment creditor the inducement to redeem, that he shall have in satisfaction of his judgment whatever he can obtain over and above the amount of his disbursements upon another sale of the property. But as before stated, appellant's right to satisfy his judgment out of the property attached by him arose and was enjoyed upon the first sale thereof and cannot be asserted again.

Therefore the judgment of the district court is affirmed.

Affirmed.

ATTACHMENT CREDITORS. — Where sale under one of two attachments merely transfers the attachment lien from the property to the fund: *Claffin v. Doggett*, 3 Colo. 415.

HOWARD v. SHERWOOD.

ARBITRAMENT — evidence of submission. A certificate of a county clerk, to the effect that a controversy relating to a mule was submitted to him by

agreement of the parties claiming the mule, is not evidence that the parties did so agree.

POSSESSION — illegal award — evidence. A certificate of a county clerk, to the effect that a controversy relating to a mule was submitted to him by agreement of parties, and that the property was awarded to the defendant, cannot be given in evidence to show that the possession of the defendant was lawful.

DEMAND AND REFUSAL in replevin — evidence. In an action of replevin it appeared that plaintiff demanded the property from the defendant the day before the suit was commenced, and the defendant agreed to take the property to a place named on the following day. On the following day the suit was commenced and the defendant contested it at every step. *Held*, that there was sufficient evidence of demand and refusal.

It is not necessary that a defendant in replevin should expressly refuse to comply with a demand for property. If he neglect to deliver it and contest the suit, he cannot, after verdict, be permitted to say that he intended to avoid litigation by surrendering the property before suit.

Appeal from District Court, Jefferson County.

At the trial, J. W. Mosby testified on behalf of the plaintiff, that the plaintiff demanded the property from the defendant, at Boulder, before the commencement of the suit; the defendant had the mule in his possession at that time; the mule belonged to plaintiff; the demand was made the day before this suit was commenced.

On cross-examination, the witness testified that plaintiff had possession of the mule and used it in 1865; the mule left in January or February, 1865. I next saw it in defendant's possession; plaintiff told defendant it was his mule and he had fetched a witness to prove it; plaintiff left the mule, and defendant agreed to bring it to Boulder City that evening or next day; defendant took the mule to Boulder the next day; he did not deliver it to plaintiff.

George R. Strouse testified that he knew the mule and that it belonged to plaintiff.

The defendant offered a transcript from the records of Boulder county, which consisted of a subpoena issued by James Hubbard, a justice of the peace, directed to a constable, commanding him to summon three persons named to testify concerning the description and value of certain property taken up as "estray" by defendant below. An

affidavit, by defendant below, respecting certain property taken up by him as "estrays," among which was one brown mule, also the report of certain appraisers as to the value of the property taken up by defendant below; also a certificate of the county clerk of Boulder county, as follows:

"J. M. SHERWOOD }
v. } ss.
N. M. HOWARD. }

"The above entitled cause coming on to be heard before the county clerk of Boulder county, Col. ter., this 17th day of June, A. D. 1867. By agreement of the parties to have the title of one brown mare mule branded on left shoulder with figure (5), taken up by N. M. Howard, and now claimed by Jessy Sherwood, adjusted.

"Whereupon, after hearing the evidence of both parties, it was decided against the said Sherwood, and the property in controversy was not the property of said Sherwood, and that he was not entitled to the possession thereof, but that the said N. M. Howard was entitled to the possession thereof.

"W. A. CORSON,
County clerk of Boulder county, C. T."

Plaintiff objected to these papers, and the court excluded them.

Mr. Justice GORSLINE did not participate in the decision.

Mr. G. BERKLEY, Mr. G. W. CHAMBERLIN, and J. F. BOSTWICK, for appellant.

HALLETT, C. J. Upon the trial in the court below, a transcript of the record of Boulder county, showing that upon a hearing before the clerk of that county, the property in controversy was awarded to appellant, was offered as evidence, and, upon objection by appellee, excluded from the jury. It is contended that this paper should have been admitted for the purpose of showing that appellant's possession of the mule was lawful, and that such possession would only become unlawful upon demand made after the award made by the county clerk, and a refusal by appellant

to deliver the property. The argument is founded upon the assumption that appellee agreed with appellant to submit the matters in controversy to the decision of the county clerk. There is no evidence of any such agreement and therefore the argument fails. It is true, that it is stated in the transcript that the clerk proceeded upon the agreement of the parties, but it is not necessary to say that this is not sufficient. As there is no evidence of any authority in the clerk to decide the controversy the paper was properly excluded. There are other objections to the transcript, but it is not necessary to dwell upon them.

It is also urged that the evidence in the court below was not sufficient to show a demand and refusal. Upon this point there was evidence tending to prove that appellee demanded the property the day before the suit was commenced, and that appellant agreed to take it to Boulder the next day. In accordance with this agreement the mule was taken to Boulder on the following day, when appellee replevied it. Respecting the demand there seems to be no question, and if we connect the evidence with the acts of appellant, as shown by the record, the refusal will be no less clear. When appellant arrived at Boulder on the day the suit was brought, he did not surrender the property to appellee, but, upon service of the writ, he gave bond and retained possession of it and contested the suit at every step. If he had delivered the property at that time, even if the writ had been in the hands of the officer, the controversy would have been reduced to a question of costs. Upon this point the acts of appellant are as convincing as the most positive testimony. He had the opportunity to comply with appellee's demand for the property, and he declined to accept it. If he took the property to Boulder, for the purpose of surrendering it to appellee, he could have done so, and the fact that he did not deliver it was sufficient to warrant the jury in finding that he had no intention to give it up without litigation. It is not necessary that a defendant in replevin should expressly refuse to comply with a demand for property. If he neglect to

deliver it and contest the suit, he cannot, after verdict, be permitted to say that he intended to avoid litigation by surrendering the property before suit. Other errors assigned have not been mentioned in the argument, and we think it unnecessary to notice them.

The judgment of the district court is affirmed, with costs.
Affirmed.

SMITH v. THE PEOPLE.

RECORD — COMMON LAW — *how constituted.* At common law the testimony of witnesses, the opinions of the court upon questions of evidence, the charge of the court to the jury, and other incidents attending the trial of a cause, did not appear in the record.

RECORD — BILL OF EXCEPTIONS — *statute of Westminster.* The statute of Westminster which gave the bill of exception had no application to criminal causes.

RECORD — *bill of exceptions in criminal cause.* A statute of this territory (4 Sess. 92) makes it the duty of a judge to sign and seal a bill of exceptions in a criminal cause, when tendered to him, and provides that such bill of exceptions shall be filed by the clerk and shall become a part of the record of such cause.

RECORD OF EXCEPTIONS — *how made.* Exceptions to the rulings, opinions and decisions of the court form no part of the record until they are reduced to writing and signed and sealed by the judge.

And if no exception to the ruling or decision of the court is taken at the trial, the ruling or decision cannot be put on record.

ERROR — *must appear of record.* And error cannot be assigned as to matters not of record.

ERROR — *instructions not excepted to.* Where no exceptions were taken to the ruling of the court as expressed in the instructions to the jury, error cannot be assigned as to such ruling.

VERDICT OF GUILTY — *sufficiency.* Upon an indictment for murder a verdict of guilty is a conviction of the offense charged in the indictment.

NEW TRIAL — *verdict supported by evidence.* Where the prisoner went to the house of deceased with R. and after some words with deceased the prisoner knocked him down, and thereupon R. put a rope around deceased's neck and strangled him to death, and the prisoner and R. carried deceased's body some distance from the house where the homicide was committed and threw it into a running shaft, a new trial will not be granted on the ground that the evidence is not sufficient to support a verdict.

HOMICIDE — INTENT — *unlawful act.* If two or more persons combine to do an unlawful act, and in the prosecution of the unlawful design death ensue to any, the killing will be murder as to all of the participants in the unlawful purpose.

The prisoner having made a violent assault upon deceased and having assisted in carrying away and concealing deceased's body, even if the killing was done by another, the prisoner must be regarded as aiding, abetting and assisting in the perpetration of the crime.

NEW TRIAL — *newly-discovered evidence.* A new trial will not be granted to enable the prisoner to obtain evidence which does not tend to excuse or mitigate the crime.

Error to District Court, Gilpin County.

THE plaintiff in error was indicted for the murder of Wm. Hamblin, and the jury found him guilty. At the trial the evidence was as follows :

John Y. Glendenin testified : In February last I was called by Sheriff Grimes to attend a coroner's inquest upon the body of William Hamblin. I went over with others and found the man in a shaft ; we got the body out of the shaft ; there was a rope around the neck and another around one of the wrists ; I cut the rope off with a knife ; there were gashes on Hamblin's head. We examined in the house and found a pool of blood by the door, and this stick (here the witness identified the stick) ; there was hair on one of these knots and the stick was colored by blood. The place where the body was found and the house are in Gilpin county.

Joseph Harper testified : I was down the road between here and the gate and saw some men gathered together, and they were talking about this murder, etc. The prisoner and several men were there ; some of the men asked the prisoner questions ; they asked him what made him do such a horrible deed, and what he hit him with ? the prisoner said he got mad and hit him with the stool he was sitting on and knocked him down. He said he was likely to get up again and he hit him with a chunk of wood and knocked him down again. The murder occurred a night or two before this conversation ; the prisoner said that in struggling around Hamblin made such a fuss that they put a string around his

neck and another around his arm, and hauled him off and put him in a shaft. Both of them hauled him up the hill, one started with him and the other gathered hold and helped. The prisoner said he was sorry that he did it. He said that he knocked Hamblin down twice; there was considerable chat there which I do not now recollect; no threats toward the prisoner were made; we were sitting on a wood pile at the time of the conversation, and the prisoner said that the name of the man who helped him was Robert Reynolds.

Cross-examination: There were about five men present at the conversation with defendant; Mr. Brown, the officer, was there; I don't recollect the others who were present; I remember only Brown and the prisoner; I then supposed that defendant was a prisoner and in charge of the officer; I cannot tell what was said before I came there; they were about sitting down when I came in sight; I do not know whether or not I heard all of the conversation; I am sure the prisoner said he got mad and hit Hamblin with a stool; he referred to himself as the person who got mad; he said something about a chair I think, but I did not hear him say that Hamblin struck him with a chair; I understood that this man struck Hamblin two blows, and Bob Reynolds struck the third blow. I cannot say that the prisoner stated which of them started to drag Hamblin's body to the shaft; he said one started and the other took hold and helped drag Hamblin to the shaft; the prisoner said that he and Bob Reynolds put Hamblin in the shaft.

John C. Bruce testified: I knew William Hamblin in his life-time; he lived in Chase Gulch and he was a milkman; I saw his body just after it was taken from the shaft; the shaft is twenty or thirty yards from the house, in a southeasterly direction. I think it is a little up hill from the house to the shaft; Hamblin's pockets were turned wrong side out when I saw him.

Dr. R. G. Adudell testified: I practice medicine and surgery; I saw the body of William Hamblin in the shaft before it was taken out; the feet were invisible from the

top ; from the position in which Hamblin lay in the shaft, I supposed he was thrown in by two persons ; if he had been thrown in by one person the body would have gone out of sight ; I don't remember whether the body lay on the side or upon the face ; the body of Hamblin was taken out of the shaft ; there was a ragged wound on the top of the forehead, a rope around the neck very tight, and another rope around the wrist ; the rope around the neck was very tight, it was buried in the neck about two-thirds its width ; in carrying the body from the house to the shaft, some places it was carried clear of the ground and others it was allowed to drag upon the ground ; Hamblin might have been dead twelve or fifteen hours when we came there ; there was still warmth in the stove in the house when we came there ; the fire had not burned down ; I think Hamblin was still alive when the rope was put around his neck ; he came to his death by strangulation ; the blow on the head would knock him down.

Cross-examination : I think that the body of Hamblin was dropped into the shaft, not thrown down ; the position of the body showed this ; if the body had been thrown in it would have been doubled up more ; I think Hamblin died of strangulation produced by the rope around his neck ; I am inclined to believe he was dead before he was taken from the house ; I think Hamblin was taken to the shaft by two persons ; I did not see any signs of his being dragged by one person, but he might have been dragged by one person near the door ; the marks on the ground were of the hips dragging and not the limbs ; there were no marks of the heels upon the ground ; the appearances were of the body being carried by one person at the head and another at the feet, and the hips sometimes dragging on the ground ; I did not see in or about the house any rope of the kind which was around Hamblin's neck ; the rope around the neck was of a different twist from that in the house ; it had evidently been brought there.

Hinds testified : I was upon the coroner's inquest touching Hamblin's death ; before the body was brought up from

the shaft we could see it ; it lay upon the back ; the body had moved very little from where it first struck ; I saw the body when it was hoisted from the shaft ; the pockets were turned wrong side out ; there were two cords around Hamblin's neck ; one of the cords was tied very tightly and the other one loosely ; there was no rope about the house like the one that was tight on the neck ; there was rope in the house like the one that was loose on the neck ; there was water on the stove in the house which was warm ; there were gashes on Hamblin's head that could have been made with this stick (referring to the stick mentioned by Mr. Glendenin, in his testimony).

Samuel Merrick testified : I live between Smith's Rancho and Clear Creek, four miles below Black Hawk. The next morning after the killing of Hamblin, two men stopped at my house and got breakfast, and this man here (the prisoner) looks like one of them ; they came soon after it was light ; I had just got up in the morning.

Cross-examination : This man looks very much like one of the men that stopped there that morning for breakfast ; he is of the same build, I suppose that he is one of the men.

John C. Bruce, re-called, testified : I think I have seen the defendant down by Fitzpatrick's mill, in Black Hawk. He was with another colored man. They went off up Chase's Gulch. I saw them about half-past five or six o'clock one Saturday night before the killing of Hamblin. Hamblin was killed on Sunday, and this was the Saturday night before that.

Cross-examination : I know this man's countenance, and I think he is the same man I saw near Fitzpatrick's mill.

Chelton M. Grimes testified : I am the sheriff of Gilpin county ; I have had the defendant in my charge since about the middle of February last. We have talked frequently about the murder of Hamblin. I never made any threats against the prisoner or held out any inducements to him to get a confession. The prisoner said that he got into a bad scrape, that it was Reynolds' fault, and that Reynolds got him to go there with him. The prisoner said that Hamblin

used words that he did not like and then he struck Hamblin with a chair ; that then Bob struck Hamblin, and then he threw something at Hamblin ; I think it was a stick of stove wood, and hit Hamblin on the shoulder and Hamblin fell down. That Bob then hit Hamblin on the head with a stick of stove wood, and Hamblin commenced groaning and making a noise, and Bob put the rope around Hamblin's neck to prevent him from making the noise. The prisoner said that, when Bob put the rope around Hamblin's neck, he told Bob that was wrong, and asked him how he would like to be served that way. Bob said it made no difference, he was dead any how.

He said that Bob put the rope around Hamblin's wrist and asked him to help take Hamblin to the shaft and throw him in. The prisoner said he refused to help Bob at first ; that Bob dragged Hamblin out of the house and then he, the prisoner, helped until they got to the shaft, and then Bob threw Hamblin into the shaft. The prisoner said that Bob went down to the house and he went down to the cabin below and stayed there until nearly morning, and then Bob came down and they started off together. He said they went down near the Child's House, at foot of Gny Hill, and stopped in the woods and counseled for awhile, and finally went down to the Child's House, where they had been stopping before. The prisoner said he was very sorry for it ; that he had never done any thing like it before. Bob said that he was not sorry ; that he had done the like before many a time. The prisoner said they were stopping at the Child's House before the murder ; that they left the Child's House the evening of the murder and came up to Hamblin's. The prisoner said they left the Child's House to come up to see Mr. Pickle to get some money he was owing them for wood and to go to Hamblin's and get some blankets Hamblin had of theirs ; that they did not see Mr. Pickle ; that when they got opposite Mr. Pickle's house Bob didn't want to go there, but wanted to go up to Hamblin's ; that they went to Hamblin's about dark and stayed there some time—several hours—before any difficulty

commenced. The prisoner could not tell what time he left Hamblin's house ; it was some time in the night ; he supposed about eleven o'clock. This conversation occurred about the first opportunity the prisoner had to talk to me after he was put in jail ; the prisoner was very anxious to talk to me. I think the first conversation I had with him was before the coroner's inquest was held. I guess it was the first evening after he was brought in ; on going in the jail the prisoner was frightened at the crowd around the jail, but he seemed content when I told him that he was in no danger there in the jail, that the crowd couldn't get in there. I do not think the conversation was long after the prisoner was put in jail. After Robert Reynolds was put in he made about the same statement as the defendant. The defendant said Bob locked the door of Hamblin's house and threw the key away, and Bob said the same ; they described the place where the key was thrown, and Mr. Hamblin, the brother of the deceased, afterward found it there. I have talked with the prisoner about the matter frequently, and there has been nothing like a denial of guilt on his part until within a few days.

Cross-examined : At the time of the first conversation with the prisoner there was no excitement out of doors. There was a crowd around the door when the prisoner was put in jail, but they went away soon, and at the time of the conversation there was none there. The conversation was two or three hours after the crowd had left ; the defendant did not seem to be excited. The defendant said that they were disputing with Hamblin about blankets ; that Hamblin refused to give them the blankets, and he struck Hamblin with the stool ; that Hamblin struck back and then Bob joined in the fight. I think he said Hamblin ordered them out of doors. Defendant did not speak of time passing between the time Bob got Hamblin out of doors and the time they hauled him off to the shaft ; defendant said that Bob threw Hamblin into the shaft. I think defendant said that he stepped out of the door where so much blood was, while the body was there. Defendant did not say that Bob used

threats to compel him to help haul the body of Hamblin away ; it seemed that Hamblin and the defendant disputed altogether, and Bob had nothing to say until the fight begun ; they talked quietly for some time before the difficulty arose. Within the last few days the defendant has said that Bob was guilty, and he, the defendant, was not guilty.

Re-direct : Bob Reynolds was arrested and brought in four or five days after the defendant was arrested.

A portion of the charge which was given to the jury was as follows :

“In no view which can be taken of the evidence in this cause is the accused guilty of manslaughter ; if not guilty of the crime charged in the indictment, he is not guilty of any crime whatsoever under the law.”

No exception was taken to any portion of the charge. The counsel for plaintiff in error contended that this instruction was erroneous. The jury returned a verdict of guilty, and a motion for new trial being made and overruled, the plaintiff in error excepted to the ruling of the court upon that motion. Upon the hearing of the motion for new trial, certain affidavits were read as follows :

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George Smith, being first duly sworn, says he has heard the affidavit of Clara Brown read and knows its contents, that he was not aware of the existence of any such testimony as that contained in the said affidavit until after his trial ; that he did the best he could to prepare for his trial, and told his counsel and others for what purpose he went to the house of William Hamblin, and that such purpose was to get his blankets ; that he had no knowledge that said Hamblin intended to keep said blankets until he arrived there, and that he had no knowledge whatever that said Hamblin had declared his intention so to do until after the trial of the cause ; that he revealed his own case to his counsel and made every effort possible in his circumstances

to prepare for his defense ; that his failure to discover the evidence contained in the affidavit of Clara Brown is not the result of his negligence, but that such failure is to be attributed to the fact that the same never was divulged to any one until after his trial.

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Clara Brown, being first duly sworn, says she is a resident of Gilpin county, and knew William Hamblin during his life-time ; that on the Thursday morning previous to the Saturday on which he was killed, said Hamblin was at her house in Central City in said county ; that on said morning she had a conversation with him, said Hamblin, in respect to some colored men that had been stopping over with him in a cabin, and had been chopping wood ; that said Hamblin complained that said colored men had used him badly, had taken away his pistol and some cups and plates belonging to him ; but that he, Hamblin, had then in his possession some blankets belonging to them, enough to make him whole in respect to the property taken away by them ; that she never told this conversation to said George Smith or his counsel before the trial of said cause, and that she never supposed the same could ever have any thing to do with the trial of said Smith until after the trial, and she had heard what said Smith had said as to going to the house of said Hamblin to get his blankets.

Messrs. JOHNSON & TELLER and Messrs. ROYLE & BUTLER, for plaintiff in error.

Mr. I. N. WILCOXEN and Mr. C. C. Post, for the people.

GORSLINE, J. The plaintiff in error, George Smith, was indicted at the May term, 1868, of the district court of Gilpin county, for the murder of William Hamblin. He was arraigned and pleaded not guilty, and was tried at the same term, the chief justice presiding. The jury returned

a verdict of guilty, and the prisoner sued out a writ of error from this court. There were no exceptions taken at the trial to the decisions of the court in admitting or rejecting testimony, or to the instructions given to the jury in behalf of the people, or to the refusal by the court to give instructions asked for by the prisoner. The only exception taken was to the decision of the court in overruling the motion for a new trial interposed by the prisoner.

The argument of the case in this court was not confined to the exception taken as mentioned above, but extended to a discussion of such instructions given by the court below, as the counsel for the prisoner conceived to be erroneous, and to the refusal to give other instructions asked for by the prisoner. We permitted this, reserving the right to consider whether we could, in accordance with the law, regard matters which were not contained in the record before us.

It becomes us then to determine on this presentation of the case the appellate jurisdiction of this court, and to ascertain whether agreeably to the forms of law we can decide upon matters, which in no legal manner have been submitted for our consideration. At common law a writ of error only carried to the superior court such matters as appeared of record. The testimony of witnesses, the opinions of the court upon questions of evidence, the charge of the court and other incidents attending the trial of a cause never appeared upon the record, and therefore were never removable by writ of error. This rule being extended as well to criminal as to civil cases it followed, as a necessary sequence, that a person convicted of crime, although many errors might have intervened in the course of the trial, was remediless except by an appeal to the consideration of the same court in which such errors occurred.

To remedy this evil the statute of Westminster 2d, 13 Edward I, chapter 31, was enacted, which gave the bill of exceptions. It was considered in England, however, and so adjudged, that this statute, although general and unrestricted in its phraseology and terms, had no application to criminal causes. This statute has been substantially enacted in this

territory, and we suspect in most of the States of the Union. In some of them, however, the courts being of the opinion that the statute did not apply to criminal cases, the legislatures of the respective States were compelled to extend the law specifically to that class of cases. In Pennsylvania, for instance, the original statute of Westminster 2d was passed in 1792, yet the court entertaining the opinion that it did not apply to criminal cases, persons under conviction for crime had no redress until the year 1860, when a law was passed which gave defendants, under indictment for murder or voluntary manslaughter, the right to except to the decision of the court upon any point of evidence or law, which exception should be made a part of the record as in civil cases. Thus it will be seen that in that State, previous to 1860, a defendant convicted of murder, notwithstanding errors very dangerous to him might have been committed during the progress of the trial, had no remedy whatever, except perhaps a motion for a new trial, addressed to the same court in which the error occurred. Our statute (Laws 1865, page 92) makes it the duty of the judge before whom any case shall be tried in the district court to sign and seal a bill of exceptions when tendered to him, and provides that such bill of exceptions, when allowed, signed and sealed by the judge, shall be filed by the clerk, and *shall become a part of the record of such cause*. It follows, then, that exceptions to the "rulings, opinions and decisions" of the court, as expressed in the statute, form no part of the record until they are reduced to writing and signed and sealed by the judge; much less can it be said that the proceedings on the trial of a case form a part of the record of such case, when no exceptions whatever were taken to the same. The question now arises, whether this court can, we will not say with propriety, but according to uniform and established rules of law, take cognizance of such proceedings as occurred in the progress of the trial, which do not come before us in any approved or legal manner. To this question there can in our opinion be but one answer. We should wander very far from the line of our duty if we

should assume to determine matters which do not appear in the record before us. The evil consequences of such a precedent would greatly outweigh any good or favorable result which could be derived in a particular case, however important it might be. It would be contrary to the law as we understand it from the nearly uniform decisions of the courts, and we are bound to decide according to law. By doing so we should undertake to review points first made in this court, and not taken in the court below or made a part of the record of the case.

In the case of *Hopkins v. The Commonwealth*, 50 Penn. 9, which was also an indictment for murder, the chief justice, in delivering the opinion of the court, with great emphasis inquires, in regard to a point to which no exception had been taken at the trial, if it would not be an imperinent interference with the established course of administering criminal law to obtrude a discussion of the point which was suggested by counsel in the argument. And the court, in that case, held, that they could not legally inquire whether that part of the charge of the court below, to which no exception had been taken, was correct or otherwise. The courts of this country, which proceed according to the course of the common law, have been nearly uniform in their decisions upon this question. There is one remarkable exception, which we will presently notice. The supreme court of the United States has expressed but one language, and has always held that objections to instructions given, or to the refusal to give instructions asked, can only be taken advantage of and preserved by bill of exceptions. *Pomeroy's Lessee v. Bank of Indiana*, 1 Wall. 592; *Thompson v. Riggs*, 5 id. 663. The latter case is somewhat remarkable in this, that the counsel for the defendant in error waived the objection that there was no proper bill of exceptions to raise the principal question involved in the case. Notwithstanding this waiver, the court declined to discuss it on the ground that the record was not properly before them. Justice CLIFFORD, in rendering the opinion of the court, says: "Settled practice in

this court is, that neither the rulings of the court in admitting or rejecting evidence, or in giving or refusing instructions, can be brought here for revision in any other mode than by a regular bill of exceptions." And, in relation to the practice generally, he further says: "Instructions requested or given rest in parol, and do not, in the practice of this court, or in any other court where the common law prevails, become a part of the record unless made so by a regular bill of exceptions, sealed by the judge who presides at the trial." The instructions which are given or refused, or whatever else may transpire, *ore tenus*, during the trial, become no part of the record, any more than do the arguments of counsel, until exceptions to the same are signed and sealed by the judge, when, upon filing the same with the clerk, according to the statute, they form a part of the record. There is a decision, however, in conflict with the opinion we have announced herein, and, we believe, also opposed to the uniform decisions of the courts of common laws in this country and in England. It is in the case of *Falk v. The People*, reported in 42 Ill. 331. The question arose upon an instruction given by the circuit court, to which no exception was taken. In the opinion of the court, which upon this point contained no argument, and we suspect that court could find neither reason, argument or authority to sustain the extraordinary decision which they made, we find the following inquiry: "Suppose all the instructions given by a court to a jury in a capital case are wrong, that they do not announce correct legal principles, or, being correct, are inapplicable to the case, and no exceptions are taken to them, would it be the duty of an appellate court, under such circumstances, when the record shows the prisoner has been illegally condemned by misapplication of the law to his case, and he asks a review of the proceedings, that such court, in the face of the record, should pronounce the sentence of death upon him?" Now, with great deference, we say that what is implied by this inquiry is a begging of the whole question. It assumes that, in some manner, not by the record, for as we

have seen, the only way to make an instruction a part of the record is by exception signed and sealed, but perhaps by street rumor, by a newspaper report, or by what some person may have told the court, they are informed that a certain instruction was given. The court evidently makes a point that it is a capital case. In *Shorter v. The People*, 2 N. Y. 193, which was an indictment for murder, the court, certainly one of as high authority as that of Illinois, speaking through Justice BRONSON, one of the ablest judges who ever adorned the bench of that State, says: "The law concerning bills of exceptions is the same in criminal as in civil cases," and further says: "We should not allow our feelings to draw us into the making of a bad precedent." In the case of *Gill v. The People*, decided at the same term as *Falk v. The People*, and reported in the same volume, which was an indictment for an assault with intent to kill, the court absolutely refused to review the proceedings in the circuit court, because they were not preserved by bill of exceptions, and they had no record before them. It will be seen, therefore, that the supreme court of Illinois, in the case of *Falk v. The People*, not only contradicted their former decisions but ignored the cases of *Hopkins v. The Commonwealth*, *Shorter v. The People*, *Thompson v. Riggs*, and, we may add, the opinions of respectable courts everywhere. It may be thought that we can consider this case as upon an agreed statement of facts. This cannot be for two reasons. First, the transcript sent up by the clerk of the district court does not contain, nor does it pretend to contain the *facts*, but it does purport to contain the *evidence*, which consists of the testimony of witnesses. Second, Because the rulings and opinions of the district court cannot be reviewed in this manner; it can only be done by bill of exceptions. *Pomeroy's Lessee v. State Bank*, 1 Wall. 592. It is alleged as error that the verdict of the jury was informal and insufficient. The verdict was in these words: "We, the jury, find the defendant guilty." Under the indictment in this case the jury might have found the prisoner guilty of manslaughter, and it is urged that

they should have specified in their verdict of what offense they convicted him. We are referred, in support of this proposition, to the case of the *State v. Dowd*, 19 Conn. 387, and *McGee v. The State*, 8 Mo. 495. It will be found upon examination, however, that these decisions were given under peculiar statutes of those States. In Connecticut the statute prescribed that the jury, if they should find the defendant guilty, should ascertain in their verdict whether it be murder in the first or second degree. The court, in its opinion, states that this is a positive provision of the statute, without any exception or qualification. And so in Missouri the statute provided that, "Upon the trial of any indictment for any offense, where by law there may be conviction of different degrees of such offense, the jury, if they convict the defendant, shall specify in their verdict of what degree of offense they find the defendant guilty." These statutes seem to be imperative, and the courts of those States were compelled to yield obedience to them. We have no statute upon the subject, and our practice has conformed to the general practice of courts in those States where they have no peculiar statutes with reference to the matter.

Mr. Bishop, in his very excellent work on criminal procedure, vol. 2, sec. 627, says: "That a general verdict of guilty convicts the prisoner of all matters which are well charged against him in the indictment." So are the cases of *The People v. Marsh*, 6 Cal. 542; *Bond et al. v. The People*, 39 Ill. 26, and numerous others which might be cited. We are of the opinion that this verdict is sufficient in form. The prisoner made a motion in the court below for a new trial, on the ground, among other things, that the verdict was against the law and the evidence, and also because of newly-discovered evidence. This brings up the question as to whether there was sufficient evidence to sustain the verdict. It seems, from the evidence, that the prisoner and Robert Reynolds, both colored men, were at the cabin of Hamblin on the night of the affray, which resulted in his death. For what purpose they were there, is not disclosed. The evidence consisted mainly of the confessions of the prisoner;

some made immediately after his arrest, and some at different times while he was in prison previous to his trial. The first were made in the presence of Joseph Harper, a witness, who testified to them, and who says that the prisoner on being asked why he did such a horrible deed, and what he hit the deceased with, replied that he got mad and hit him with the stool he was sitting on, and knocked him down; that the deceased was likely to get up again, and he hit him with a chunk of wood and knocked him down again; that, in struggling round, Hamblin made such a fuss that *they* put a string around his neck and another around his arm, and hauled him off and put him in a shaft; that the prisoner struck the deceased two blows, and Reynolds struck him once, and that they dragged him to the shaft and put him in. The confessions made by the prisoner to Mr. Grimes, the sheriff, after he was confined in jail, vary in some respects from the foregoing. He admits having commenced the affray by hitting the deceased with the stool and the piece of wood, but says that Bob put the rope around his neck; that he remonstrated with him for so doing, and that Bob replied that it would make no difference, for he was dead anyhow. He also, in these conversations with the sheriff, admitted that he and Reynolds dragged the body to the shaft, and Reynolds threw it in; that Reynolds went back to the house, and he to a cabin below, where they remained until nearly morning, when they went together to the Childs' House at the foot of Guy Hill; that the dispute was between Hamblin and the prisoner about some blankets, and Bob had nothing to say until after the fight commenced. The prisoner also stated that Bob locked the door and threw the key away, describing the place where it was thrown.

Such were mainly the confessions made by the prisoner. The body of the deceased was found in a shaft as proven, some twenty or thirty yards from the house; when found, there was a rope tied tightly around the neck so as to be imbedded in the flesh; another rope, also, loosely drawn around the neck, and another around the wrist were dis-

covered ; his pockets were turned wrong side out ; there was a pool of blood near the door, and a stick was found colored with blood ; there were gashes on the head of the deceased, and the surgeon testified that they were made by blows sufficient to knock him down ; the key of the house was found in the place designated by the prisoner. The surgeon also testified that the death was caused by strangulation. Such were the main facts upon which the jury found the verdict of guilty, and the question is, whether upon this evidence the jury were warranted in their conclusion, or whether the verdict should be set aside, and a new trial awarded.

Murder is defined in our statute to be the unlawful killing of a human being in the peace of the people with malice aforethought, either express or implied. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, or where all the circumstances of the killing show an abandoned and malignant heart. These are statutory definitions (Laws of 1861, page 292) and are similar to the common law. We presume that if Reynolds and the prisoner had been tried together, there could have been but little question as to the correctness or justice of the verdict. We also presume that if the confession of the prisoner, as narrated by the witness Harper, stood alone, disconnected from that made to the witness Grimes, there could no lawyer be found, who would question it. In *Rex v. Shaw*, 6 Carr. & Payne, 480, the prisoner confessed that he and the deceased quarreled ; that the deceased struck him and the prisoner knocked him down ; he got up and the prisoner knocked him down again and kicked him, and then put a rope around his neck and dragged him into the ditch. This case only differs from the one at bar in this, that only two participated in the fight and the deceased struck the first blow, certainly under greater provocation than is proven to have existed in this case. "But," said PATTERSON, Justice, "if two persons fight,

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and one of them overpowers the other and knocks him down and then puts a rope around his neck and strangles him, that is murder. The act is so willful and deliberate that nothing can justify it." There can be no doubt, we think, that this proposition is correct, and we might cite many more cases of similar purport, if we did not deem it entirely unnecessary. Now the confessions made to Sheriff Grimes stand upon a basis a little different. In those statements the prisoner asserted that Reynolds put the rope around the neck of the deceased against his remonstrances. His statements, however, in regard to the rest of the affray are substantially the same as those related by the witness Harper. It was contended in argument that, although the prisoner commenced the affray, yet the act by which the killing was effected was performed by Reynolds, and therefore he and not the prisoner was the one guilty of murder. We do not believe such to be the law. If two persons combine to do an unlawful act and death ensue, it is considered by writers on criminal law and by the decisions of the courts to be murder as to both of the participants. Here the prisoner, without any provocation which appears in proof, with a stool and with a chunk of wood, knocked the deceased down twice, once at least hitting him on the head, and after his confederate Reynolds had tied the rope around his neck, the prisoner assisted to drag the body some forty or fifty yards to a place of concealment. If this was not murder on the part of the prisoner, we think it cannot be denied that he did stand by and "aid, abet and assist" in the perpetration of the crime. The principle is well stated in the case of *Brennan et al. v. The People*, 15 Ill. 511. The court say: "The prisoners may be guilty of murder; although they neither took part in the killing nor assented to any arrangement having for its object the death of Story. It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob Story, and that he was killed in the attempt to execute the common purpose."

The motion for a new trial was further made on the ground of newly-discovered evidence after the trial and ver-

dict, and was supported by the affidavit of Clara Brown. We cannot conceive that what she states in her affidavit could have made any possible difference in the result. Certainly none in favor of the prisoner. If any thing, it would have told against him, as exposing a motive on the part of these men in being at the cabin of Hamblin, from which the jury might well have inferred a malicious intent.

The prosecution might well have admitted every thing stated in the affidavit as true without any injury to its cause. We believe, therefore, on this whole record, that the prisoner, upon the law and evidence, is guilty of the murder of William Hamblin, and that the jury, in rendering a verdict of guilty, arrived at a correct conclusion.

The judgment of the district court is affirmed.

Affirmed.

A petition for rehearing was presented by counsel for the prisoner, and, at an adjourned session of the court in January following, the petition was denied.

Mr. Justice GORSLINE was not present at that session, and the opinion of the court was drawn up by

HALLETT, C. J. The plaintiff in error asks a rehearing in this cause, mainly upon the ground that the opinion of the court is erroneous upon the question of practice respecting exceptions to instructions given in the court below. This point was very fully considered in the opinion of the court, and we have re-examined it with such care and attention as we are able to command. It is urged that the authorities cited in the opinion of the court are not to be regarded in this territory, for the reason that, in the States from whence they are taken, it is the practice to charge juries orally, while our statute requires such charges to be reduced to writing. In the first place, it is to be observed that it was always the practice in civil cases, and in criminal cases where exceptions were allowed, to write down the part of the charge objected to, and the statute has simply changed the time for putting the charge into writing and

provided that the whole shall be written out, whether objected to or not. We do not perceive that the objection and exception to the ruling of the court, which was always necessary, is, by the statute, rendered unnecessary. The obvious intention of the statute was to prevent mistake or misapprehension respecting the language used by the court, by requiring that the charge should be put into writing, and there is nothing to show that it was intended that the instructions, when written down, should become part of the record. It is not provided that the instructions shall be authenticated in any way whatever, or that they shall be filed among the papers in the cause. It is true that the judge is required to signify his approval by writing the word "given" in the margin of the instructions, and his disapproval by the word "refused," but this is so obviously designed as a mark of distinction rather than of authentication, that we think it not necessary to comment upon it.

- We cannot lightly assume that it was intended to incorporate the instructions into the record without any authentication whatever. The mere filing of a paper in a cause is not alone sufficient to make it a part of the record. In *McKinney v. The People*, 2 Gilm. 551, the rule upon this point was stated as follows :

"In a criminal case, after the caption stating time and place of holding the court, the record should consist of the indictment as found by the grand jury, the arraignment of the accused, his plea, the impaneling of the traverse jury, their verdict, and the judgment of the court. This, in general, is all the record need state. If, during the progress of the prosecution, motions are made and overruled, the facts can be preserved by a special entry on the record, or by bill of exceptions. In one or the other of these ways it is necessary to preserve every fact that the prisoner may deem essential to his rights, and a fair and regular trial."

We believe this to be good law, although the same court seems to have adopted a different rule in *Falk v. The People*. According to this rule, instructions do not become a part of the record unless made so by bill of exceptions.

Again, the language of the statute of 1865, respecting exceptions in criminal cases, seems to leave no doubt as to the necessity of an exception upon every point reserved for the consideration of a court of review. That statute is as follows:

“In all cases in the district court where either party shall except to any ruling, decision or opinion of the court, and shall reduce such exception or exceptions to writing, it shall be the duty of the judge to allow the same, and to sign and seal the same. * * * And when such bill of exceptions is so allowed, and signed and sealed by the judge, * * * it shall thereupon be filed by the clerk, and shall become a part of the record in such cause.”

It will be noticed that the statute does not declare that the ruling of the court alone, however certified, shall become part of the record. It is only when such ruling is accompanied by an exception, and is properly certified, that it gains the legal quality necessary to its admission to the record. Bouvier defines an exception to be, “the statement in writing of the objection made by a party in a cause to a decision of the court on a point of law, which, in confirmation of its accuracy, is signed and sealed by the judge or court who made the decision.”

From this, it appears that three things are comprised in an exception; the ruling of the court, the objection thereto, and the authentication. The objection of the party appears to be quite as indispensable as either of the other qualities, and we know of no ground upon which it can be said to be unnecessary. It is one of the essential elements of an exception, and the exception cannot exist without it. In *Falk v. The People*, the supreme court of Illinois assumes that the record shows the instructions, which is the very point in controversy. How can the record show the instruction when the exception for which the statute calls, and which is the essential condition upon which they are to be entered of record, is wanting? For ourselves, we must continue to say that we cannot thus interpret the law. It is written that exceptions to the rulings of inferior courts shall be

entered of record, and shall be open for review in this court, and we cannot say otherwise, even if we would. What is here said will furnish an answer also to the suggestion, that the instructions being found in the bill of exceptions are the subject of judicial cognizance in this court. We have here the certificate of the judge who tried the cause as to these instructions, but in the absence of any exception to them we are not judicially informed of their character. The modern practice of putting all the exceptions taken throughout the whole course of a cause into a single bill has not changed the rule that each exception stands upon its own merit. The circumstance that a ruling to which no exception has been taken is incorporated in the same bill with another ruling to which an exception has been taken, cannot affect the status of the former. Each must stand or fall by itself. It was also urged that the judge of the district court should have entered exceptions in behalf of the accused, or, at all events, that it ought to be assumed that all exceptions were taken at the proper time. We are acquainted with the ancient maxim, adopted in the days when persons charged with crime were not allowed the assistance of counsel, which declares that a judge shall be counsel for the prisoner, but we doubt whether it has ever been carried so far as to require the judge to object to his own ruling. We may say, with Foster :

“In capital cases the court is so far of counsel with the prisoner that he should not suffer him to consent to any thing manifestly wrong, and to his own prejudice,” but this is not saying that the court is bound to object to every thing that is done in the progress of the cause. A proper respect for the maxim would doubtless restrain the judge from misapplying or misinterpreting the law. But if, after stating the law as judge, he should be required as counsel for the accused to state an objection to his ruling, he would appear to be in an exceedingly perplexing situation. One who is bound to lay down the law correctly, and immediately show himself wrong by stating a valid objection to it, is certainly in need of an ingenious mind. If a judge believes a ruling

to be erroneous he ought not to make it, and if he believes it to be correct, he cannot state a valid objection to it. The statute provides that the *party shall except* to the ruling of the court, which is sufficiently explicit and free from ambiguity. There are authorities also which hold strong language upon this point. In *Clem v. The Commonwealth*, 2 Metc. (Ky.) 10, which was a capital case we find the following language :

“It is insisted on behalf of the appellant that the circuit court committed errors to his prejudice in admitting important evidence against him. It does not appear from the record, however, that any exceptions were taken to any of the evidence offered by the Commonwealth and permitted to go to the jury, and for this reason, even if it appeared that improper evidence had been admitted upon the trial, the appellant could not avail himself of such error as a ground of reversal.”

So also in 1 Bishop's Crim. Law, § 843, it is said : “If the defendant permits illegal testimony to be given to the jury, as shown by his making no objection to it, he cannot afterward claim any privilege on account of its admission.” The rule is here stated with reference to testimony, but it is the same in respect to instructions, as we may learn from the case of *Hopkins v. Commonwealth*, cited in our opinion in this cause. If a superior court is required to assume that objection has been made to an instruction or to testimony upon a trial in an inferior court, or if a judge upon a trial of a capital cause is bound to interpose an objection when none is made by the prisoner, these authorities are strangely silent upon those points. Upon a careful examination of the opinion drawn up by our brother Gorsline, we are again compelled to express our concurrence therein, and we are constrained to add that we do so under a profound sense of the responsibility resting upon us, as the minister of the law, listening to the last appeal of a wretched man who is about to take his place upon the gallows.

In this connection we will briefly allude to the instructions given upon the trial below for the purpose of freeing

the case from any suspicion of illegality that may be cast upon it. We have not lost sight of the fact that these instructions are not before us in a way which will enable us to pronounce a judicial opinion upon them, but we desire to make some observations for the purpose of showing that the instructions are not, as has been claimed, wholly unsupported by the law. The case of *The People v. King*, 27 Cal. 507, was an indictment for murder, and upon the trial in the district court an instruction was given which, as will be seen, was substantially the same as the one of which complaint is made in the case at bar. We give the remarks of the court at length :

“It is next claimed that the court erred in giving the following instruction : ‘In the case that is now being submitted to you, there is no evidence on any points or matters given in proof which reduce the crime charged in the indictment to manslaughter ; if the defendant be found guilty, therefore, you cannot consider the question of manslaughter upon the evidence in this cause.’ This instruction is not a little obscure, and if it was given as represented in the transcript, it is quite possible that the jury may have found some difficulty in determining its exact meaning. The record does not contain the evidence, or any part thereof, and we cannot, therefore, read the instructions in the light of the testimony in view of which it was given, but are forced to determine its meaning by its own terms. If there was any evidence before the jury tending, however slightly, to reduce the homicide to the grade of manslaughter, this instruction was erroneous. If the expression ‘there is no evidence on any points or matters given in proof’ is to be understood as admitting that there were ‘points and matters given in proof’ which, if true, would reduce the offense to manslaughter, but declaring the evidence as to such points or matters to be insufficient to warrant the jury in finding them to be true, it was erroneous, because it assumed to pass upon the weight of evidence which, under our constitution, is left entirely to the jury, and in regard to which the judge, contrary to the rule of common law, is not

allowed to express an opinion. On the other hand, if there was a total absence of all testimony as to such facts and circumstances as would, under the law, reduce the offense from murder to manslaughter, and the instruction is to be understood as declaring such to be the case, then it was not erroneous, because judges, although not allowed to charge juries with respect to matters of fact, may state the testimony and declare the law (sec. 17, art. VI of the Constitution). At common law a judge is allowed to express his opinion as to the weight of evidence. *Commonwealth v. Child*, 10 Pick. 252. In this respect the constitutional provision referred to was intended to change the rule so as to leave the weight of the evidence entirely to the jury; but judges may still, as formerly, state what facts are in evidence and what are not; or in other words, they may state the evidence *pro* and *con.* in view of which the existence of certain facts is affirmed or denied, which includes the right to state to the jury, that there is no evidence as to particular facts or issues, when such is the case; counsel for defendant seems to have understood the judge as instructing the jury that there was no evidence as to facts, which, under the law, would reduce the offense charged to manslaughter, and to have excepted to the instruction upon that ground, so understood, there being no evidence of the character in question, the instruction was not erroneous."

So, also, in *The People v. Byrnes*, 30 Cal. 207, the court say:

"It is neither necessary nor proper for the court, on the trial of an indictment for murder, to give an extended or any definition of murder in the second degree, unless there is evidence in the case tending to prove that the crime was or may have been of that grade in the given instance. Instructions are always to be given with reference to the facts proved before the jury. * * * The circumstance that counsel conducted the defense on the theory of murder in the second degree, assuming that he did so, did not in itself make it necessary that the court should deal with the case in an aspect which it did not in fact present."

The constitution of the State of California, like our statute, restrains courts from charging juries respecting matters of fact, and therefore these decisions are in point. It is true that the constitution of that State expressly declares that the courts may state the testimony, but as our statute is silent upon that point, and courts were always, by the common-law practice, allowed to state the testimony, we may safely affirm that the law is the same in this territory. We learn from these decisions that it is not error to withdraw from the consideration of the jury a crime concerning which there is no evidence before them. Whether there is any evidence at all to prove a fact charged is always a question for the court, but the sufficiency of evidence to prove the facts charged must be determined by the jury. If, in a case of felonious homicide, the evidence shows the killing to have been deliberate and intentional, there is no question of manslaughter presented, and therefore no reason for submitting that question to the jury. To require the jury in such a case to pass upon the question of manslaughter would be as unreasonable and absurd as to instruct them respecting the crime of larceny. So in the case of the *State v. Mill*, 3 Nev. 444. The court instructed the jury that they must find the prisoner guilty of murder in the first or second degree or not guilty; thus taking from them the right to find the prisoner guilty of manslaughter, and the supreme court of that State say: "If it was proper, under such a state of facts, to charge the jury they might, in their discretion, find the prisoner guilty of manslaughter, it was equally proper to charge they might find him guilty of an assault to commit murder, or even guilty of a simple assault, for both of these are crimes of which a party under our statute may be convicted upon an indictment for murder; yet in a case where a party was beyond all question slain, and another party indicted for the murder, it would seem ridiculous to charge the jury that they might find the defendant guilty of a simple assault."

We agree, that if the evidence tends to prove a case of

manslaughter, or if, upon the evidence, there is any doubt whatever as to the grade of the crime, the question of manslaughter ought to be submitted to the jury; but when all the evidence tends to prove murder, if it proves any thing, it cannot be wrong to say to the jury that the only question before them is, whether the accused is guilty of that crime. It is true that in the case at bar the question of manslaughter was withdrawn from the consideration of the jury, but there was no evidence whatever tending to establish that crime. To adopt the language used in *The People v. Byrnes*: "We consider that all the evidence tended to prove murder * * * * , and it is certain that there is none having the slightest tendency to the contrary."

The evidence in this case shows that the deceased, after being twice knocked down upon the floor of his isolated cabin by the blows of the plaintiff in error, was strangled to death by the latter's companion in the terrible crime. The combat was commenced by the plaintiff in error, so far as we know, without provocation, and after he had reduced his victim to a condition of helplessness, the cause of death was applied by this man and his associate, or by his associate alone. The guilty pair then bore away the body of deceased and threw it into a neighboring mining shaft, and together fled from the scene of the tragedy. According to the statement of one witness, the prisoner protested against the act of Reynolds in tying the rope around the neck of deceased, but if the jury accepted this as true we cannot say that it tended to reduce the crime to manslaughter. The only effect of it would be to deny on the part of the prisoner any participation in the killing. The statute declares, that "in cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury upon the person killing. The killing must be the result of that sudden violent impulse of passion supposed to be irresistible. And again, the killing being proved, the burden of proving cir-

cumstances of mitigation, or to justify or excuse the homicide, will devolve on the accused unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide.”

With the law and the evidence in this case before us, we are unable to perceive that there was any question of manslaughter arising in the case. The accused must be guilty of murder if he is guilty of any thing, and we have already said that we entertain no doubt as to his guilt. We deplore the necessity which rests upon us to declare this conclusion and we would gladly avert the dreadful doom of the wretched man, who now invokes our aid, if it were possible to do so, but we have a duty to perform as officers of the law which cannot be controlled by any feeling of sympathy for the prisoner, and it is in the discharge of that duty that we now declare that the petition for rehearing must be denied.

Petition denied.

ARMOR v. FISK.

PLEADING — *performance of condition precedent.* In an action upon contract to pay two sums of money, the first, when a certain suit is defeated; the second, when the title to certain property is perfected, it is necessary to aver and prove performance of these conditions, or to excuse the failure. *But a condition impossible to be performed need not be noticed, and if, at the date of the contract, no suit was pending as set forth in the contract, the payee could not be required to show that he had defeated such suit, and he may recover the sum payable upon such condition, upon a count for an account stated.*

EVIDENCE of pendency of suit. Whether a suit was pending as described in the contract at the time therein mentioned, was provable by the records of the court in which it was alleged to be pending.

Appeal from District Court, Gilpin County.

FIRST count in the declaration was *indebitatus assumpsit*.

“For certain quartz lode mining claims, lode claims, gulch claims, quartz mill claims, water mill claims, mill claims, water power, water privilege, flumes, buildings, stamp mills, water mills, tools and machinery, more particularly described as follows, to wit: Mining claims number (1) one, (5) five and the undivided half of number (6) six, on the Fisk lode, east from discovery. Also, claims number (1) one, and (2) two, on the Gregory extension lode, number (1) one being the discovery claim, and running (200) two hundred feet from the upper or north-east end of said discovery claim along said lode south-west to a point below the base of a large rock, and about fourteen feet south-west of a certain shaft sunk on said claim, and known as the shaft of Charles W. Fisk. Also claim number (4) four, on the Simmons lode, adjoining the Black Hawk Mill Company's claim on the south-west end, and running thence south-west along said lode (100) one hundred feet. Also two gulch claims, commencing at or near the road in front of Davenport's saloon, and running down two hundred feet in the direction of the Gregory lode. All of the above-described property lying and being in Gregory mining district, county of Gilpin, and territory of Colorado. Also the mill claims, water power and flumes, situated therein, commencing at a point on North Clear creek below the old toll road gulch and twenty (20) feet below what is generally known as the old Newland Arastra bed, and running from said creek eight hundred and fifty (850) feet. Also all of the quartz mill, with all the tools, machinery and appurtenances of every description and kind thereunto belonging, situate on said water claims, and generally known as the Fisk mill property; and all the buildings and hereditaments on said claims, and situate in Enterprise Mining District, Gilpin county, Colorado territory.”

In the second count the property was differently described, but no special agreement was mentioned.

The money counts were added.

The defendant pleaded the general issue, payment and a set-off.

At the trial, Fisk proved a conveyance from himself to Armor of the property mentioned in the declaration, and also gave in evidence the following agreement :

“ ARMOR, JOHN }
and } Agreement.
FISK, CHAS. W. }

“ Know all men by these presents, that whereas, heretofore, to wit, on the 20th day of December, A. D. 1862, John Armor, of the county of Gilpin and territory of Colorado, made, executed and delivered to Charles W. Fisk, of the same place, his certain writing obligation (a bond), subscribed with his name and sealed with his seal, by which said bond the said John Armor bound and obligated himself to pay to the said Charles W. Fisk the penal sum of ten thousand dollars (\$10,000) in the event that the said Fisk, having performed the conditions imposed on him in said bond, and hereinafter set forth, the said Armor failed to make the said Fisk a good and valid deed to the undivided one-half interest in and to the property described in said bond, being the same that is hereinafter described and set forth ; the conditions to be performed by the said Fisk being, that the said Fisk should prosecute successfully against Dan. S. Parmalee, Benjamin Smith and others a certain suit or suits then pending, in which said suit or suits Parmalee, Smith and others claimed a portion of the property hereinafter described, and should, by the 20th day of December, A. D. 1863, legally clear the premises hereinafter described of all persons claiming or occupying the same, so that the said John Armor should have and enjoy the quiet and peaceable possession of all the property hereinafter described, so as to vest absolutely in the said Armor the title to all of said property both at law and in equity. Another condition to be performed by said Fisk was, that said was to pay over to the said John Armor all sums of money which the said Armor should pay, or cause to be paid, on behalf of the said Fisk (over and above the sum of fifty-two hundred dollars [\$5,200]) cash in hand, paid

by the said Armor to the said Fisk, in order to obtain a clear title and peaceable possession to any of said property, as well as all other sums of money which the said Armor shall advance to the said Charles W. Fisk, or pay out for the use and benefit of the said Fisk, as well as all indebtedness, by account or otherwise, by which the said Charles W. Fisk may be indebted to the said Armor, together with the interest at the rate of five per cent per month from the date of such indebtedness is created up to the 20th day of December, A. D. 1863; the property alluded to as aforesaid, lying, being and situated in the county of Gilpin and territory of Colorado, to wit: Mining claims No. (1) one, (5) five, and the undivided half claim No. (6) six on the Fisk lode, north-east from the discovery claim; also claims Nos. (1 and 2) one and two, on the Gregory extension lode (No. [1] one being the discovery claim), and running two hundred feet from the upper or north-east end of said discovery claim along said lode south-west to a point below the base of a large rock, and about fourteen feet south-west of a certain shaft sunk on said lode, and known as the shaft of Charles W. Fisk. Also claim No. (4) four on the Simmons lode, adjoining the Black Hawk Mill Company's claims on the south-west end, and running thence south-west along said lode one hundred feet; also two gulch claims, commencing at or near the road in front of Davenport's saloon, and running down two hundred feet in the direction of the Gregory lode; also the mill claim, water power and flume, situate thereon, commencing at a point on North Clear creek, below the old toll road gulch, and twenty feet below what is generally known as the old Newland Arastra bed, and running down said creek eight hundred and fifty feet; also all the quartz mill, with all the tools, machinery and appurtenances of every description and kind thereunto belonging, situated on said water claims, and generally known as the Fisk mill property; and whereas it is the desire of both the said Armor and the said Charles W. Fisk, that said property shall be sold by the said Armor, upon the conditions hereinafter set forth:

“Now, therefore, know all men by these presents, that I, John Armor, for and in consideration of the premises, as well as in consideration of the covenants and agreements of the said Charles W. Fisk, hereinafter set forth, do by these presents covenant and agree, to and with the said Charles W. Fisk, to use my best endeavors to sell the property aforesaid within the space of four months from the date hereof, and upon the sale thereof, to pay over to the said Fisk, as a consideration in full for all the interest he may have in said property, the sum of twenty thousand (\$20,000) dollars, less the amount, if any, that the said Fisk may be indebted to the said Armor at that time, provided always that the said Charles W. Fisk shall, on or before that time, have fulfilled all the conditions imposed on him in said bond, and hereinafter set forth; and the aforesaid Charles W. Fisk, for and in consideration of the premises, as well as in consideration of the aforesaid covenants and agreements of the said Armor, doth, by these presents, covenant and agree, to and with the said Armor, that the said Armor may, at all times, within the four months from this date, bargain, sell and convey said property to such person, and for such sum or sums of money as he, said Armor, shall deem fit and proper, and the said Fisk, upon the payment to him by the said Armor of the sum of twenty thousand (\$20,000) dollars, less the indebtedness of the said Fisk to the said Armor as aforesaid, hereby relinquishes forever all rights, title and interest, whether at law or in equity, to the property aforesaid, and agrees that the bond aforesaid shall be void and of no effect, and out of twenty thousand dollars to be paid by the said Armor, as aforesaid, the said Fisk hereby agrees that the said Armor may retain all sums of money which the said Armor shall have paid or caused to be paid, on behalf of said Fisk, to obtain a clear title and peaceable possession to any of said property, as well as all other sums of money which the said shall or may have advanced or paid out for the use and benefit of the said Fisk, as well as all indebtedness by bond, note, account or otherwise, by which the said Fisk may be indebted to the

said Armor, together with interest at the rate of five per cent per month on such indebtedness, from the time it was or is credited up to the time such settlement may be made.

“It is also agreed and understood that in the event said sale is not made by said Armor as aforesaid, this agreement is to be considered as canceled and of no effect. As witness our hands hereto subscribed, and our seals hereto affixed this 11th day of November, A. D. 1863.

(Seal.)

“JOHN ARMOR.

“CHARLES W. FISK.”

This agreement bore a certificate of acknowledgment from a notary public.

The plaintiff below also introduced a written instrument, as follows :

“BLACK HAWK, Colorado, *April 5, 1864.*

“I promise to pay to Charles W. Fisk two thousand eight hundred and twenty dollars, and also pay two thousand one hundred and eighty dollars, the amount of a note given by Charles W. Fisk to one John Shumer, about March 10th, 1864, being amount of principal and interest due on said note when the same shall become due, provided the said C. W. Fisk shall successfully defend a suit now pending in the district court of Gilpin county, wherein Benjamin F. Smith and Dan. S. Parmalee are plaintiffs, and Chas. W. Fisk is defendant, and shall obtain a writ of restitution from said court and be put in possession of a certain shaft on the Gregory extension lode (about the possession of which the suit is pending), and generally known as the shaft of said Fisk, and I also agree to pay all costs that may accrue upon said suit, or upon any suit for title to said property after the April term of said district court, leaving a balance due to C. W. Fisk on property John Armor purchased by me from him of five thousand dollars after the amounts mentioned above are paid ; said five thousand dollars (\$5,000) to be paid when the title to said property is all cleared, as mentioned in a certain bond from said Armor to

said Fisk, bearing date about December 20th, 1862, and also a certain agreement between said Armor and said Fisk, bearing date November 11th, A. D. 1863, and on record.

“JOHN ARMOR.”

The defendant below introduced a written instrument, as follows :

“Received, Black Hawk, Colorado, April 5th, 1864, of John Armor, ten thousand dollars (\$10,000) in part payment for my interest in certain property in Gilpin county, Colorado territory, which I agreed with said Armor, on November 11th, A. D. 1863, that he should sell, and for which interest I was to receive twenty thousand dollars (\$20,000) as payment in full as per said agreement. I have also received of said Armor his obligation to pay me two thousand eight hundred and twenty dollars (\$2,820) when I shall obtain a writ of restitution from the district court of Gilpin county to the possession of certain property on the Gregory extension lode, more fully described in said obligation and in the agreement above referred to ; and I have also received from the said Armor his obligation to pay a certain note given by me to John Shumer about March 10th, 1864, for two thousand dollars, due in three months from date, with interest at the rate of three per cent per month, upon which note said Armor is security. Now, if the said Armor shall pay the sum of two thousand eight hundred and twenty dollars (\$2,820), above specified, and also the amount of the note to Shumer when the same shall become due, which would be, in principal and interest, \$2,180, then there would be due to me, as balance in full of the twenty thousand dollars (\$20,000) above spoken of, five thousand dollars (\$5,000), to be paid according to the conditions of a certain bond given me by said Armor, December 20th, 1862, and also the conditions of a certain agreement made between said Armor and myself, on November 11th, 1863.

“CHAS. W. FISK.”

There was a large amount of evidence not referred to in the opinion of the court, and therefore it is not inserted here.

The cause was tried to the court without a jury, and judgment for the plaintiff for \$3,337, and costs.

Messrs. ROYLE & BUTLER, for appellant.

Mr. JOHN W. REMINE and Mr. E. T. WELLS, for appellee.

HALLETT, C. J. In the investigation of this case we have not found it necessary to consider all the objections to the record made by the appellant. The rights of the parties are established by the two papers of date April 5, 1864, and the agreement of November 11, 1863, to which reference is made in those papers, and we shall confine the discussion to those instruments. We learn from the agreement of November 11, 1863, that the appellee was jointly interested with the appellant in certain property described therein, which the latter held by deed from the former; if the appellant should sell the property he covenanted to pay to the appellee \$20,000, less any indebtedness of the appellee to him, and upon the condition that the appellee should successfully prosecute a certain suit or suits in which the property was involved, and "legally clear the premises hereinafter described of all persons claiming or occupying the same, so that the said John Armor should have and enjoy the quiet and peaceable possession of all the property hereinafter described, so as to vest absolutely in the said Armor the title to all of said property, both at law and in equity."

By the writings of April 5, 1864, it appears that the sale referred to in the agreement had been effected, and the agreement was modified in some important particulars. The appellee then acknowledged that he had received \$10,000 of the \$20,000 mentioned in the agreement, and the balance of \$10,000 was divided into two equal parts, and separate conditions attached to each of the parts. First, the sum of \$5,000 was payable "provided the said C. W. Fisk shall

successfully defend a suit now pending in the district court of Gilpin county wherein Benjamin F. Smith and Dan. S. Parmalee are plaintiffs and Chas. W. Fisk is defendant, and shall obtain a writ of restitution from said court and be put in possession of a certain shaft on the Gregory extension lode (about the possession of which the suit is pending), and generally known as the shaft of said Fisk."

Second, the sum of \$5,000 was payable "when the title to said property is all cleared, as mentioned in a certain bond from said Armor to said Fisk, bearing date about December 20, 1862, and also in a certain agreement between said Armor and said Fisk, bearing date November 11, 1863, and on record."

Appellant claims that this last clause is changed so as to include all the conditions specified in the agreement by the paper of April 5, 1864, signed by the appellee. It is true that this writing of the appellee states that the last \$5,000 is payable upon the conditions of the bond and agreement, and this standing alone would of course include all of those conditions, but the paper given by appellant mentions only the title to the property, and as he was the party upon whom the obligation to pay was placed, we may presume that he selected his language with care.

Again, the condition respecting the Smith and Parmalee suit, mentioned in the agreement, was made applicable to the first \$5,000 by the writings of April 5, and if the same condition was to be applied to the second sum of \$5,000 the purpose of dividing the sum of \$10,000 into two parts, as was done by those writings, is not apparent. It would seem, also, that the indebtedness and advances which occupied so large a space in the agreement of 1863, and was evidently the subject of much anxiety on the part of the appellant, had been extinguished before the writings of April 5 were drawn. The appellant makes no mention of it in the obligation signed by him, but he obliges himself to pay costs which should thereafter accrue in defending or securing the title to the property. This obligation to pay costs is not at all consistent with the notion that advances

previously made were yet in arrear. It is plain that the first \$5,000 was payable upon the successful issue of the Smith and Parmalee suit, and the second upon perfecting the title to the property in the appellant, and securing to him the possession thereof. The appellant, having doubts as to the soundness of the title to the property, retained \$10,000 of the purchase-money to secure himself against eventual loss. As the issue of the Smith and Parmalee suit, if favorable to the appellee, would in some measure demonstrate his right to the property, the appellant was willing to pay one-half the amount upon the successful termination of that controversy; the remaining one-half of the \$10,000 was to abide the result of a more comprehensive scrutiny of the title, with a view to supply defects therein if any should be found. Now here were acts to be done by the appellee before he could call upon the appellant for payment, and if it were possible to perform these acts, the appellee should have averred in his declaration and proved upon the trial performance, or an excuse for the non-performance of them. In *Campbell v. Jones*, 5 Term R. 570, Lord Kenyon says: "If one thing is to be done by a plaintiff, before his right of action accrues on the defendant's covenant, it should be averred in the declaration that that thing was done."

So, also, in 1 Chitty's Pl. 321, we find the doctrine laid down as follows:

"But when the consideration of the defendant's contract was executory, or his performance was to depend upon some act to be done or forborne by the plaintiff, or on some other event, the plaintiff must aver the fulfillment of such condition precedent, whether it were in the affirmative or negative, or to be performed or observed by him or by the defendant, or by any other person, or must show some excuse for the non-performance."

In the declaration in this cause we find only the common counts, and of course there is no averment of performance, or of excuse for the non-performance of the conditions precedent, mentioned in the writings of April 5, 1864, and

this upon the supposition that there is no inherent impossibility in performing those conditions is decisive of the question respecting their admissibility as evidence under the declaration. Our attention has been called to that numerous class of cases where, upon sale of goods, or performance of labor under special contract, the plaintiff, although unable to comply strictly with his contract, and therefore unable to support a special count upon it, has, nevertheless, been allowed to recover the value of his goods or services under common counts, and an attempt has been made to show that this case may stand upon the doctrine of those cases.

If the appellee had contracted to sell property to the appellant, and had conveyed the property, but not in the time or manner specified in his contract, and the appellant had accepted the property, the analogy between those cases and this case would be easily traced, and we should have no difficulty in applying the rule laid down in those cases. But the present is not like those cases. Here was property sold, and part of the purchase-money paid, the vendee, with the consent of the vendor, withholding the balance of the purchase-money until the title to the property should be established, which is a payment to be made upon condition and not the substantial performance of a contract. We conclude, therefore, that the writings of April 5, 1864, were not admissible under any count in the declaration, unless, indeed, the conditions mentioned in those writings were impossible of performance. As to the second of those conditions respecting the title, we cannot perceive any inherent impossibility in regard to its fulfillment, nor has any such impossibility been suggested. As to the first of those conditions respecting the Smith and Parmalee suit, it is said that there was no such suit pending in the district court of Gilpin county, at the date April 5, 1864, and if that fact appeared, it seems to us the condition would be impossible. If no suit existed, certainly the appellee could not resist successfully, nor could he obtain a writ of restitution therein. If the appellee had contracted to procure

Smith and Parmalee to institute a suit against him in the district court of Gilpin county, and to defeat the suit thus instituted, he would be held to his contract. But here the undertaking is to defeat a certain suit pending in a certain court, and if there is no suit pending in that court, it is like the case given in the books, of one who should contract to go to Rome in a day, inherently impossible to be performed.

In *Worsley v. Wood*, 5 Term R. 718, Lord Kenyon declares that, "If there be a condition precedent to do an impossible thing, the obligation becomes single."

And the same doctrine is found in Bacon's Abridgment, title Condition N. Under this rule, if the condition respecting the Smith and Parmalee suit was impossible, the first \$5,000, mentioned in the writings of April 5, was payable unconditionally and presently after the making of the instrument. In the words of Lord Kenyon, the obligation was single, and there was no condition to be performed or excused and no necessity for any averment of performance or of excuse for the non-performance. The sum of money, being payable absolutely, might be recovered upon a count for an account stated. However, we find in the record no evidence tending to show the non-existence of the Smith and Parmalee suit, and for the want of such evidence the judgment must be reversed. The fact, if it exists, was provable by the records of the court of the date April 5, 1864, and those records, or a copy thereof, should have been introduced. *Pitcher v. King*, 1 Carr & Kir. 655 (47 E. C. L. R. 655); 1 Greenl. Ev., § 507. It is not necessary to consider further the admissibility of the evidence given in the court below, nor is it necessary to express any opinion as to the weight of the evidence. In conclusion, we desire to express our satisfaction with the manner in which this case was prepared for hearing in this court. The abstracts, prepared by counsel for appellant, present the parts of the record to which the attention of the court is directed in a full and perspicuous manner, and thereby the labors of the court have been very much lightened. The duty of preparing abstracts of the record in this court is usually so imperfectly performed,

that the abstracts are of no service whatever to the members of the court. We hope that the commendable practice inaugurated by the counsel for appellant may be very generally observed.

The judgment of the district court is reversed and the cause is remanded for further proceedings.

Reversed.

BOARD OF COUNTY COMMISSIONERS OF ARAPAHOE CO.
v. KOONS et al.

CONSTRUCTION OF STATUTE—*meaning of the word "stationery."* Blanks used by a clerk of a district court are not stationery within the meaning of section 28, chapter 31, Revised Statutes, and the county is not liable for them.

Error to District Court, Arapahoe County.

THE statute (Rev. Stat. 172), so far as it relates to the subject considered, is as follows:

"SEC. 28. The board of commissioners of their respective counties shall, at the expense of the county, * * * provide suitable books and stationery for the use of each of the county officers of their county."

Mr. Justice EYSTER dissented.

Mr. V. D. MARKHAM, for plaintiff in error.

Mr. G. W. MILLER and Mr. S. E. BROWNE, for defendants in error.

GORSLINE, J. This case comes before us on an agreed statement of facts, and the only question to be determined is, whether the county is liable for blanks furnished to the clerk of the district court to be used in his office. The statute provides, that the several boards of county commissioners shall provide suitable books and stationery for the use of the county officers of their county. If these blanks,

used by the clerk of the district court, come within the definition and meaning of "stationery," then the judgment of the district court should be affirmed. Stationery is defined to be such articles as are usually sold by stationers, as paper, ink, quills and the like. We might go further and say that such blanks as are used by the public generally, as blank deeds, mortgages and the like, could well be included in the meaning of the term. It must be different, however, as to those blanks which are intended for and used only by one person in the county, for they are valueless to all others. Such blanks are not *usually* kept by stationers, for the public have no use for them. They are printed solely for the use of one person, and the public has no use for or interest in them. It is, doubtless, convenient, and facilitates business, for the clerk to have these blanks, but the question is, whether the law has provided that the county shall pay for them. We think it has not, and, therefore, that the judgment of the district court should be reversed. We are aware that the question has been decided differently by the supreme court of Illinois (*County of Knox v. Arms*, 22 Ill. 175), but we fail to see the force of the argument advanced by that court, unless the long practice of the court in auditing such bills of its clerks had sanctioned the construction which the court gave to the statute.

The judgment of the district court is reversed.

Reversed.

HOEHNE v. TRUGILLO.

RECORDS OF PROBATE COURTS. A mere minute or memorandum of a proceeding is not a record.

An entry in the following form: "Judgment given by default by order of the court," is not a judgment.

JUDGMENT — *what shall be regarded as final.* Where the court below has awarded execution, this court will entertain a writ of error to reverse the judgment, although the record of such judgment is defective.

JUDGMENT — *defective in form.* There may be error in the form or substance of a judgment, as well as in the proceedings preliminary to it.

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Error to Probate Court, Las Animas County.

Mr. W. F. STONE, for plaintiff in error.

Mr. G. W. PURKINS, for defendant in error.

HALLETT, C. J. The transcript of the record filed in this court contains informal memoranda of the proceedings of the probate court in the manner usually adopted by justices of the peace, together with copies of papers filed in that court. It is not in the form used by courts of record, and, indeed, is so unlike a record that it is difficult to apply that name to it. The statute gives to probate courts the character of courts of record, and declares that they shall be governed by the rules of practice and proceeding prescribed by law for district courts. In the words of Mr. Justice BLACKSTONE, "A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony ; which rolls are called the record of the court, and are of such high and super-eminent authority that their truth is not to be called in question."

In these days the parchment is discarded, but records still retain their character as a judicial memorial of "high and super-eminent authority." The importance of uniformity and perspicuity in the language of records was early appreciated, and great care was taken in selecting it. It is to be regretted that the same care has not always been observed, and that the familiar forms which have been sanctioned by long usage should be disregarded. The law overlooks many mistakes, omissions and ambiguities in records, when they do not affect the sense of the matter recorded, but we are not prepared to say that the approved forms in which the orders and judgments of courts are usually entered may be entirely ignored. A mere minute or memorandum of a proceeding is not a record. *Leveringe v. Dayton*, 4 Wash. C. C. 698.

And we have nothing more than memoranda in this transcript. For instance, the entry which is said to be a judg-

ment is as follows: "Judgment given by default by order of the court," following which is a statement that the plaintiff below filed a note of a certain amount.

There is no statement that any sum of money was recovered by one party from the other, or that any thing was considered or adjudged by the court, or indeed any thing that is essential to a judgment. And yet it seems that execution was issued out of the probate court against the property of the plaintiff in error to collect the amount for which this entry is supposed to stand as a judgment. And here we approach the consideration of the motion to dismiss the writ of error for want of a sufficient record. The rule which limits the appellate jurisdiction of this court to cases in which final judgment has been rendered is supposed to apply to this case, inasmuch as no judgment appears in the transcript, and yet, if we dismiss the writ, there appears to be nothing to prevent the defendant in error from obtaining another execution out of the probate court; in our judgment the rule referred to does not apply to cases of this kind, for the reason that the court of original jurisdiction has decided that final judgment has been rendered. It is true that we do not find any such opinion in express terms, but execution has been awarded by that court, which cannot be done except upon final judgment. There would be great hardship in denying to one whose property has been taken in execution the right to test the validity of the judgment upon which the execution issued. If the judgment is defective or void, that is the very fact which he wishes to establish in a court of errors in order to prevent his adversary from selling his property under it. There may be error in the form or substance of a judgment as well as in the proceedings preliminary to the judgment. *Martin v. Barnhardt*, 39 Ill. 12. The motion to dismiss must be denied, and from what we have said of the record it will be apparent that the judgment, such as it is, must be set aside and the cause remanded with directions to the probate court to permit the plaintiff in error to plead to the action. Even if the judgment was perfect in form, there is no record

preliminary to it, upon which it could stand. In the present condition of the probate courts we trust that counsel in this and other cases before those courts will make some effort to conform the records to the rules of practice by which such records are to be tested. The question respecting the right to change of venue will probably receive the attention of the legislative assembly at an early day, and therefore we think it not necessary to consider it.

The judgment is reversed with costs, and the cause remanded.

Reversed.

ERROR WILL LIE TO REVIEW what assumes to itself the force of a judgment, even though on the face of the record it may want the essentials of validity; *Skinner v. Beahodt*, 2 Colo. 387. In determining whether a decision is to be considered a judgment, or in the nature of a judgment, the court looks to the subject-matter of the decision, and to its resulting effects: *Corning v. Ryan*, 3 Colo. 582.

KURTZE v. McCORD.

JURISDICTION *of probate court to try appeals.* One who appeals from the judgment of a justice of the peace to a probate court, and goes to trial in the latter court without objection, cannot question its appellate jurisdiction.

TRIAL — *before the court.* If neither party demand a jury, a probate court may try an issue of fact without a jury.

Error to Probate Court, Jefferson County.

HALLETT, C. J., did not sit in this case.

Messrs. BROWNE & MECHLING, for plaintiff.

Mr. ALFRED SAYRE, for defendant.

GORSLINE, J. The defendant in error, John N. McCord, sued the plaintiff in error before a justice of the peace, and on the 3d day of April, 1865, recovered the sum of \$49.50 damages, and costs taxed at \$33.60. The defendant below then appealed to the probate court of Jefferson county, and filed his appeal bond. The appeal was tried at the June term of the probate court, and the defendant in error recovered a judgment for the sum of \$125.90 and costs of suit, to reverse which judgment this writ of error is brought. The principal errors assigned are, that the probate court had no appellate jurisdiction from justices of the peace, and that

the probate judge assessed the damages without the intervention of a jury. We think it unnecessary to discuss the question whether the law conferring appellate jurisdiction upon the probate courts has been repealed or not, for in this case the plaintiff in error not only submitted himself to the jurisdiction of the probate court, but by taking the appeal *thrust* himself into the jurisdiction. It cannot be, nor is it denied, but that the probate court had jurisdiction of the subject-matter, and by the parties voluntarily appearing and going to trial they waived all objections as to jurisdiction of the parties. *County of Randolph v. Ralls*, 18 Ill. 29. The cases referred to in the brief of the plaintiff in error are a class of cases where the court had no jurisdiction of the subject-matter, and are therefore unlike the one at bar. As to the other error assigned and above referred to, we fail to see upon what ground it is based. The statutes cited refer to cases where a default has been taken, and the cause is referred in some cases to the clerk, and in others to a jury to assess the damages. No such state of facts exist here, for the record shows that both parties appeared, and the cause was tried by the probate judge, as by law he could properly, neither party having demanded a jury. It was not an assessment of damages, but a trial of the merits on an issue made. There were some other errors assigned which were not argued, and which we suspect are not relied upon. The judgment of the probate court is affirmed, with costs.

Affirmed.

PROBATE COURT — APPELLATE JURISDICTION. — One who appeals from the judgment of a justice of the peace to a probate court, and goes to trial in the latter court without objection, cannot question its appellate jurisdiction: *Smith v. District Court*, 4 Colo. 237.

GOOD v. MARTIN.

PROMISSORY NOTE — *party indorsing at the time it is made, may become maker*

If a party put his name on the back of a note at the time it is made, as surety for the maker and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note.

BURDEN OF PROOF — *as to when note was indorsed. Prima facie.* One whose name is upon the back of a note is to be regarded as an indorser, and if

the plaintiff would charge him as maker, the burden of proof is upon him to show that the party to be charged signed his name at the time the note was made, as surety for the maker and for his accommodation, or that the indorser participated in the consideration. Where there was no express agreement between the parties, and the indorser did not participate in the consideration, and it does not appear that he wrote his name on the back of the note before it came to the hands of the payee, the evidence is not sufficient to sustain the verdict.

In order to charge the indorser of the note as maker, it was necessary to show specifically that he put his name upon the back of the note before it was delivered to the payee.

PRESUMPTION arising from indorsement at time note is made. If one put his name on the back of a note at the time it is made and make no statement of his intention in so doing, he is presumed to have done so as the surety of the maker and for his accommodation, and to give him credit with the payee.

WITNESS — competency of payee, in action against indorser, as maker. In an action by the assignee of a note against one whose name appears on the back of the note, charging him as maker, the payee of the note is a competent witness.

PRACTICE — pleadings not to be given to the jury. It is not good practice to allow the jury to take the declaration to their room when they retire to consider of their verdict.

Appeal from District Court, Arapahoe County.

Mr. Justice GORSLINE did not participate in the decision of this cause.

Messrs. J. BRIGHT SMITH & E. L. SMITH, for appellant.

Mr. S. E. BROWNE, for appellee.

HALLETT, C. J. The principal question presented in this record has been the subject of much judicial discussion in the courts of this country, resulting in a difference of opinion, which is exceedingly perplexing. All the courts agree that a liability is incurred by one who, being a stranger to a note, puts his name upon the back of it at the time it is made; but whether he should be regarded as maker, guarantor or indorser, is the point of difference. 2 Parsons' Notes and Bills, 119.

This difference of opinion arises only in cases in which the parties have omitted to express their contract, and have

left it to the law to imply a contract upon the naked signature appearing upon the back of the note. Because the signature is upon the back of the note, it is difficult to say that the party intended to become a maker, and because the signature was put upon the note at its inception, and before it gained the legal quality imparted to it by delivery, it is difficult to say that the party intended to assume the liability of indorser only.

We are glad to find that we have been relieved of the labor of deducing a rule from the mass of conflicting authority upon this point by the court which has revisory jurisdiction of our proceedings. The case of *Rey et al. v. Simpson*, 22 How. 341, was an action upon a promissory note against three parties, two of whom had indorsed the note at its inception, and the point under consideration was fully presented and passed upon by the court. "When a promissory note, made payable to a particular person or order, as in this case, is first indorsed by a third person, such third person is held to be an original promisor, guarantor or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. If he put his name on the back of the note at the time it was made, as surety for the maker and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. On the other hand, if his indorsement is subsequent to the making of the note, and he puts his name there at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as a guarantor. But, if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would be liable then only as a second indorser in the commercial sense, and, as such, would be clearly entitled to the privileges which belong to such indorsers."

And again, "They placed their names there at the incep-

tion of the note, not as a collateral undertaking, but as joint promisors with the maker, and are as much affected by the consideration paid by the plaintiff and as clearly liable in the character of original promisors as they would have been if they had signed their names under the name of the other defendant upon the inside of the instrument."

This is, undoubtedly, the law of this territory and of every other territory of the United States, notwithstanding a different rule may have been adopted in some of the States.

We learn from this case that, in order to charge one, whose name is upon the back of a note, as maker, it must appear that the name was placed upon the back of the note at its inception, and that parol evidence is admissible for the purpose of showing the circumstances attending the signing. *Prima facie*, one whose name is upon the back of a note is to be regarded as an indorser, and if the plaintiff, in an action upon the note, would charge him as maker, the burden of proof is upon him to show that the party to be charged signed his name at the time the note was made, in the language of *Rey v. Simpson*, "as surety for the maker and for his accommodation, to give him credit with the payee, or that he participated in the consideration for which the note was given." If there is evidence of an express agreement between the parties, of course that will control, but if the plaintiff relies upon the mere act of signing the note upon the back, unaccompanied by any agreement or declaration of intention, then it becomes important to know precisely when the signing took place.

The authorities are explicit upon the point that the signature must be attached at the time the note is made, in order to affect the signor with the liability of maker, by which we understand that the act must be done while the note is *in fieri*, yet in the hands of the maker, and before it has come to the hands of the payee.

If one put his name upon the back of a note while it is in the hands of the maker, from this act alone it may be presumed that he did so with intent to serve the maker by

becoming surety for him ; but if he put his name upon the back of the same note after it has passed into the hands of the payee, we cannot determine from this act alone whether he intended to serve the maker or the payee. Upon looking into the evidence in this cause, we do not find any thing tending to show an express agreement on the part of the appellant with any of the parties, nor does it appear that he shared in the consideration of the note. It seems that the appellee relied upon evidence tending to prove that appellant wrote his name upon the back of the note at its inception. The only witness called (Davidson, the payee of the note), testified that Cheney, Shepard, appellant and himself were present at the making of the note, and that the names were all on it, including, as we understand him, his own, at the time he delivered it to the appellee. We are not informed whether the appellant signed his name upon the back of the note before or after it came into the hands of Davidson, the payee, and, as we have seen, this is material. All the original parties to the note were present at the making of it, and for aught that appears the note may have been delivered to Davidson, and accepted by him, before the appellant became a party to it. If such were the fact, the work of creation was complete when it was delivered to the payee, and no one could become a maker by subsequently indorsing it in blank. It is true that the witness testifies that he would not deliver certain money until the appellant had indorsed a pre-existing note, but who were the parties to that note, and whether the note upon which the action was brought was given in renewal of the other, he does not state. We do not see that the testimony respecting the money is connected with the note here in suit. It is true, also, that he testifies that he cautioned the appellant against putting his name on the note, which shows that the appellant did not sign upon his request, but he also testifies that he was but the nominal payee, his name being inserted by mistake for that of the appellee. If the note was in the hands of Davidson at the time of the indorsement by appellant, the latter may have acted upon

the request of the appellee, or he may reasonably have believed that he was to stand between the payee and the appellee as second indorser. But, if he signed after the note was delivered to Davidson, a better reason for withholding from him the character of maker, is found in the fact that at the time he signed, the contract was fully completed, and it cannot be said that he participated in making it, or that the act of signing stands upon the consideration of the note. We hold that, in order to charge the appellant as maker of the note, it was necessary to show specifically that he put his name upon the back before it was delivered to the payee, and if this appear to be a rigid application of the rules laid down in *Rey v. Simpson*, we say as was said in *Clapp v. Rice*, 13 Gray, 403, that the doctrine which holds a party who has put his name upon the back of a note liable as maker, is somewhat anomalous, and is not to be extended beyond adjudged cases.

The counsel for appellant insists that, in testifying that he had no interest in the note, and that his name was inserted as payee by mistake, Davidson negatived the condition prescribed in the rule given by the supreme court, to the effect that appellant must have signed for the purpose of giving the makers, Cheney and Shephard, credit with the payee Davidson. As to this it is to be observed that the language of the supreme court is used for the purpose of indicating the possible motives which may have operated upon the mind of the party at the time he put his signature upon the back of the note, and is a statement of the presumption of the law rather than the subject of proof. If one put his name on the back of a note at the time it is made and make no statement of his intention in so doing, he is presumed to have done so as the surety of the maker and for his accommodation, and to give him credit with the payee. If it be said that this presumption is rebutted by the testimony of Davidson, it may be answered that his name was inserted as payee by mistake, the party who was beneficially interested being the appellee. If the appellant signed for the purpose of giving Cheney and Shephard credit with the

appellee, and his name was omitted from the note by mistake, Davidson being inserted in its stead, it will not be contended that the want of interest on the part of the latter would relieve the appellant of liability. Objection was made to the competency of Davidson as a witness, upon the ground that he as first indorser was liable to appellant as second indorser. As a recovery must be had against appellant as maker of the note, if at all, in this action we fail to perceive the force of the objection. Upon the point that the jury were allowed to take the declaration with them to their jury room, we think it necessary at this time only to say that it is a practice not to be sanctioned. The pleadings in a cause are for the consideration of the parties and the court and not for the jury. The court below should have granted a new trial because of the insufficiency of the evidence to charge the appellant as maker of the note and for this cause the judgment is reversed and the cause remanded for a new trial. *Reversed.*

PROMISSORY NOTE — INDORSEMENT BEFORE DELIVERY. — The indorser of a note before delivery to the payee, for the accommodation of the maker, and to give him credit with the payee, is liable as a joint maker of the note: *Best v. Hopple*, 3 Colo. 130; *Kiskadden v. Allen*, 7 Colo. 203. This doctrine is re-affirmed on a second appeal of the principal case: *Good v. Martin*, 2 Colo. 220.

HAX et al. v. LEIS.

PRACTICE — computation of time. In computing the time allowed by the district court for filing an appeal bond, the day on which the order was made is to be excluded.

Appeal bond must be filed within the time allowed by the district court.

Appeal from District Court, Arapahoe County.

Mr. G. W. PURKINS, for appellants.

Mr. S. E. BROWNE, for appellee.

GORSLINE, J. This is a motion by the appellee to dismiss the appeal for the reason that the appeal bond was not filed within the time limited by the district court. The order was made on the 18th day of December, that the bond

should be filed within thirty days. The bond was filed on the 18th day of January following. The rule in the computation of time is, that one day shall be included and one excluded, and the day on which an order is made, as in this case, is the one to be excluded. In computing the time by this rule, the thirty days expired on the 17th day of January, and the bond was therefore filed too late. The appeal must be dismissed with costs. *Dismissed.*

IN COMPUTING TIME allowed by the district court for filing an appeal bond, the day on which the order was made is to be excluded: *Evans v. Bowers*, 13 Colo. 514.

CRARY v. BARBER.

SERVICE OF PROCESS *must be shown by the record.* The record must show that the defendant was duly notified of the proceedings against him, or that he appeared in the district court.

SERVICE OF ATTACHMENT — how made. The statute regulating the service of writs of attachment requires the sheriff to read the writ to the defendant named therein, or to deliver to him a true copy thereof, and personal service cannot be obtained except in one of these ways.

In serving a writ of attachment a sheriff cannot substitute his own language for that of the writ, or cull from the writ such facts as he believes to be material for the information of the defendant, but the language of the writ must be used.

A return to a writ of attachment — That the name of the plaintiff, the amount claimed, and when and where the defendant was to answer the complaint of the plaintiff was read to the defendant, is not sufficient.

NOTICE BY PUBLICATION — what is sufficient. Where the statute requires that notice of the pendency of an attachment suit shall be published in a newspaper for four weeks, it is not sufficient to publish such notice for twenty days.

APPEARANCE for the purpose of objecting to the service of process. If a defendant file written objections to the manner of serving process and limit his appearance to the purpose of the motion, this is not a general appearance in the cause.

APPEARANCE — what amounts to. An order of court which sets out that the parties came by their attorneys, and on plaintiff's motion leave was granted to amend the sheriff's return and the declaration and the cause was continued, does not show a general appearance in the cause by the defendant.

Error to District Court, Gilpin County.

Mr. Justice GORSLINE did not participate in the decision.

Mr. E. T. WELLS, for plaintiff in error.

Messrs. JOHNSON & TELLER, for defendants in error.

HALLET, C. J. The motion to dismiss the writ of error has not been argued, and, perceiving no reason for allowing it, we proceed at once to consider the errors assigned. The plaintiff in error claims that he was not served with process or otherwise legally notified of the pendency of suit in the court below. If this is true, the judgment must be reversed, inasmuch as a court has not authority to render judgment without notice to the party to be charged thereby. Nor can we indulge in a presumption that the plaintiff in error was duly notified of the proceedings against him, or that he appeared in the district court in the absence of record evidence of that fact. *Rany et al. v. The Governor*, 4 Blackf. 2; *Anderson v. Brown*, 11 Mo. 638.

There were several writs issued out of the district court, all of which were returned *non inventus* as to the defendant named therein except one, to which the sheriff returned, that the defendant had accepted service and subsequently modified his return as follows: "I do further return that the service made on said defendant, Beebe D. Crary, was made by reading to said Beebe D. Crary the name of the plaintiff in said writ and the amount claimed, and when and where the said defendant was to answer the complaint of the plaintiff."

The statute regulating the service of writs of attachment requires the sheriff to read the writ to the defendant named therein, or to deliver to him a true copy thereof, and it is not contended that personal service can be obtained except in one of these ways. It is said, however, that the sheriff complied with the statute substantially by reading to the plaintiff in error the material facts contained in the writ, but we cannot agree to this. The sheriff said nothing to the plaintiff in error of the ground upon which the attachment issued, the filing of the affidavit and bond and other facts set forth in the writ. But if the contents of the writ had

been fully stated to the plaintiff in error, the language of the writ must have been used or the service would not be effectual. The law prescribes the form of the writ, and commands the sheriff to read it, or furnish a copy of it, and this duty must be faithfully performed. We cannot permit a sheriff to substitute his own language for that of the writ, or to cull from the writ such facts as he believes to be material for the information of the defendant named therein and communicate them to him. The law provides for communicating to the defendant in the writ the language of the writ and the whole of it, trusting to his intelligence to comprehend its meaning, and without this there is no service. The principle upon which this point must be decided has been frequently recognized by the courts, and we do not think it necessary to discuss it at length. *Maher v. Bull*, 26 Ill. 348; *Chickering v. Failes*, id. 519; *Halsey v. Hurd et al.*, 6 McLean, 14.

A notice of the pendency of the suit was published in a newspaper for twenty days, but as the statute requires such notices to be published for four weeks, it was not claimed upon the argument that such publication was in any way effectual.

The transcript of the record contains a motion filed in the district court by the plaintiff in error, which probably ought not to be noticed, since it has not been preserved in the record by bill of exceptions or otherwise. *Pomeroy's Lessee v. Bank of Indiana*, 1 Wal. (U. S.) 592; *McDonald v. Arnout*, 14 Ill. 58; *Douglas v. Park et al.*, 43 id. 146.

If, however, it is claimed that we have cognizance of it, we do not perceive that by filing written objections to the manner of serving the process, the plaintiff in error entered his appearance to the action, especially as he limited his appearance to the purpose of the motion. *Malcolm v. Rogers*, 1 Cow. 1; *Nye v. Liscomb*, 21 Pick. 263.

There is an entry in the record as follows :

“This day came the said parties by their attorneys, and on motion of plaintiff, it is considered by the court that the sheriff have leave to amend his return on the writ in this

cause, and that said plaintiff have leave to amend his declaration, and that this cause stand continued to the next term of this court."

The question is presented whether such an appearance by the plaintiff in error is shown in this order, as warranted the court in entering judgment against him. It seems that the several orders, here incorporated in one, were made at the instance of the defendant in error. The plaintiff in error, although present at the time the order was entered, asked no relief, but remained a silent spectator of the proceedings. We may say that he assented to what was done upon the motion of the plaintiff below, to wit: the amendment of the declaration and the sheriff's return, and the continuance of the cause; but is there any thing in this showing an intention to submit himself to the jurisdiction of the court? We think not. For aught that appears, he may have intended to object to the regularity of the proceedings, if his adversary should take action prejudicial to him. There is nothing to show his intention, and if we are left to conjecture his object in going there, it is quite as reasonable to suppose that he was there for the purpose of objecting to the insufficient return of the sheriff, as for any other purpose. We do not doubt that a party may submit his person to the jurisdiction of a court, and thus bring himself completely within its power. But such submission is not effected by entering the court room merely and witnessing the proceedings of the court. It may be effected by engaging in the controversy with his adversary, opposing him in the forum with the weapons known to the law, but not by unresisting silence and acquiescence merely. We are aware, that it has been held, that an appearance for the purpose of making a motion will be regarded as a full appearance to the action, unless the mover limits his appearance to the purpose for which he is then in court. It will be seen that such cases are distinguishable from this, inasmuch as in those cases the parties who were held to have entered an appearance were participating in the proceedings and invoking the aid of the court, while here the plaintiff in error asked nothing and

did nothing. If one enter the field as a combatant, we may fairly conclude that he was duly notified of the conflict, and fully prepared for it when he came upon the ground. If he stand by calmly awaiting the attack of his adversary, no such conclusion is deducible from his conduct. The voluntary appearance of a party to an action is undoubtedly sufficient to enable a court to proceed to judgment against him according to its recognized methods, but in every case the fact of such appearance ought to be clearly established. The right of every defendant to his day in court is inviolable, and in every case it ought clearly to appear that he has enjoyed it. We find in this record nothing to show that the plaintiff in error was served with process, or that he entered an appearance to the action in the district court, and therefore the judgment of that court is reversed, with costs, and this cause is remanded for further proceedings.

Reversed.

GENERAL APPEARANCE, WHAT CONSTITUTES. — An appearance upon a motion confined to the single object of enforcing a statutory right (as a motion to dismiss an appeal, though not special in form, cannot be considered a general appearance and consequent waiver of that right: *Law v. Nelson*, 14 Colo. 412. An order of court granting a continuance without any objection does not amount to a general appearance by a party who did not otherwise appear, and who did not move the continuance: *Tiptey v. Deane*, 3 Colo. 25.

SMITH v. SALOMON.

SURVIVOR — *may sue alone upon joint demand.* The right of a survivor to sue without joining with the representative of his deceased co-obligee is not limited to cases of partnership.

ACTION — *causes of that may be joined.* Demands due to a plaintiff in his own right and as survivor of another, may be joined.

DEMURRER *too large.* Whether a demurrer is general or special, if it go to the whole declaration and there be one good count, it must be overruled.

Error to Probate Court, Arapahoe County.

Mr. Justice GORSLINE did not participate in the decision of this cause.

Messrs. S. E. BROWNE, ALFRED SAYRE & E. L. SMITH, for plaintiff in error.

Messrs. CHARLES & ELBERT, for defendant in error.

HALLETT, C. J. In three counts of his declaration the plaintiff in error set out causes of action which accrued to himself and Crocker in the life-time of Crocker, and in three other counts he set out causes of action which accrued to himself only. Counsel for defendant in error admit that this was no misjoinder, but say that according to *Jell v. Douglas*, 4 B. & Ald. 374, the plaintiff should have shown himself to be the surviving partner of Crocker. The rule that a surviving partner shall declare himself to be such in an action upon a demand due the partnership, appears to be well established, but it is to be observed that the right of a survivor to sue alone without joining the representative of the deceased is not limited to cases of partnership.

“When one or more of several obligees, covenantees, partners, or others, having a joint legal interest in the contract, dies, the action must be brought in the name of the survivor.” 1 Chitty’s Pl. 19.

If the plaintiff and Crocker, although not partners, were jointly interested in the sum to be recovered, the plaintiff may maintain his action for this and other demands accruing to himself alone. *Vandenheuvel v. Storrs*, 3 Conn. 203; *Slipper v. Stidstone*, 5 Term. R. 493.

Again, the counts upon indebtedness due the plaintiff alone were certainly good, and as the demurrer was to the whole declaration, it should have been overruled for that reason. Whether a demurrer is general or special, if it go to the whole declaration and there be one good count, it must be overruled. 1 Chitty’s Pl. 664.

The judgment of the probate court is reversed, and the cause is remanded for further proceedings.

Reversed.

DOSS v. CRAIG.

UNLAWFUL DETAINER — *demand for possession*. In an action for unlawful detainer under section 5, chapter 83, Revised Statutes, 833, the plaintiff must aver and prove a demand in writing for possession of the premises which he seeks to recover.

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The omission to make such demand is not cured by plea of title in defendant nor by verdict.

Error to Probate Court, Pueblo County.

THE information was filed by Craig in the probate court of Huerfano county and thence removed to Pueblo county by change of venue. Complainant alleged that he was the owner of certain agricultural lands in the county of Huerfano, and that he was in possession of them on the 1st day of February, 1866, at which time he let and demised the same to plaintiff in error for and during the period and term of one growing season or year, which period and term expired on the 1st February, 1867. He further alleged that plaintiff in error held over and detained the said lands, but nothing was averred as to a demand in writing or otherwise. A demurrer to the information was overruled, and defendant below pleaded the general issue and title in himself, upon which issues were joined. At the trial, defendant below asked the court to instruct the jury that "if they believed from the evidence that the defendant did not enter upon the premises alleged in bad faith, and that no notice or demand in writing to quit the premises alleged in plaintiff's complaint, and to deliver the premises and possession thereof to plaintiff, his agent or attorney, or any one for him, was made, in writing, of the defendant, his agent, or any one for him, by the plaintiff, his agent or attorney, or any one for him, they will find for defendant," which being refused, defendant excepted.

Mr. A. A. BRADFORD, for plaintiff in error.

Mr. W. F. STONE, for defendant in error.

EYSTER, J. (after stating the facts). In order to maintain a suit under the act it is absolutely and essentially necessary that the plaintiff shall have first made a demand in writing for the delivery of the premises in question. Until this is done he can have no relief under the statute. This being the law, it was the duty of the plaintiff, if such demand was

made, to set it out in his petition as a substantial fact, as required in section 11 of the act. He does not make any such averment in his petition, and of it the defendant complains. It was contended by the defendant in error that the defendant's plea of title in himself was a waiver of any such right to a written demand for the possession of the premises. This is not the law in this case. A party may, by a plea of title in himself, waive a right to notice of the determination of a tenancy, but in this proceeding a demand in writing for the possession of the premises in controversy is widely different from a notice to terminate a tenancy. It was intended by the legislature by such notice to give the defendant an opportunity to surrender the possession and avoid expensive litigation. It is analogous to the demand required in replevin, and as it relates to the possession of lands, the legislature made it more formal, and provided that it must be in writing. Time is not material, it may be made a month or a day before action brought, but it must be made and it must be in writing. A demand, formal according to all of the requirements of the law, and set out in writing, if read to the party, is not sufficient. It must be made in writing and left with the party or it is no demand. 24 Minor, 192. A party cannot be guilty of wrongful detainer until after this demand has been made upon him. Nor was it cured by the verdict. It is of so important a character in this proceeding that no judgment could be rightly rendered against defendant unless it was alleged in the petition, or the absence of it expressly waived. The judgment of the court below is reversed.

Reversed.

REYNOLDS v. THE PEOPLE.

CONSTITUTIONAL LAW. It seems that paragraph 17, section 8, article 1 of the constitution of the United States is not applicable to the territories.

POWERS of the federal and territorial governments. The fact that the general government has legislative authority in the territory tends not to diminish or displace the authority of the territorial government but to establish it.

MILITARY RESERVATION — *laws of territory operate within.* An indictment and conviction under chapter 53, Revised Statutes, for selling spirituous liquor without license, at and within the military reservation of Fort Lyon, is good.

Error to District Court, Pueblo County.

Mr. Justice GORSLINE did not participate in the decision of this cause.

Mr. H. C. THATCHER, for plaintiff in error.

Mr. W. F. STONE, District Attorney, third district, for defendant in error.

HALLETT, C. J. The plaintiff in error was found guilty of a violation of the license law in respect to selling spirituous liquors. The sale was made at and within the military reservation known as Fort Lyon, and it is claimed that the conviction is erroneous upon the ground that the law under which it was had was not, at the time of the sale, operative within that reservation. This theory is founded upon the seventeenth paragraph of section eight, article one of the constitution, by which congress is invested with exclusive legislative authority "over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings."

In terms, this clause refers to places purchased by the consent of the legislature of a State, and therefore within a State, and we are not aware of any instance in which it has been applied to a place not within the limits of a State. In *United States v. Bevan*, 3 Wheat. 388, the court say of this clause, "It is observable that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the States."

Again, it has been expressly decided that a place, although within a State, is not subject to the legislation of congress under this clause, unless jurisdiction has been ceded by the legislature of the State in which it is situated

The People v. Godfrey, 17 Johns. 226; *Clay v. The State*, 4 Kan. 49.

It seems that this clause of the constitution has no application to the territories. 2 Story on Con., § 1224, *et seq.*; 2 Curtis' History of Constitution, 340.

Upon the general proposition, however, that congress has legislative authority in the territory, no doubt can be entertained. When we consider that the territorial government was established by act of congress, we are ready to concede the jurisdiction of the federal government.

Upon authority, also, the point is not to be questioned. *American Insurance Company v. Canter*, 1 Peters, 511; *Leitensdorfer v. Webb*, 20 How. 181.

In the case of *The American Insurance Co. v. Canter*, it is said that, "in legislating for them (the territories), congress exercises the combined powers of the general and of State government."

The power of congress over a territory is exerted in establishing a government to which is delegated authority to legislate upon all rightful subjects. As we had occasion to remark in the case of *Franklin v. U. S.*, *ante*, 35: "Usually all restrictions upon the powers of a territorial government are found in the organic law by which it is established, but sometimes, as in the law punishing bigamy in the territories, and the law prohibiting slavery and some other acts, this rule has not been followed." The body politic thus created is not a sovereignty but an emanation of federal power, standing upon and subordinate to the authority of the general government. Itself, the creature of the federal government, a territory cannot transcend the power of its superior, nor can the authority of the territory be arrayed against that of the general government. There can be no real conflict between them unless the territory, like the gourd in the fable, which disdained its vine, should attempt to cut down the parent stem upon which it stands. The power of the general government, descending upon the territorial government, is thence diffused by the latter, and there is no question of pre-eminence presented. Every act

of the legislative assembly derives its legal force and validity from the organic act, and is subject to disapproval by congress. Indeed, an act of the territorial assembly cannot run into any place of which the federal government has not jurisdiction, for the obvious reason that it proceeds in virtue of the will and power of the latter. We perceive, therefore, that the fact that the general government has legislative authority in the territory tends not to diminish or displace the authority of the territorial government but to establish it. And, as to Fort Lyon, if the general government had no authority there, then, indeed, would the act of assembly be ineffectual in that place; but the general government had full and complete jurisdiction in that place, in virtue of which the territorial act gained force and effect there as well as elsewhere in the territory. This doctrine is not opposed to those considerations which induced the framers of the constitution to give to the general government exclusive control of forts, arsenals, etc., within the several States. If the territorial assembly should attempt to interfere with the functions of the general government in any such place, the act of interference would probably conflict with some act of congress, or it could be made ineffectual by the disapproval of congress.

It is not contended that the legislative assembly was without authority to enact the law upon which the conviction in this cause is based, and we think that law was in force in the reservation of Fort Lyon as well as elsewhere in the territory at the time of the sale by the plaintiff in error.

The judgment of the district court is affirmed, with costs.
Affirmed.

WESTERN UNION TELEGRAPH COMPANY v. GRAHAM.

DISMISSING WRIT OF ERROR—effect. If plaintiff voluntarily dismiss his writ when his cause is regularly before the court, this will operate to affirm the judgment of the court below.

If the writ be dismissed for irregularity therein no such effect will follow.

Where a writ was dismissed for want of a cost bond a new writ may be prosecuted in the same cause.

BOND — *execution of by corporation.* The bond of a corporation was executed by an attorney in fact appointed by the president, pursuant to a resolution of the executive committee of the corporation. Upon motion to vacate the order allowing supersedeas, *held*, that the bond was well executed.

Error to Arapahoe District Court.

UPON motion to vacate order allowing supersedeas and to dismiss the writ of error.

Messrs. CHARLES & ELBERT, in support of the motion.

Mr. ALFRED SAYRE, *contra*.

The chief justice did not sit at the hearing.

BELFORD, J. Two points are presented, on which it is claimed that this motion to dismiss the writ of error should be sustained. First, that a former writ of error was sued out in this case, and voluntarily dismissed by the plaintiff in error. It is conceded in the argument that the cause of the dismissal of the first writ of error was the failure of appellant to file a cost bond. The statute provides, section 14, page 153, that in all actions in law and equity when the plaintiff or person for whose use an action is to be commenced shall not be a resident of this territory, the person for whose use such action shall be commenced, shall, before he institutes such suit, file, etc., with the clerk, etc., a bond for costs, and on failure so to do, the cause shall be dismissed. If no action had been taken by the plaintiff in error in reference to the dismissal, it is clear that the court, on motion of the defendant in error, would have struck the cause from the docket.

In the case of *Hax v. Leis*, *post*, 187, where the same principle was to some extent involved, we held, that to make a dismissal of an appeal operate as a bar to a subsequent appeal or writ of error, the appeal must have been dismissed, not for a defective record or insufficient bond or the like, but for a failure to prosecute the appeal after it had been regularly

and properly in the supreme court. A writ of error is a new suit, and before it can be prosecuted, if the plaintiff in error is a non-resident, he must file a cost bond. If he fails to do so, he has no standing in court; his case cannot be heard on the merits, if objection be made. It is not regularly and properly in court, and by dismissal for a failure to comply with the required conditions on which it can be alone prosecuted, it cannot act as an affirmance of the judgment below, or as a bar to a subsequent writ of error. When a dismissal operates as a bar to subsequent proceedings, the cause dismissed must have been in the appellate court regularly and properly in a position to have been heard upon its merits. And being in this position, if the party fails to prosecute his cause in the appellate tribunal, and the same is dismissed, he must abide the consequences, whatever these may be, and cannot be heard at another time. It may be urged, that in allowing a party who has dismissed one writ of error to sue out another we give encouragement to a loose and careless practice. This may be true, but to adopt any other rule would be attended with the most serious and hurtful consequences to the rights of litigants. 1 Duer, 252; *Korth v. Light*, 15 Cal. 326; *United States v. Pacheco*, 20 How. 263. The second ground assigned for the motion is, that the bond or bonds, for there are two, are defective and insufficient. The first bond and the one on which the writ of error was had, and the supersedeas allowed, purports to be executed by the Western Union Telegraph Company, by Alfred Brewer, its attorney in fact. It is objected that there is no sufficient evidence before this court, showing that Alfred Brewer was authorized to execute this bond. The bond bears date June 30, 1869, and was filed and approved the same day. It further appears from an exhibit in the case, that at a meeting of the executive committee of the board of directors of the Western Union Telegraph Company, held at the principal office of the company in the city of New York, on the 22d day of May, 1869, a resolution was unanimously adopted by said executive committee, authorizing the president of the company and directing him

to make, execute and deliver to Alfred Brewer, of Denver, in Colorado territory, a sufficient power of attorney, in the name and under the seal of the company, authorizing said Brewer, in the name and for the benefit of the company, to execute and deliver any bond, undertaking, security or stipulation in writing, being provided for or required by the laws of Colorado, which it may be necessary to make or give upon the institution or in the prosecution or defense of any and all suits, etc., wherein the telegraph company is a party, which may be now or hereafter brought, etc., in any court of Colorado territory. It further appears from a copy of the by-laws of said company, filed with the bond, that the executive committee shall have the power of the board of directors of the corporation in the management of the business of the company.

Pursuant to the resolution above referred to, the president of the company executed a power of attorney, authorizing Mr. Brewer to make the bond in question, and under and by virtue of such power of attorney, which is filed in the case, the bond was executed. Does this evidence show the consent of the company to Mr. Brewer to execute the bond? We think it does. The evidence, in part, is a transcript of the record of the corporation, and, by that record, the corporation will and must be bound. Even if the facts were different than they appear on the face of the record, that recital must be conclusive on the company. It may be said as to all corporations created by special statutes, that, in the statute of incorporation, either expressed therein, or by reference to the more general statutes respecting incorporations of that character or use, they have an authority and capacity granted therein to establish such rules and regulations as shall be necessary for the well ordering of the affairs thereof. We are, therefore, to look at their rules and their mode of doing business, of well ordering their affairs, which they themselves have adopted, and if they have particularly, or by the rules established, neglected or dispensed with any precautions which, at common law, were deemed essential to the security of the aggregate cor-

porations, if there is sufficient evidence of a common consent, or a just and corporate act, they must be considered as liable when individuals would be injured or deprived of their remedy if any other construction of the doings of the corporation were adopted. While it is true that no individual can represent the corporation in their aggregate capacity, but, in consequence of their consent, still they have powers given them to order their affairs and to appoint and employ agents by votes, or in such other manner as the corporation, by their by-laws, may direct. *Hayden et al. v. Middlesex Turnpike Co.*, 10 Mass. 403; 404. In the case of *The American Insurance v. Oakley et al.*, 9 Paige, 496, it was held by Chancellor WALWORTH that a corporation may be bound by the acts of its agents, although such acts have not been authorized by a deed or power in writing under its corporate seal, or even by a written instrument not under seal, except in cases when, by the statute of frauds or otherwise, the contract, if made by a natural person, must be reduced to writing to be valid. And again he says: "When the president of a corporation authorizes an attorney or solicitor to prosecute or defend a suit, or to commence any legal proceedings in which the corporation is interested, the attorney or solicitor will be authorized to appear for the corporation, and such corporation will be bound by the acts of their attorney, and if the president exceed his authority in retaining such attorney or solicitor, the corporation must look to him for any damages sustained in consequence of such unauthorized act." It is not necessary to multiply the authorities on this point. Under the decision above referred to, how does Brewer stand? As the attorney of the corporation, clothed with the power to prosecute this suit, and to do all things needful for its prosecution; and if the minutes of the corporation were less clear than they are on this subject, still, under the power of attorney executed by the president of the corporation, he would have the authority to execute the bond; and, when executed by him pursuant to such warrant of attorney, it would bind the corporation.

I have not deemed it advisable to discuss the objections made to the second bond, for the reason that, if the first bond is sufficient (and such we adjudge it to be), the supersedeas could not be overruled. Besides, the second bond, if worth any thing, inures solely to the benefit of the defendant in error, and he certainly can have no especial desire to lessen and diminish the number or character of the securities now at his command.

The motion to vacate the supersedeas and dismiss the writ of error will be denied. *Motion denied.*

WRIT OF ERROR IN COMMENCEMENT OF NEW SUIT: *Webster v. Goff*, 8 Colo. 473.
COST BOND MUST BE FILED. — If an action be commenced or a writ of error sued out without filing a cost bond, the court shall on motion dismiss it: *Edgar G. & S. M. Co. v. Taylor*, 10 Colo. 112. The language of the statute is unequivocal, and leaves nothing to the discretion of the court: *Pitney v. Cady*, 3 Colo. 221.

HAX et al. v. LEIS.

PRACTICE — *former adjudication must be pleaded.* Upon motion to dismiss the writ of error, this court cannot determine that the judgment was affirmed on appeal. The former adjudication should be pleaded.

APPEAL — *effect of dismissal upon the judgment.* If an appeal is dismissed for the reason that the appeal bond was not filed within the time fixed by the district court, this will not operate to affirm the judgment, and a writ of error may be prosecuted to reverse the same judgment.

Error to District Court, Arapahoe County.

UPON motion to dismiss the writ of error.

Mr. S. E. BROWNE, in support of the motion.

Messrs. CHARLES & ELBERT, contra.

BELFORD, J. The motion made in this case by the defendant, to dismiss the writ of error, has been carefully considered, and we have reached the conclusion that the same cannot be entertained. The ground upon which this motion rests is, that at the July term of the supreme court, A. D. 1869, this cause was pending in this court on appeal. That, on the thirteenth day of that month, the court, on motion of George Leis, dismissed the appeal, and made the following entry of the order on the journal: "It is ordered by the

court that the appeal herein be dismissed without day, and that said appellee recover of and from the said appellants the sum of dollars and cents for his costs and charges paid out and expended in his defense in this behalf," etc. It is claimed, that the action of the supreme court in dismissing said appeal operated as a bar to any subsequent proceeding, either by appeal or writ of error. That the dismissal was tantamount to an adjudication on the merits and that the doctrine of *res adjudicata* must obtain. If this objection was tenable and the dismissal entitled to be regarded as a bar to subsequent proceedings, and did amount to an affirmance of the judgment below, still it is not raised in the proper way. It must be done by plea and not by motion. We are not at liberty to presume that an appeal was taken and dismissed. True, the fact could be ascertained by an inspection of the record, but the proper way to secure an examination of the record, and to take advantage of the facts recited in it, is to plead the judgment previously rendered and to use the record as evidence of it. The fact that an appeal had been taken and dismissed is an issuable fact, one capable of being affirmed on the one side and denied on the other. It is a rule universally recognized by and practiced upon in the courts below, that a party, claiming advantage of a former adjudication, must specially plead it. We do not know of a case where a different practice has been sanctioned or permitted. But we do not desire to rest our decision on this ground alone.

The courts of this country have had repeated occasions to examine the point presented and have uniformly held, that to make a dismissal of an appeal operate as an affirmance of the judgment below, and as a bar to a subsequent appeal or writ of error, the appeal must have been dismissed, not for a defective record or insufficient bond or the like, but for a failure to prosecute the appeal after it had been regularly and properly in the supreme court. In the case of *Watson v. Huson*, 1 Duer, 252, the supreme court of the city of New York held that a dismissal of an appeal was not an affirmance of the judgment. "A judgment," says Mr. Jus

tice DUER, "affirmed in the court of ultimate jurisdiction, can never again be questioned," and if the effect of the dismissal of the appeal was to preclude any further examination or impeachment of the judgment, it might reasonably be contended that the averment in the complaint, that the judgment was affirmed, is sustained by the admitted fact that the appeal was dismissed, and the learned justice observed that to affirm a judgment was to declare by a judicial sentence of the appellate court its validity, and that it was a legal solecism to say that a judgment had been affirmed, when the question of its validity was exactly that which the appellate court refused to consider. In *Karth v. Light*, 15 California, 326, FIELD, C. J., delivering the opinion of the court, says: "The cases in which the dismissal of an appeal will not operate as a bar to a second appeal are those when the dismissal has been made upon some technical defect in the notice of the appeal, or the undertaking, or the like. The bar applies when the dismissal is for want of prosecution, and the order is not vacated during the term, or the dismissal is on the merits." How stands the case before this court? It is conceded that the appeal bond was not filed within the time prescribed by the court, and the appeal was dismissed for that reason. It had never been perfected. There was really no case before the appellate court for trial. The appeal was simply void. The condition necessary to vitalize it was wanting, the bond not having been filed in time. In the case of the *United States v. Juan de Pacheco*, 20 How. 263, TANEY, C. J., in delivering the opinion of the court, says: "It is proper, however, to add, in order to prevent mistake on this subject, that the only effect of docketing and dismissing an appeal under this rule is to enable the party to proceed to execute his judgment in the court below. It removes the bar to further proceedings in that court which the appeal created, and does nothing more, and after the case has been docketed and dismissed, the party against whom the decree was rendered may still, at any time within five years from the date of the decree, take a new appeal in the inferior court."

And again, on page 264, he remarks further: "It follows from what we have said, although the case before us must be docketed and dismissed, yet this will not prevent the United States from filing a transcript at the present term, and docketing the case for argument, if they can show that the delay has not arisen from any fault or negligence on their part, and if they fail to do so, they may yet take another appeal at any time within five years, and bring here the decree of the district court for examination and reversion," and to the same effect will be found the case of the *United States v. Gomez*, 23 How. 327. It may be proper for us here to inquire as to the effect of a dismissal of an appeal on the rights of a party interested in the bond. We are of the opinion that the dismissal of an appeal for any reason entitles the appellee to have suit on the bond. The very object in exacting a bond is to guard against delay, etc., and to afford to the appellee compensation for a failure to enjoy and reap the immediate fruits of the judgment he has obtained. The covenant is, that the obligor will prosecute his appeal with due diligence. If he fails to file his transcript in time, or neglects to perform any duty requisite and essential to place his case properly before the supreme court, so that the cause can be heard, he is guilty of a breach of his obligation, and the appellee is entitled to an immediate action to recover whatever damages he has sustained by reason of such failure. A different interpretation of the law would lead to fraud and injustice, subjecting creditors in many instances to the entire loss of their debts. Appeals would be taken without an expectation of successful prosecution by principals, and the bonds entered into by sureties without the fear of responsibility. *Harrison, etc. v. Bank of Kentucky*, 3 J. J. Marsh. 376.

While we are of the opinion that when an appeal regularly taken is dismissed for want of prosecution, the dismissal operates as an affirmance of the judgment below, and a second appeal cannot be allowed, unless during the term or before the remittitur has gone out, the order of dismissal is vacated and the cause re-instated. *Chamberlin v. Reed*, 16

Cal. 209. Still, we cannot sanction the doctrine that a dismissal for the failure to file a proper bond has that effect, and hence we are compelled to overrule the motion made to dismiss this writ of error. *Motion denied.*

APPEAL—EFFECT OF DISMISSAL: *Western Union Tel. Co. v. Graham*, 1 Colo. 183; *Freas v. Englebrecht*, 3 Colo. 380.

KINNEY v. WILLIAMS.

INSTRUCTIONS *must be confined to the law of the case.* The existence of facts proper for the consideration of the jury must not be assumed in the instructions of the court.

DAMAGES — EXEMPLARY — *to be determined by the jury.* Whether exemplary damages shall be awarded in an action of trespass is a question for the jury.

PRACTICE — costs denied. Where a motion for new trial has not been presented in the time and manner directed by the court the party in fault will not be allowed costs.

Appeal from District Court, Jefferson County.

THIS was an action of trespass against appellant and others, to recover damages for an assault upon appellee, and for making a loud noise and disturbance in and about appellee's dwelling-house, at various times. There was evidence tending to prove that appellee was severely beaten upon one occasion by appellant, and others of the defendants below. The jury returned a verdict in appellee's favor for \$2,500 damages.

The following is the instruction referred to in the opinion of the court:

"The court instructs the jury that they are at liberty to consider the malice of the defendants, the insulting character of their conduct, the rank in life of the several parties, and all the circumstances of the assault, if any was committed, and to award such exemplary damages as the circumstances of the case may, in their judgment, require, and are not restricted to the mere corporal injury of the party."

The cause was tried at the March term of court, and motion for new trial then made. The court directed that

written arguments should be filed on this motion by July first, following, which was not done. At the September term the motion was formerly overruled, and judgment rendered on the verdict.

Messrs. ROYLE & BUTLER, for appellant.

Mr. G. W. PERKINS, for appellee.

HALLETT, C. J. The first instruction given to the jury at appellee's request upon the trial below assumes the existence of facts which should have been left to the jury, and is in conflict with the twenty-eighth section of the practice act. Whether this was a case for exemplary damages was a question for the jury and not for the court. The jury may have understood this instruction as determining this question for them.

For this error the judgment must be reversed and the cause remanded for a new trial.

If the motion for new trial had been presented in the court below, as directed by that court, there is little doubt that the relief now granted here would have been given in that court, and the expense and delay of this appeal would have been avoided. Because of this neglect, the appellant will not be allowed his costs in this court or in the court below.

The court below is instructed to tax the costs, which have been made by appellant in that court, to him. *Reversed.*

EXEMPLARY DAMAGES, WHETHER PROPER. — In *Murphy v. Hobbs*, 7 Colo. 552, the question is raised whether exemplary damages should ever be allowed, and the principal case is cited as an instance in which they were allowed.

SOUDDER v. CLARKE.

BILL OF EXCHANGE — *order for lumber is not.* An order for lumber, drawn by S. upon R., is not a bill of exchange, and the drawer is not liable upon it.

Error to Probate Court, Arapahoe County.

Mr. ALFRED SAYRE, for plaintiff in error.

EYSTER, J. This was an action of assumpsit, brought by the defendant in error against the plaintiff in error, in the probate court of Arapahoe county, on an instrument in writing, of which the following is a copy, as set forth in the pleadings :

“DENVER, *July 22, 1867.*

“Mr. Edward Rawlings. Sir : please deliver to Mr. Clarke or bearer four thousand feet of lumber and charge, as agreed, to my account.
EDWIN SOUDDER.”

There were two counts in the plaintiff's declaration. The first was a special count on the instrument, as above set forth, and the second was the common indebitatus assumpsit count for work and labor, goods sold and delivered, etc.

The defendant demurred to the first count of the plaintiff's declaration, and pleaded the general issue to the second count. The court below overruled the demurrer, and the defendant stood by his demurrer and refused to plead. The plaintiff then withdrew the second count, and a jury was sworn to assess the plaintiff's damages on the first count in his declaration. The jury, after hearing the evidence submitted to them on the first count, rendered their verdict, assessing the plaintiff's damages at \$100. A motion for a new trial was made by defendant, which was overruled, to which the defendant then and there excepted, and which, with the ruling of the court on the defendant's demurrer, is here assigned for error.

The only question for decision by this court is : Was the instrument sued on a bill of exchange or promissory note ? Was it such an instrument as involved the personal responsibility of the drawer of it ? We think it was not, it was not a bill of exchange, it had not one of the requisites of such an instrument. It was a mere request made by the defendant to Rawlings to deliver to the plaintiff or bearer four thousand feet of lumber and no more. In the case of *Mershon v. Withers*, 1 Bibb, 503, the supreme court say in reference to a similar case : “The bill in its subject-matter and consequences was not as supposed in the declaration.

It was drawn on a particular fund, it could not make the drawer personally liable, and, therefore, was no bill of exchange according to the custom of merchants; for it is essential to such a bill that it depends upon the personal credit and responsibility of the parties whose names are on it, without such personal credit and capacity to charge the drawer and drawee the bill is not negotiable according to the usage of merchants, and if not negotiable the parties to it are not liable to an action on it."

In the case of *Nichols, Administrator, v. Davis*, 1 Bibb, 490, the same court say in a case not dissimilar to this, "most clearly it (the instrument in question) does not possess the properties nor is entitled to the privileges of that commercial instrument (a bill of exchange). It is an essential quality of a good bill, that it attach to itself the personal responsibility of the drawer, and be not drawn on the credit of any particular fund. But in the present case the instrument is drawn on the credit of a particular fund and does not involve the personal responsibility of the drawer. It can only be considered as an appointment or authority to the person to whom it is addressed to pay so much out of the particular fund mentioned, which if they refuse to do no recurrence can be had upon the instrument itself to the drawer, but recourse must be had to the original debt (if any such existed), which induced him to make such appointment."

These cases we think are conclusive of the points in this case, and the judgment of the probate court must be reversed, and the court below is directed to enter judgment on the demurrer of the defendant below, to the declaration of the plaintiff in this suit.

Reversed.

LOVELAND v. SEARS.

JURISDICTION of district and probate courts. District and probate courts within the limits prescribed to the latter, are of concurrent jurisdiction. **CERTIORARI** will not lie from a district to a probate court

Appeal from District Court, Arapahoe County.

MESSRS. MILLER & MARKHAM, for appellant.

MR. E. L. SMITH, for appellee.

HALLETT, C. J. After judgment in the probate court, the cause was removed to the district court by *certiorari*, and the latter court quashed the writ upon appellee's motion. In his petition to the district court, the appellant prayed that the writ might be issued in pursuance of the statute, but it is not possible to ground this proceeding upon that act. The act refers to proceedings before justices of the peace, and it is impossible to extend it to probate courts. If, in this instance, the probate judge had been acting as a justice of the peace, there would be some ground for saying that the proceedings were subject to removal according to the statute, but such was not the fact. The cause originated in the probate court, and was not within the jurisdiction of a justice of the peace. Therefore this writ cannot stand upon the statute, and we will now inquire whether it may stand upon the common law.

By the common law the writ of *certiorari* lies for the removal of causes from an inferior to a superior tribunal. 1 Tidd's Prac. 398.

Hence the first question arising in every case is as to the jurisdiction of the court from which the writ is issued; for if the court to which the cause is taken is not superior to that from which it is removed, of course the writ is nugatory. In *Cass v. Davis, ante*, 43, this court held that the district and probate courts, within the time prescribed to the latter, were of concurrent jurisdiction, the supreme court being invested with authority to revise the proceedings of either. It is true that in that case the subject of appeals only is discussed, and nothing is said of the proceeding by *certiorari*. Nevertheless, the power to review the decisions of probate courts was found to be in the supreme court and not in the district court, and this is decisive of this question. It would be strange indeed if district courts could review

proceedings of probate courts upon *certiorari* when they are unable to proceed to the same result upon appeal or writ of error. The judgment of the district court is affirmed, with costs.

Affirmed.

DISTRICT AND PROBATE COURTS — CONCURRENT JURISDICTION: See *In re Rogers*, 14 Colo. 19, 20, and note to *Cass v. Davis*, ante, p. 49.

CAROTHERS v. JONES.

FORMER RECOVERY — *conclusive*. In an action of replevin it appeared that the property in dispute had been the subject of another suit, and the record of that suit being introduced in evidence, a verdict contrary to the judgment in the first suit will not be sustained.

NEW TRIAL — *where the verdict is not supported by evidence*. In an action of replevin for two mules, a wagon and harness, there was no evidence as to the wagon and harness. A general verdict for the plaintiff will be set aside and a new trial awarded.

Error to District Court, Jefferson County.

JONES brought replevin against Carothers for two horse mules, one set double harness, one large double wagon; each of said mules branded T on the left shoulder, and each about eight years old; one dark brown color, the other a lightish bay color, known as the Tucker mules.

At the trial Arthur McLaughlin testified: He knew property in dispute; it is one span of horse mules, one light bay, one dark brown and branded T on left shoulder, they are known as the Tucker mules; bought in Georgetown of Tucker in September, 1867; property paid for in hay and potatoes. Defendant told me he was to have one-half of the mules if he paid for them; defendant paid nothing, told me he had nothing to do with the mules. Mules worth \$400, wagon, \$75; harness, \$25. Plaintiff kept possession of mules until May 15, 1868; the defendant took possession and kept them till August.

Cross-examination: The defendant got possession of the mules from the sheriff of Park county. I was present at the term of court in Park county in 1868.

Jesse McLaughlin testified: Plaintiff obtained the mules

of Tucker, to be paid for in hay and potatoes. Defendant told me he had nothing to do with the mules, that Jones owned them. I was present when parties settled; allowed defendant \$30 a month for his work; this took place the last of January, 1868; defendant came with the sheriff and took the mules and replevied them.

Defendant gave in evidence a transcript of record from the probate court of Park county, which record was of a suit between John M. Carothers, plaintiff, and William M. Jones, defendant; declaration in replevin for one dark-brown mule, one bay mule, both branded T on left shoulder, one four-mule wagon and a double harness. This transcript showed a judgment for the plaintiff, that he retain possession of the property replevied, and that he recover his costs of suit, etc. Jesse McLaughlin testified that the mules in controversy, in the probate court of Park county, were branded T on left shoulder, and that one was a dark-brown mule, and the other a light-bay mule. Arthur McLaughlin testified that the property replevied by Carothers in Park county were two large mules, one light-bay, one dark-brown, a double harness and a four-horse wagon.

MR. JAMES MARSHAL PAUL, for plaintiff in error.

MR. L. C. ROCKWELL, for defendant in error.

BELFORD, J. William M. Jones, the defendant in error, instituted his suit in replevin against John M. Carothers, the plaintiff in error, in the district court of Jefferson county. The property sought to be recovered in this action consisted of two mules, a two-horse wagon and a set of double harness. The property is described in the plaintiff's affidavit as follows: "Two horse mules, one set of double harness, one large double wagon; each of said mules branded T on its left shoulder, one of a dark-brown color and one of a light-bay color, known as the Tucker mules." The defendant, Carothers, filed several pleas, *non cepit*, *non detinet*, and one setting up title in himself. The cause was tried by a jury, who returned a verdict for the plaintiff. A motion

was made by the defendant for a new trial, which was overruled and excepted to.

Judgment was entered on the verdict and the defendant appeals to this court.

The errors assigned are two : First, that the verdict of the jury was contrary to the evidence ; second, that the court erred in overruling the motion for a new trial. Appellate courts are very reluctant to interfere with the verdict of a jury, and especially so when there is evidence tending to support it. The jurors have the witnesses before them, hear them testify, observe the manner in which their evidence is given, and are in a better situation to estimate correctly the weight to be attached to their testimony than is a court whose impressions of the evidence are simply drawn from a perusal of the record. For these reasons the supreme court will only interfere when it is clear and manifest that injustice will result from upholding a verdict. From the evidence incorporated into the bill of exceptions, it appears that the mules in controversy were purchased by Jones and Carothers in September, 1867, of one Tucker. These mules remained in the possession of Jones from September, 1867, until May 15, 1868, when they were delivered into Carothers' possession by the sheriff of Park county, by virtue of a writ of replevin. Carothers retained possession until August, 1868, when the mules were taken by the sheriff of Jefferson county and delivered to Jones in pursuance of a writ of replevin, issued out of the Jefferson district court in the suit of Jones against Carothers. To establish his title to the mules, Carothers introduced in evidence a transcript of the record of the probate court of Park county, from which it appears that, at the June term, 1868, of said probate court, Carothers had instituted an action of replevin against Jones for the recovery of one brown mule, branded on the left shoulder with the letter T, also one bay mule branded on the left shoulder T ; also a four-mule wagon and set of double harness. A trial was had, a verdict rendered in Carothers' favor, and it was ordered by the court that the plaintiff in that suit retain possession of the property. Whatever objection

may exist to the form of the judgment rendered in the Park probate court, none was made either to its form or validity in the court below. And no cross-errors having been assigned by the defendant in error, I regard said judgment for the purposes of this suit as valid and effectual. Were the mules replevied by Jones in the action below the same mules replevied by Carothers in his suit in the Park probate court? I think there can be no doubt of it, when we compare the description of the property in the two suits. Jones, in his affidavit, describes them as the Tucker mules. The evidence introduced shows conclusively that Jones kept possession of the mules bought of Tucker, until dispossessed by the sheriff of Park county, under the authority of a writ of replevin; that then Carothers obtained possession of these same Tucker mules, and that the mules in controversy in the court below were the identical mules purchased by Jones and Carothers of Tucker in Georgetown, September, 1867.

If the proceedings of the Park probate court are to be regarded as valid, and the title to these mules between these same parties was settled in that suit, then this second action should not and cannot be maintained. The verdict should have been set aside and a new trial awarded. But this verdict cannot be maintained on another ground. The jury found that the plaintiff below was the owner of the wagon and harness; and in that verdict the same was adjudged by the court to Jones. There is not one particle of evidence to sustain this finding; not a single witness testified on the subject. The finding was entirely unauthorized and unwarranted, and to permit such a verdict to stand is to do violence to the rights of property and injury to the principles of justice.

The action of the court below in denying a new trial must be reversed and the cause remanded for further proceedings.

Reversed.

NEW TRIAL — VERDICT — EVIDENCE. — Where the evidence does not support the verdict, judgment will be reversed and a new trial granted: *Kent v. Abert*, 12 Colo, 553.

PATTERSON v. GILE.

STAMPS — *need not be canceled.* An instrument which has been stamped according to the revenue laws of the United States may be read in evidence, although the stamp thereon has not been canceled.

SAME — *construction of the act relating to.* Whether an instrument is admissible in evidence, under the act of 1864, is to be determined by section 163 of that act as amended (14 Statute at Large, 148).

PLEADING — *want of consideration.* In an action upon a promissory note, want of consideration must be specially pleaded.

Error to Probate Court, Arapahoe County.

ASSUMPSIT on a due bill for \$365.86. Plea general issue, under which defendant offered evidence of want of consideration, was rejected.

Mr. W. C. KINGSLEY, for plaintiff in error.

Mr. L. B. FRANCE, for defendant in error.

HALLETT, C. J. When the due bill, upon which this action was brought, was produced at the trial in the court below, it bore revenue stamps of sufficient amount, but the stamps had not been canceled. The court permitted the attorney of the plaintiff below to cancel the stamps and allowed the instrument to be read in evidence against the objection of the plaintiff in error, who now insists that this ruling was erroneous. By section 158 of the revenue act, a penalty is provided for any violation of the act in respect to the stamping of instruments in cases where the omission or neglect to stamp is with an intent to evade the provisions of the act, and it is also declared that the instrument which is omitted to be stamped with such intent shall be deemed invalid and of no effect. By some courts it has been considered that the omission to stamp an instrument, whether fraudulent or not, will invalidate it. *Hugus v. Strickler*, 19 Iowa, 414; *Maynard v. Johnson*, 2 Nev. 16, 25.

But the weight of authority is opposed to this construction, and finds the forfeiture of the instrument to be a penal

consequence of a fraud upon the act. *Harper v. Clark*, 17 Ohio St. 190; *Hitchcock v. Sawyer*, 39 Vt. 412; *Hallock v. Jaudin*, 34 Cal. 175; *McGovern v. Hoesback*, 53 Penn. 178.

After a careful study of the act I have not been able to convince myself that the omission to stamp an instrument, under any circumstances, will render such instrument invalid and of no effect, and therefore I do not perceive the importance of ascertaining the intention of the maker in omitting the stamp, except it be with reference to the penalty of \$50 prescribed by the act in cases of intentional omission. I comprehend the clause above referred to, which declares that the instrument shall be invalid and of no effect if the omission to stamp it be with intent to evade the provisions of the act, but I find in the same section provisions for stamping all instruments not stamped at their inception, whatever the intention of the maker in omitting to stamp them at the proper time. It is provided "that hereafter, in all cases where the party has not affixed to any instrument the stamp required by law thereon at the time of making or issuing the said instrument," upon complying with certain conditions prescribed by the act, the collector of the revenue for the proper district may affix the stamp, and the instrument "shall thereupon be deemed and held to be as valid to all intents and purposes as if stamped when made or issued."

Inasmuch as every instrument not stamped may be perfectly stamped under this clause, and thus invested with all its legal attributes, I am not able to say that any unstamped instrument is, for want of the stamp, invalid and of no effect. I understand that an invalid instrument cannot be validated by the simple act of a government officer affixing a stamp. If an instrument be absolutely invalid and of no effect, it must remain so until it receive life at the hands of its authors.

The legal status of an unstamped instrument is not easily defined, but so long as the law admits it to be stamped I cannot regard it as a nullity.

This view is, I think, supported by section 163 of the act
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which was enacted in 1866, and which prescribes the only condition of the revenue law, upon which an instrument may be admitted as evidence in a court of justice. That section declares:

“That, hereafter no deed, instrument, document, writing or paper, required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof shall be recorded or admitted or used as evidence in any court until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto as prescribed by law.”

Accepting this plain declaration as it is written, it is obvious that the circumstances attending the omission to stamp an instrument are entirely immaterial. If the instrument has not been stamped, it cannot be used as evidence although the omission to stamp it may have been entirely accidental and without any design to evade the act. If it has been stamped by the maker at its inception or by the collector subsequently, as provided in section 158, it is wholly immaterial whether the maker intended to defraud the government of the tax imposed upon the instrument. Under this section but one question can arise concerning an instrument offered in evidence, and that is, whether it has been stamped as the act requires, and upon the answer to this question the instrument should be admitted or excluded. Therefore as I find that, according to section 163, the only question respecting the admissibility of an instrument as evidence is, whether it has been stamped as the law prescribes, and that while section 158 denounces a penalty against a fraudulent omission to stamp an instrument, it also provides for affixing a proper stamp to every instrument which requires it, and which has not been stamped when made. I conclude that the intention of the maker of an unstamped instrument is not material in determining the legal character of such instrument, and that so much of the latter section as appears to establish a different rule must receive a construction which will make it harmonize with the other provisions of the act.

I have attempted to show that an instrument is to be rejected or received in evidence upon the provisions of section 163 of the revenue act, and none others, and if I have succeeded in this, the remaining inquiry is, whether the due-bill in this case was admissible according to the provisions of that section.

When the instrument was offered in the court below it bore sufficient revenue stamps, and although these stamps were not canceled, I think we may fairly presume that they were placed upon the due-bill at the time it was made. Certainly, if the stamps had appeared to be canceled the court would have indulged such presumption, and, because the maker omitted the cancellation, it is somewhat illogical to say that he also omitted to affix the requisite stamps.

The object of the law in requiring the stamp to be canceled, as declared by section 156, is to prevent another use of it, and, while it may be said that the date placed upon the stamp in canceling it, affords some evidence of the time when the stamp was placed upon the instrument, the act does not make it evidence of that fact. The law requires the stamp to be put upon the instrument when the latter is made, and leaves this fact to be proved in the same way that every other controverted fact is proved. If an instrument appears to be stamped, the law will, in the absence of evidence to the contrary, assume the stamps to have been properly affixed, for the reason that it cannot be presumed that any one has attempted a fraud upon the act, until the fact is established by testimony. Assuming that the stamps were placed upon the due-bill when it was made, I think that the provisions of section 163 were observed. The act of stamping an instrument is accomplished by affixing a stamp or stamps denoting the duty imposed by law upon such instrument. The cancellation is another and different act prescribed for another purpose. By the act of stamping, the payment of duty upon the instrument is accomplished; by the cancellation the fraudulent use of the stamp is prevented. I cannot doubt that, if an uncanceled stamp should be removed from an instrument to which it had been properly affixed, with

intent to use it again in fraud of the act, the offender would be subject to the penalty announced in section 155. A party guilty of such an offense could never take refuge under the circumstance that the stamp fraudulently used by him lacked cancellation. Therefore the omission to cancel the stamp upon an instrument, while, if intentional, it will subject the party to the penalty of \$50.00, prescribed in sections 156 and 158, does not in any way affect the legal character of the instrument, and I respond to the requirements of section 163, by saying that the due-bill in this case was stamped as required by law.

This discussion has been extended beyond the limits required by this case, for the purpose of showing that we are unable to recognize the doctrine promulgated by many State courts, that an instrument required by law to be stamped, may be used as evidence in a court without being stamped. As a territory, we derive our political existence and every political right and privilege that we enjoy from the general government, and therefore we cannot deny the power of that government to legislate upon this subject in this way, as did the supreme courts of Illinois and Massachusetts. *Latham v. Smith*, 45 Ill. 29; *Carpenter v. Snelling*, 97 Mass. 452.

We recognize the power of the congress to enact this law, and, according to the one hundred and sixty-third section of the act, we will require every instrument to be stamped according to the provisions of the act before it is used as evidence.

Another question presented in this record, and strongly urged by the counsel for plaintiff in error, has been determined in the State of Illinois, and we are disposed to adopt the ruling of that court. It has been the practice in this territory, since the present statute relating to bills of exchange and promissory notes was enacted, to plead a want or failure of consideration specially, and since the statute is not very clear upon this point, we think it better to uphold the rule which has been hitherto observed than to attempt to change it. The supreme court of Illinois was evidently

influenced by a desire to maintain the rule as it had been understood and practiced by the profession, and we may, with propriety, act upon the same consideration. *Rose v. Mortimer*, 17 Ill. 475.

If the statute were opposed to this rule, of course we should be compelled to abandon it. But the statute groups together the several defenses of want and failure and partial failure of consideration, and declares that they may be pleaded, and, inasmuch as it was certainly intended that partial failure of consideration should be specially pleaded, we may say that it was also intended that want or failure of consideration should be specially pleaded. At all events the profession have so construed the act from the first, and we will not now seek a new construction. The judgment of the probate court is affirmed, with costs. *Affirmed.*

PLEADING — WANT OF CONSIDERATION. — In an action upon a promissory note, want of consideration must be specially pleaded: *Munro v. King*, 3 Colo. 240.

LONGAN v. CARPENTER.

MORTGAGE — not assignable at law. The assignee of a mortgage has no remedy upon it at law, except it be treated as an absolute conveyance and the mortgagee convey the premises by deed.

Same — assignable in equity. But if a promissory note secured by mortgage is assigned, the assignee will hold the mortgage subject to the equities existing between the mortgagor and mortgagee at the date of the assignment.

MORTGAGE ASSIGNED — rights of parties. At law the innocent holder of a negotiable note may recover the amount thereof; but if the note is secured by mortgage and the holder seeks to foreclose the mortgage, the mortgagor can avail himself of any payments made to the mortgagee before the assignment.

A promissory note secured by mortgage and by pledge of personal property was assigned before maturity to a bona fide purchaser. Previous to the assignment a portion of the pledged property was sold by the payee, but no credit was indorsed on the note. In a suit by the assignee to foreclose the mortgage, held, that the mortgagor was entitled to be credited with the amount realized by the payee from the sales of the pledged property.

Appeal from District Court, Jefferson County.

APPELLEE filed his bill to foreclose a mortgage given by appellant to Jacob B. Carpenter. He alleged that the mort-

gage was given to secure a note for \$980, dated March 5, 1867, payable six months after date at the Colorado National Bank to Jacob B. Carpenter or order, that on the 24th of July, 1867, Jacob B. Carpenter assigned the note and mortgage to him.

Appellant in her answer denied all knowledge of the assignment and averred that, at the date of the mortgage, in addition to the mortgage security, she delivered to J. B. C. as collateral and further security for the sum of money specified in the note and mortgage, 103 sacks of good merchantable wheat flour then of the value of \$1,236, and 7,500 lbs. of wheat then of the value of \$450, which, she alleged, said J. B. C. agreed to sell and apply to the payment of the sum due him on said note and mortgage; or, if not sold, to return on payment or tender of payment of the sum of money specified in the note and mortgage. Appellant also alleged, that, at the maturity of the note, she tendered the sum of \$1,180 at the Colorado National Bank in payment of the note, and demanded the return of the note and mortgage and the flour and wheat to her, which was refused. Appellant averred further, that J. B. C. appropriated the said flour and wheat, of the value of \$1,686, to his own use and refused to account therefor. The master found that there was due upon the note and mortgage \$1,622.68. At the hearing, the deposition of William Longan was read. He testified that the mortgaged premises belonged to his mother, the appellant; that appellant borrowed from J. B. C. \$980, and gave the mortgage and 100 sacks of flour and 7,520 or 7,530 lbs. of wheat as security; that the flour and wheat were in a house on Blake street belonging to Williams & Miller, and that J. B. C. took Williams & Miller's receipt for it; that J. B. C. authorized witness and his brother to take the flour and wheat to the mountains and dispose of it, if they would pay to Williams & Miller the market price for the same in Denver; that Williams & Miller should indorse the amount so paid on the note. That, in the latter part of April or 1st of May, 1867, witness

got 560 or 660 lbs. of wheat from Williams & Miller and paid them 4½ cents per lb. for it; that this was a portion of the wheat given to J. B. C. as aforesaid; witness at other times got flour of the same lot and paid Williams & Miller therefor at \$8.50 a sack; witness could not tell the exact number of sacks he got; in July, 1867, Williams & Miller failed in business and witness found a lot of the flour and wheat being disposed of; witness went to J. B. C. and tried to get him to save the wheat and flour. J. B. C. stated that he was not going to get himself in any law suit about it, and declined to take any steps about the matter; said that he was sufficiently secured by the mortgage and that he would give the warehouse receipt for the flour and wheat back to witness; that he would assign the receipt to witness so that he could go and get the flour and wheat.

Witness further stated that, after Williams & Miller failed, Mr. Miller of that firm told him that J. B. C. was the owner of the flour and wheat, and that he would account to him alone for it, which he had done, and that J. B. C. had authorized its disposal, and that witness would look at Williams & Miller's books and they would show just what had been done with the flour and wheat. Witness told J. B. C. what Miller had said, and J. B. C. said he would give witness the receipt. When witness asked him where it was, he said witness would have to go to his lawyers as they had his papers. On cross-examination witness stated: The wheat and flour was in the warehouse of Williams & Miller before the loan was made; that we had before that time borrowed money, about \$600, on the flour alone; the first loan was about sixty days before that of J. B. C.'s was made; the grain and flour belonged to witness and his brother; the warehouse receipt was given to Mr. Kountze as security for the first loan; the old warehouse receipt was taken up, with the money borrowed of J. B. C., and the first loan so paid off.

Jesse B. Longan testified that he pledged the flour and grain to J. B. C. as security for the payment of the note;

that he had previously borrowed money at the bank, and that Williams & Miller became his security therefor, and they had the flour in their possession; that Williams & Miller arranged the loan with J. B. C. and that the money was borrowed of J. B. C. for himself and his brother William Longan; that the flour and wheat were owned by himself and William Longan; in other respects his testimony was substantially the same as that of William Longan.

Jacob B. Carpenter testified that he assigned the note and mortgage to B. Platte Carpenter, the complainant below, in July, 1867; that, when the flour and wheat were pledged to him, it was understood that the same should lay in the store of Williams & Miller until the note became due, unless the Longans should take a portion thereof to the mountains, and in that event, the Longans would pay to Williams & Miller the market price therefor in Denver, and the amount so paid was to be indorsed on the note. This witness also testified as to the circumstances attending the failure of Williams & Miller. He also stated that he received \$1,000 upon the assignment of the note and mortgage, and that he never received any of the proceeds of the sales of the wheat and flour nor ordered the sale of it, nor exercised any control over it in any manner whatever.

There was other testimony corroborating the foregoing and also conflicting testimony as to the tender alleged to have been made by the respondent, which it is unnecessary to refer to. An assignment of the mortgage executed by J. B. C. was given in evidence and also the promissory note before mentioned, which was signed by Mahala Longan and Jesse B. Longan, and appeared to have been indorsed without recourse by J. B. C.

The court decreed for the complainant below, and found that there was due to him the sum of \$1,820, being the full amount of the note, and that the mortgage premises be sold to satisfy the same.

Messrs. BROWN & MECHLING, for appellant.

Mr. ALFRED SAYRE and Mr. DANIEL SAYRE, for appellee.

BELFORD, J. This was a bill in chancery to foreclose a mortgage filed by the appellee, as the assignee of one Jacob B. Carpenter. The mortgage was given to secure a negotiable note. The mortgage bears date March 5th, 1867, and is payable to Jacob B. Carpenter or his heirs or assigns, and was by him assigned to the complainant on the 20th day of July, 1867. The assignment was properly recorded on the 7th day of February, 1868. The defendant, in her answer, denies all knowledge of the assignment, and avers that at the date of said mortgage, she, in addition to the said mortgage security, delivered to the said Jacob B. Carpenter, as collateral and further security for the payment of the said sum of money, specified in said note and mortgage, one hundred and thirty sacks of good merchantable wheat flour, then of the value of \$1,236, and seven thousand five hundred pounds of wheat of the value of \$450, which she alleges said Carpenter agreed to sell and apply to the payment of the sum due him on said note and mortgage, or, if not sold, to be returned on payment or tender of payment of said note and mortgage. She further charges that said Carpenter sold said flour and wheat, and appropriated the sum to his own use, and refuses to account to her for the proceeds. This cause has been ably argued by counsel, and has received great consideration from this court. The principle involved has never been before adjudicated in this territory, and in the States where it has received judicial notice the decisions are in direct conflict. It is claimed by the appellee that the note secured by the mortgage is a negotiable note, that it was negotiated before due, and that the assignee being a *bona fide* purchaser of the note without notice, took it and the mortgage freed and discharged from all equities and defenses that existed in favor of the mortgagor and against the mortgagee. There is no evidence showing that B. Platte Carpenter had, before or at the time of the assignment of the note, any knowledge of the wheat and flour given by Mahala Longan as further security to Jacob B. Carpenter.

It is contended by the appellant, that, having taken

security by way of mortgage, that that security qualifies the rights of the mortgagee and those claiming under him, and that, when an action is brought to foreclose the mortgage, that that instrument, together with the note secured thereby, passes into the category of obligations to which defenses and equities may attach and be made available into whosoever hands they fall. We are free to admit that this question is surrounded with great difficulties, and deeply regret that no settled and uniform rule exists in this country on the subject. The supreme courts of Wisconsin, Michigan and Illinois, so far as we have been able to discover, are the only courts that have passed upon the matter in controversy. In Illinois, the rule is laid down as claimed by the appellant. They hold there that, although the note secured by the mortgage is negotiable, still it is open to whatever defenses existed against the mortgagee. A different rule obtains in Wisconsin and Michigan. Amid this conflict of authorities, we feel at liberty to choose our course, and shall endeavor to follow that which, in our judgment, is recommended by the better reason. What relation does a mortgage sustain to a note secured by it? In one sense, it is a mere incident to the debt. He who owns the note owns the mortgage. The assignee of the former is entitled to the benefits of the latter, although the assignee did not know of its existence. *Kyes v. Wood*, 21 Vt. 331. But it must be borne in mind that these principles are the outgrowth of equity, and equity alone. At common law, choses in action were not assignable. For the convenience of commerce, by the statute of Anne, in England, certain choses in action were made assignable, so as to vest in the assignee the legal title, as promissory notes or bills of exchange. We have a statute to the like effect, which prescribes that any promissory note, bill, bond or other instrument in writing, whereby one person promises to pay another any sum of money or article of personal property, or sum of money in personal property, shall be assignable by indorsement thereon.

The mortgage, to foreclose which this bill was filed, was

given to secure the payment of a promissory note which was assigned by the payee and mortgagee to the complainant. This was in equity an assignment of the mortgage. The note was assignable by the statute, but the mortgage is not nor is it assignable by the common law. The assignee of a mortgage has no remedy upon it by law, except it be treated as an absolute conveyance, and the mortgagee convey the premises by deed. The 22d section of the statute, page 377 (Revised Statutes of Colorado), provides that if default be made in the payment of any sum of money secured by the mortgage on lands and tenements duly executed and recorded, it shall be lawful for the mortgagee, his executors or administrators, to sue out a writ of *scire facias*, etc. Here the remedy is specifically confined to the mortgagee, his executors or administrators. The assignee cannot proceed at law and sue out a *scire facias*. To avail himself of his mortgage security he is driven to the court of chancery. His remedy is purely equitable, and seeking equity he must be willing to do equity. He who buys that which is not assignable at law, relying upon a court of chancery to protect and enforce his rights, takes it subject to all infirmities to which it is liable in the hands of the assignor, and the reason is, that equity will not lend itself to deprive a party of a right which the law has secured him, if such right is intrinsically just in itself. "Mortgages," says Chief Justice CATON, in *Olds v. Cummings*, 31 Ill. 192, "are not commercial paper. It is not convenient to pass them from hand to hand, performing the real office of money in commercial transactions as notes, bills and the like. When one takes an obligation secured by a mortgage, relying upon the mortgage as security, he must do it deliberately, and take time to inquire if any reason exists why it should not be enforced. While he may take the mere promise to pay the money as commercial paper and depend upon the personal security of the parties to it, it may be said to be a distinguishing characteristic of commercial paper, that it relies upon personal security, and is based upon personal credit. It is a part of the credit system, which is said

to be the life of commerce, which requires commercial investments to pass rapidly from hand to hand. Mortgage securities are too cumbersome to answer these ends. The note itself, though secured by a mortgage, is still commercial paper, and when the remedy is sought upon this, all the rights incident to commercial paper will be enforced in the courts of law. But when the remedy is sought through the medium of the mortgage; when that is the foundation of the suit, and the note is merely used as an incident to ascertain the amount due on the mortgage, then the courts of equity, to which resort is had, must pause and look deeper into the transaction and see if there be any equitable reason why it should not be enforced. He who holds a note and also a mortgage holds in fact two instruments for the security of the debt; first, the note with its personal security, which is commercial paper, and as such may be enforced in the courts of law, with all the rights incident to such paper; and the other, the mortgage with security on land, which may be enforced in the courts of equity, and is subject to the equities existing between the parties. The right of an assignee to set at defiance a defense which could be made against the assignor is an arbitrary statutory right, created for the convenience of commerce alone, and must rely upon the statute for its support, and is not fostered and encouraged by courts of equity."

This doctrine, so clearly enunciated by Chief Justice CATON, is re-asserted and enforced by Chief Justice WALKER in the case of *Walker v. Dement*, 42 Ill. 273. In delivering the opinion in this latter case he says, that while the purchaser of a note before maturity without notice will be protected against all defenses to the note, still, if it is secured by mortgage or other collateral security, the assignment will not cut off prior equities against the mortgage or collateral fund, although they might be secret and latent. There are many cases in which assignees have been protected against latent equities of third persons, whose rights and even names do not appear upon the face of the mortgage, and the reason

is, that it is the duty of the purchaser to inquire of the mortgagor if there be any reason why it should not be paid ; but he should not be required to inquire of the whole world to see if some one has not a latent equity which might be interfered with by his purchase of the mortgage, as for instance a *cestui que trust*.

In the case of *Merry v. Sylburn*, 2 Johns. Ch. 441, Chancellor KENT said :

“ It is a general and well-settled principle that the assignee of a *chose in action* takes it subject to the same equities it was subject to in the hands of the assignor. But this rule is generally understood to mean the equity residing in the original obligor and not an equity residing in some third person against the assignor.” In *Westfall v. Jones*, 23 Barb. 10, the court said :

“ Does the plaintiff, being a *bona fide* purchaser and assignee of the bond and mortgage, stand in any better condition than the person from whom he derived his title ? It is a well-settled principle that the assignee of a *chose in action* takes it subject to all equities which existed against it in the hands of the assignor.” The same rule is laid down in Pennsylvania in *Mott v. Clark*, 9 State, 399, and in *Prior v. Wood*, 31 Penn. St. It may be objected to these decisions, that the mortgage in each of the cases was given to secure a bond, and that the bond having no commercial character, the party taking an assignment would, as a matter of course, take the mortgage burdened with infirmities which the statute prescribes shall not apply to negotiable notes transferred before due.

These cases are made to rest on another and different ground, namely, that the proceeding was on the mortgage itself, and there being no express statutory provision authorizing the assignment of the mortgage. But it may be urged that the mortgage is accessory to the note, that it is attached to it, and being so attached, it is, and must remain, inseparable. This is true as long as both instruments remain in the hands of the mortgagor. But when he assigns the note there is in law a separation. The assignee can take his note

into a court of law and recover a judgment upon it, but he cannot take the mortgage there; he cannot claim the benefit of it there. He is confined simply to his remedy on the note. Whatever judgment he recovers is purely a personal one. He will not be heard to say that the maker of the note pledged a special fund, out of which the debt must be satisfied. The court could reply, and with reason, whatever your rights may be in equity, one thing is certain, there is no law authorizing your assignor to transfer to you the mortgage. It does not follow you into this court. How is it when he brings his action on the mortgage in a court of equity? Then the mortgage is the foundation of the suit, and the remedy sought is the foreclosure of the equity of redemption. The note is used to compute the amount; it has no other office to perform. The mortgage in one sense, and in an important one too, has a character of its own. If one holds a note, against which the statute of limitations has run, and also a mortgage or pledge of real or personal property to secure it, he cannot sue on the note, but he can take and hold possession of the property, and sell it if it be personal property, with proper precautions, and if real property, he can have a bill in equity to foreclose his mortgage, and if his lien fails to pay the whole of his debt, he loses the remainder, because he can have no action upon it, although he may have proper process founded upon the debt and security to establish his lien and make it available in the payment of his debt. A mortgage may be enforced so long as it is available, although the debt secured by it is barred by the statute of limitations. *Parsons on Contracts*, vol. 2, 379; 20 Mo. 482; *Angell on Limitations*, 77, 78. It is also well established that, if a legal tender is made of money due on a bond and mortgage to the mortgagee, or his assignee or attorney, which is refused, the land is discharged from the mortgage though the debt remains. *Jackson v. Bowers*, 18 Johns. 110; 5 Hill, 65; 21 Wend. 467; and 26 id. 541. Does not this indicate that the mortgage and the instrument which it secures have separate and independent characters? This is sufficient to

show that it has a character of its own. But it may be urged, if this had been an action at law on the note itself, that the assignee could not have been chargeable with equities or defenses, which might have existed against the same in the hands of the assignee or original payee, and of which the complainant was ignorant at the time of assignment, and that it being commercial paper he could have obtained judgment for the full amount expressed in the note, and on execution this same land described in the mortgage might have been levied on and sold to satisfy the same. Admitting this to be true, yet in this case the purchaser of the land under the sale would hold it subject to the mortgagor's right of redemption. *Thornton v. Pegg*, 24 Mo. 247. There is a reason why in an action on the note he would be entitled to recover the full amount, namely, a court of law cannot take cognizance of equities that in a court of chancery would not only be recognized but rigorously enforced. The books are full of cases where a judgment has been rendered in a law court against a defendant one day and the same judgment enjoined by a court of chancery the next.

It is true that the principles governing and controlling a court of chancery are as fixed and certain as are those which control a court of law, and one of those principles governing a court of chancery is, that he who invokes its equitable powers must be ready to do equity. But this discussion has already been protracted to a sufficient length. What was the equity of the mortgagor in this case? What relation did Jacob B. Carpenter sustain to the wheat and flour received by him as security in addition to the mortgage, and how far is the complainant affected thereby? We think it was a pledge. The contract of pledge is a bailment or delivery of goods and chattels of one man to another, to be holden as a security for the payment of a debt or the performance of an engagement, and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the debt is discharged or the engagement has been fulfilled. The con-

tract is to be distinguished from the contract of hypothecation by the transfer of the possession or the delivery of the thing intended to be charged to the creditor, and from the contract of mortgage by the absence of a transfer of the ownership and right of property thereof in the premises during the continuance of the trust. If the thing intended to be burdened with the debt or charge remains in the possession and under the disposition of the owner, there is no pledge. By a pledge, therefore, of the goods and chattels the right of possession is altered, but not the right of property. Was the wheat and flour in the possession and under the control of Jacob B. Carpenter? He had the receipt of the warehousemen for it. Mahala Longan could not have conveyed the same to any one freed and discharged from his lien upon it. Miller & Williams, the warehousemen, were liable to him, on their receipt, for the amount expended on it. If any one had carried away and converted the wheat to his own use, Carpenter could have maintained an action for it, and the production of the receipt in evidence would have been proof of his title. Part of this wheat and flour, while in the possession and under the control of Jacob B. Carpenter, and before the assignment of the note, was sold, and the money paid to Miller & Williams, his depositaries. He recognized them as his agents by accepting their receipt, and the money paid by them for the wheat and flour sold was equally under his control, and could have been collected by him. If he failed to apply this money on the payment of the note and mortgage, and allowed it to remain in their hands until it was dissipated and squandered, he must suffer the loss, not Mahala Longan, who had no right to the possession of it. And if, in an action by Jacob B. Carpenter, Mahala Longan would have been entitled to recoup the amount of money paid to Miller & Williams for the wheat pledged, under the rule we have announced in this opinion, his assignee stands in no better position, and this money, so paid, must operate as a satisfaction, *pro tanto*, of the note and mortgage. As to the wheat and flour that remained in

the hands of Miller & Williams at the time of the assignment of the note to the present complainant, we express no opinion further than to say, that it never passed to B. Platte Carpenter, and that, if any liability attaches to any one, it must be to Jacob B. Carpenter, and on his liability we purposely refrain from expressing any opinion.

For the failure of the court below to allow credit on the mortgage for the wheat sold prior to the assignment of the note, this case must be remanded and reversed. It is accordingly reversed, with costs, for further proceedings in accordance with this opinion.

HALLETT, C. J., dissenting. Mahala and Jesse B. Longan made their negotiable promissory note of date March 5, 1867, payable to J. B. Carpenter six months after date. To secure this note Mahala Longan mortgaged to J. B. Carpenter certain lands in Jefferson county, and the note and mortgage having been assigned to the appellee before the maturity of the note, this bill was filed to foreclose the mortgage.

The defense set up by the appellant in her answer is, that at the time the note and mortgage were given she pledged to J. B. Carpenter certain wheat and flour, and that at the maturity of the note she tendered the amount due upon it at the Colorado National Bank, where it was left for collection, and demanded the note and mortgage, as well as the wheat and flour.

The answer was put in without oath, the verification being waived by the complainant in his bill according to the statute, and therefore evidence is required to support its averments. In the first place it is to be observed, that the evidence does not support the allegation that the appellant gave to J. B. Carpenter the wheat and flour as security for the payment, but shows on the other hand, that this wheat and flour was pledged by William and Jesse B. Longan. It is true that William Longan testifies that the appellant gave the personalty as additional security, but this statement is overborne by the other testimony in the case. Upon the

whole testimony it appears that William and Jesse B. Longan were the owners of the flour and wheat, and at the time the note was made the property was in the warehouse of Williams & Miller, where it had been placed for safe-keeping. William and Jesse B. Longan had previously obtained a loan upon the same property, and as the greater part of the money obtained from Carpenter was to be applied to the payment of this pre-existing indebtedness, the same property was at first offered as security for the note in this case. This security being refused by Carpenter, the mortgage in this case, together with the pledge of the personal property, was offered as security for the note and accepted. Jesse B. Longan testifies that he gave the personalty to Carpenter as security for the note, and that the money was borrowed for himself and his brother. The whole testimony shows that Mahala Longan became a party to the transaction for the purpose of mortgaging her real estate to secure the payment of the money borrowed by her sons, that she was not the owner nor was she in possession of the personal property, and that the latter, if pledged at all, was pledged by the sons and not by the mother. Hence it is not true, as alleged in the answer, that the appellant gave to J. B. Carpenter personal property as security for this note, and the proof failing to support the allegation, the defense must be rejected. *Gresley's Eq. Ev.* 232.

Accepting these facts as if they were well pleaded, and assuming, what is by no means clear upon the evidence, that the amount due upon the note was tendered at its maturity, how was the appellant entitled to demand the possession of the personalty upon the payment of the note? Surely upon the extinguishment of the note the property would revert to the pledgors, William and Jesse B. Longan, and the appellant would be no more entitled to the possession then than before the pledge was made.

Again, the rule which makes the assignment of a mortgage subject to the equities existing between the mortgagor and mortgagee is expressly confined to such equities only, and cannot be extended to equities existing between the

mortgagee and third parties. *James v. Morey*, 2 Cowen, 297.

In this case the personalty was pledged by Wm. and Jesse B. Longan, and whatever their rights against J. B. Carpenter, the appellant is a stranger to them. This doctrine is recognized by the court in this case, but I do not perceive that any attempt has been made to apply it. It is true that there is evidence in the record tending to prove an agreement, respecting the wheat and flour, between the pledgors and the pledgee, to the effect that the property might be sold to the pledgors by the warehousemen and the proceeds applied to the payment of the note, and, also, that some of the property was sold according to this agreement. If J. B. Carpenter was responsible for the money thus received, probably this was a payment upon the note which, according to the view of my brethern, would inure to the benefit of the appellant. But conceding this, the appellant should have set up the payment in her answer. She has pleaded a tender of the whole amount due upon the note, and complains that the pledged property and the note and mortgage were not surrendered to her when the tender was made, and to this defense she must be confined. If, under such an answer, a party may show payment, every other defense is equally open, and the rule which requires correspondence between proof and allegation may as well be annulled.

I come now to consider, whether the innocent holder of negotiable paper secured by mortgage may recover upon the mortgage the amount due upon the note in his hands, or is limited to the amount which might be recovered by the mortgagee if the suit were instituted by him. Upon this question there is some conflict of opinion, but I think that the weight of authority and the better reason are opposed to the views of my brethren in this case, and therefore I reluctantly proclaim my dissent from the opinion of the court.

The nature of a mortgage and its relations to the indebtedness it is intended to secure are pretty well understood at

this day, and do not demand much discussion. In *Martin v. Mowlin*, 2 Burr, 978, Lord MANSFIELD said :

“ A mortgage is a charge upon the land, and whatever will give the money will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it.”

So, also, KENT, C. J., in *Jackson v. Willard*, 4 Johns. 43 :

“ Until foreclosure, or, at least, until possession taken, the mortgage remains in the light of a chose in action. It is but an incident to the debt, and in reason and propriety it cannot and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold its interest at the will and disposal of the creditor who holds the bond. *Accessorium non ducit sed sequitur principale.*”

To the same effect are all the authorities and no one can now be found to question the doctrine that a mortgage is a mere incident to the indebtedness it is intended to secure, inseparable from it and incapable of existence without it. It is a truism of the law that a mortgage is a security for indebtedness accompanying the latter through all hands, and ultimately sharing the same fate. This rule which identifies the security with the indebtedness in my opinion requires, that the remedy upon the security shall be co-extensive with the demand. When this is denied the mortgage is divested of its character as a security to the extent of such denial. By the mortgage contract a lien is given upon property for the payment of certain indebtedness, and if the indebtedness be withdrawn from the lien, or if the existence of the lien be denied for causes *dehors* the mortgage, that instrument is divested of its essential quality in the face of its express provisions. That is no security for indebtedness which will not come up to the point of contributing to its payment, and a mortgage intrinsically good, which falls short of the measure of its principal, is a paradox unknown to the law. To illustrate, let us look for

a moment at the present case. A negotiable note secured by mortgage was indorsed to appellee before maturity upon a valuable consideration. It does not appear that the pledged property was delivered to appellee, or that he had any knowledge of it, so that no notice need be taken of that feature of the case. Neither law nor equity will deny to the appellee, as a *bona fide* holder for value, the full amount of the note when that instrument is presented. But it is said, that the action being to foreclose the mortgage, the amount of the note must be diminished by the sum received by the payee or his agents before the assignment to appellee. The mortgage is, in itself, valid and effectual, according to its legal character as a security for the indebtedness evidenced by the note. The note is intrinsically good, and, in the hands of the appellee, constitutes a demand against the appellant, for the amount expressed upon its face. Each instrument is perfect in itself, the one as a demand against appellant, the other as security for that demand, and yet when united, and a remedy to enforce the lien is sought, the security of the mortgage is denied as to a portion of that demand. In other words, the mortgage has ceased to be a security as to part of the indebtedness evidenced by the note, its express provisions to the contrary notwithstanding. It appears to me that the mortgage having been made as a security for the payment of the note, it ought to stand as a security for the whole note, extinguishable only upon payment of the whole amount recoverable upon it. Any other view is opposed to the rule which unites the mortgage to the indebtedness inseparably and gives them a common existence.

In this connection I will ask attention to the language of the supreme court of Wisconsin upon this subject.

“ The doctrine that an assignee can enforce the mortgage for no more than is justly and actually due between the mortgagor and the mortgagee had its origin at a time when the practice of giving mortgages as collateral security for the payment of negotiable paper was wholly unknown, and was made to rest upon the ground that such would be the

rule adopted in a suit at law, upon the covenant or bond to which the mortgage was collateral, and the assignee should stand no better in equity than at law. The reason of the rule being, that because, in a suit at law for the use of the assignee upon the bond or covenant to collect the debt, a recovery cannot be had for a greater sum than is actually due from the mortgagor to the mortgagee, and therefore no more shall be recovered in equity in an action to foreclose the mortgage, or that the parties as to rights and remedies shall stand upon the same footing in both courts; it follows, as a logical conclusion, that when the nature of the instrument evidencing the debt and the circumstances of the transfer are such, that in a suit at law upon it against the mortgagor the assignee can enforce its payment regardless of any equities existing between the mortgagor and mortgagee, he should have the same rights and remedy in equity. The reason of the rule ceasing in the case of negotiable securities transferred before maturity and without notice, the rule also ceases. The debt is the principal thing, the mortgage the incident, the transfer of the debt carries with it the mortgage. It is the debt which gives character to the mortgage and fixes the rights and remedies of the parties under it, and not the mortgage which determines the nature of the debt." *Croft v. Bunster*, 9 Wis. 509. See, also, *Dutton v. Joes*, 5 Mich. 519; *Reeves v. Scully*, Walker's Ch. 248.

Another consideration of great weight ought not to pass unnoticed. It is conceded that the appellee may recover in an action at law, upon this note, that portion of his demand which is denied to him in this proceeding. It was said by HOSMER, C. J., in *Clark v. Beach*, 6 Conn. 159: "The equitable doctrine concerning the rights of mortgagor and mortgagee has gradually been naturalized in the common-law code, and by the adoption of principles long established in chancery, and tenaciously adhered to, the suitors are not driven from one bar by increased litigation and expense to obtain infallible relief at another."

The policy of the law here defined has not, I think, been

heeded in this case. The appellant is protected from the payment of a portion of the appellee's demand, to which she must hereafter respond in a court of law, while the appellee is driven from this bar by increased litigation and expense to obtain infallible relief at another. The case of *Olds v. Cummings*, 31 Ill. 188, is the authority upon which the decision of this court is based, and that case is grounded upon the assumption that a foreclosure suit is brought upon a mortgage only. The court in that case say :

“The note itself, though secured by a mortgage, is still commercial paper, and when the remedy is sought upon that, all the rights incident to commercial paper will be enforced in the courts of law. But when the remedy is sought through the medium of the mortgage, when that is the foundation of the suit, and the note is merely used as an incident to ascertain the amount due upon the mortgage, then the courts of equity to which resort is had must pause and look deeper into the transaction, and see if there be any equitable reason why it should not be enforced.”

Upon this I submit that a foreclosure is founded upon the indebtedness as well as the mortgage. A court of equity will not, and in the nature of things cannot, permit a mortgagee to recover unless he is the holder of the indebtedness secured by the mortgage. 1 Hill. on Mort., ch. 11, § 5.

Whether the proceeding be at law or in equity, the indebtedness is the principal thing, for both remedies are designed to enforce payment of the money. I concede that the remedy at law is upon the note alone, but it is equally plain that the suit in equity is founded upon the note and mortgage, and that each is essential to the right of recovery. The indebtedness is the incumbrance and the mortgage is the means by which the incumbrance is attached to the estate. If either be removed, there is nothing remaining upon which the court can act. In a proceeding to foreclose a mortgage it is the duty of the court to ascertain the amount of the indebtedness, as well as to enforce the lien upon the mortgaged property for its payment, and while the mortgage will show the lien it is rarely evidence of the

indebtedness. Sometimes a covenant for the payment of the money is inserted in the mortgage, but usually a bond, note or other separate instrument is executed for the purpose of showing the amount of the indebtedness. Where the indebtedness is evidenced by a separate instrument a court of equity is as much bound to give effect to that instrument as to the mortgage. In this case the note is evidence of the amount of the indebtedness just as the mortgage is evidence of a lien upon certain property for the payment of that indebtedness, and the court is bound to give effect to the first as well as the second. The note is the legal and unquestionable evidence of the indebtedness as the mortgage is evidence of the lien, and each according to its office determines the rights of the parties. It is impossible to say that there is any thing due upon the mortgage disconnected from the note for the reason that the note alone determines the amount of the indebtedness.

The supreme court of Illinois say that the note is "merely used as an incident to ascertain the amount due upon the mortgage," but it is plain that no such use was made of the note in that case. The note called for the amount expressed upon its face, but the court refused to recognize the demand. The mortgage referred to the note as the standard of indebtedness, but the court rejected the note in violation of the express language of the mortgage. And this was done for the avowed purpose of protecting the mortgagor from making payment to the innocent holder of negotiable paper. I am not able to perceive that the former occupies a higher position in a court of equity than the latter, or that there is any reason for setting aside the rules of law applicable to commercial paper in cases of this kind.

The opinion of that court as well as that announced by this court is open to other criticism, but I think that I have shown that the ruling of the district court was correct, and that the decree of that court should be affirmed.

PROMISSORY NOTE—ASSIGNMENT BEFORE MATURITY—MORTGAGE.—Assignment of a negotiable promissory note before maturity raises a presumption of want of notice of any defense to it, and this presumption stands until overcome by sufficient proof. The holder of the note when obliged to resort to the mortgage for payment is unaffected by an equity arising between the mortgagor and mortgagee, subsequently to the transfer, and of which he, the assignee, had no notice at the time it was made. He takes the mortgage as he did the note: *Carpenter v. Longan*, 16 Wall. 271, reversing the decision in the principal case.

MACHETTE v. WANLESS.

VERDICT on issues in trover and replevin—sufficiency. Issues upon plea of *non-detinet* and property in defendant in replevin, and upon plea of not guilty in trover, are not determined by a verdict of guilty.

CONSTRUCTION OF MORTGAGE *must be such as will give effect to the whole instrument.* A mortgage in terms defeasible upon payment of a note for \$100, but which, by another clause, appears to have been intended as a security for past indebtedness, will be construed so as to bring the clause relating to past indebtedness within the terms of the defeasance.

MORTGAGE—description of indebtedness. A mortgage given to secure all past indebtedness due and owing from the mortgagor to the mortgagee contains a sufficient description of the indebtedness.

PRACTICE—objection to evidence must be made at the trial. Objections to evidence cannot be presented for the first time in this court.

REPLEVIN BY MORTGAGEE of chattels—evidence of indebtedness. A mortgagee of chattels may proceed against the mortgaged property while he holds any portion of the indebtedness secured by the mortgage, and in replevin for such chattels it is sufficient for him to show that he holds some portion of the indebtedness secured by the mortgage.

In an action of replevin by a mortgagee to recover possession of the chattels mortgaged, the defendant cannot defeat the action by showing that a portion of the indebtedness mentioned in the mortgage has been paid.

REPLEVIN—defense arising after suit brought. In replevin by a mortgagee to recover possession of the mortgaged chattels, the defendant cannot defeat the action by showing that a portion of the indebtedness was paid after suit brought.

CHATTEL MORTGAGE *must be executed according to statute.* A chattel mortgage, which does not provide that the property shall remain in the possession of the mortgagor, and which is not executed according to the statute (Rev Stat., chap. 14, 102), cannot be received in evidence.

Appeal from District Court, Arapahoe County.

At the trial, George F. Wanless testified: That he was agent for the plaintiff below, and authorized to make advances to one Goff, who occupied plaintiff's farm; that he took a mortgage from Goff to the plaintiff on one-half of Goff's crop, to secure such advances; that, on going to the plaintiff's farm one day, he found the defendant below removing the grain; that he told defendant of the mortgage to plaintiff, and claimed the grain and forbid the removal of it; that Machette, the defendant, answered, that he did

not intend to give up the grain, and thereafter secreted it, and refused to tell where it was; that the grain was found and replevied under the writ; that Machette stated that he was aware of plaintiff's mortgage; that Goff told witness, about a week before the grain was threshed, that he would not thresh for some weeks yet; that the grain was grown upon plaintiff's farm in the summer of 1867; that the advances made for plaintiff by witness were made at different times; that the last advance was \$100; was made in June, 1867.

Cross-examination: Witness identified a note taken by him from Goff at the time the mortgage was executed, and stated that it was paid at maturity by Machette, the defendant. Witness also stated: "I had advanced Goff money before that, horses, etc. I had made advances and so had my brother, and I took this mortgage to secure all of his indebtedness to my brother. I did not then know what or how much my brother had advanced, or how much I had advanced in all, and therefore only specified particularly this note in the mortgage; Machette paid me this note on the day it was due, I think it was after this suit was brought."

Plaintiff then offered a chattel mortgage from Goff to himself, dated July 6, A. D. 1867, and two notes from Goff to himself, one dated December 1, 1866, for \$616, payable one day after date, another dated October 15, A. D. 1866, for \$500, payable eight months after date. The consideration expressed in the mortgage was \$500, and the defeasance was as follows:

"Provided, nevertheless, that if the said party of the first part, his heirs, executors or administrators, shall well and truly pay to the party of the second part, his executors, administrators and assigns, for the redemption of the above bargained goods and chattels, the just and full sum of \$100, on or before the fifteenth day of September, A. D. 1867, with interest on the same, according to the tenor and effect of a certain promissory note, given by the said party of the first part to the said party of the second part, bearing even

date with this deed, then these presents to be void, otherwise to remain in full force and virtue, and to secure all past indebtedness due and owing from the said first party to the said second party, said indebtedness to be paid on or before said fifteenth day of September, A. D. 1867."

The defendant admitted the execution of the notes and mortgage, but objected generally to the introduction of the notes and to the mortgage on the ground that it was fraudulent and invalid for uncertainty. But the court allowed them to be read in evidence. The defendant below proved the execution of a mortgage from Goff to him, and also a note of \$1,500, dated June 6, 1867, payable thirty days after date. The mortgage was of the same date, and for the undivided one-half of the crop then growing upon plaintiff's ranche. This instrument did not contain any provision as to the possession of the property by the mortgagor, nor was it acknowledged in the form prescribed by the statute, relating to chattel mortgages. Upon plaintiff's objection the note and mortgage were excluded. The defendant also offered the \$100 note, mentioned in the mortgage from Goff to plaintiff, and upon plaintiff's objection the court refused to receive it. The defendant also offered a power of attorney from Goff to him, authorizing him to pay the \$100 note and obtain a release of plaintiff's mortgage. On plaintiff's objection this was excluded also. The verdict of the jury was, they find the said defendant guilty, and assess the said plaintiff's damages on occasion of the premises at five cents.

Messrs. CHARLES & ELBERT and Mr. GEORGE W. PURKINS, for appellant.

Mr. ALFRED SAYRE and Mr. M. BENEDICT, for appellee.

HALLETT, C. J. The declaration in this cause contains a count in replevin and a count in trover. To the count in replevin *non delinet* and property in Machette was pleaded, and to the count in trover the plea was not guilty. Issues were joined upon these pleas, and upon trial thereof the jury returned a verdict of guilty, and awarded five cents

damages to the plaintiff below. It is impossible to say that these issues were determined by this verdict. Whether the jury found the defendants guilty of the detention charged in the first count, or the conversion charged in the second count, can only be conjectured, and the verdict is entirely silent as to the ownership of the property. In *Patterson v. United States*, 2 Wheat. 221, it is said: "Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue, and although the court in which the cause is tried may give form to a general finding so as to make it harmonize with the issue, yet if it appears to the court, or the appellate court, that the finding is different from the issue, or is confined to part only of the matter in issue, no judgment can be rendered upon the verdict."

It is hardly necessary to add, that according to this rule this judgment cannot stand.

Other questions are presented which will probably arise upon another trial of the cause, and therefore it is necessary to refer to them briefly.

The mortgage from Goff to Wanless, although in terms defeasible upon payment of the \$100 note, seems to have been intended as a security for all indebtedness then existing between the parties. The clause relating to past indebtedness must be brought within the terms of the defeasance in order to make it effectual, and this appears to have been the intention of the parties. This construction will give effect to every part of the instrument, while that urged by the appellant requires the provision respecting past indebtedness to be rejected, and the law will indulge the first construction rather than the last.

As to the description of the indebtedness, the case of *Insurance Company v. Brown*, 11 Mich. 266, is an authority.

In that case it was held that a mortgage conditioned for the payment of all sums due and to become due was sufficiently certain, and the opinion of the court appears to be well sustained by other authorities.

If the appellee had been called upon to show that the notes given in evidence were covered by the mortgage, the

court below would, doubtless, have required him to furnish such proof, since the mortgage does not contain a specific description of the indebtedness designed to be secured. But the appellant's objection appears to have been directed against the mortgage, and it does not appear that any question was made in the court below respecting the connection or want of connection between the notes and mortgage. So, also, as to the objection that it does not appear that the instrument was recorded in the office of the county recorder. It does not appear to have been presented to the court below, and cannot be presented for the first time in this court.

In answer to the objection that the \$100 note was not offered by the appellee together with the chattel mortgage, it is sufficient to say, that a portion of the indebtedness secured by the mortgage was offered and received. Of course, a mortgage valid and effectual to secure the whole of the indebtedness described in it, is valid and effectual as to every portion of such indebtedness, and, while the mortgagee holds any portion of the indebtedness secured by the mortgage, he is entitled to proceed against the mortgaged property. Perhaps this statement would require some modification if applied to a case where a mortgagee of chattels has assigned a portion of the indebtedness secured in his mortgage, and his assignee has obtained possession of the mortgaged chattels. But the appellant does not occupy the position of an assignee of the \$100 note. He claims to have taken it up on behalf of Goff, the maker, and is aggrieved that the court below would not permit him to show this fact. Furthermore, at the time the property was replevied, the note had not been paid, and, therefore, appellant was not then in possession of it, either as assignee or otherwise. Upon the evidence in this case, it certainly was sufficient for appellee to show, that he held a part of the indebtedness secured by the mortgage, and we do not see that appellant could defeat a recovery by showing that he did not hold all of the indebtedness. Although there was a count in trover in the declaration,

there was no attempt to charge defendants below with more property than was obtained upon the writ of replevin, and, therefore, we may say, that the action was solely to recover possession of chattels. We have seen, that appellee was only required to show some indebtedness from Goff to him under the mortgage, in order to support his right to the possession of the mortgaged chattels, and, therefore, the refusal of the court to allow appellant to show that the \$100 note had been paid was not erroneous.

As to the mortgage from Goff to appellant, it was not executed according to the statute, and, therefore, it was properly excluded. *Hunt v. Bullock*, 23 Ill. 320.

We do not perceive that any other questions presented in this record will necessarily arise upon another trial of the cause, and, therefore, this discussion will not be extended further.

The judgment of the district court is reversed and the cause remanded for a new trial. *Reversed.*

REPLEVIN — VERDICT. — In replevin a verdict of not guilty does not answer a traverse of property in the plaintiff: *Freas v. Lake*, 2 Colo. 481.

MORTGAGE — DESCRIPTION OF INDEBTEDNESS. — A mortgage given to secure all indebtedness, past, present, or future, i. e., debts due and owing or to become due from the mortgagor to the mortgagee, contains a sufficient description of the indebtedness: *Clark v. Hyman*, 85 Iowa, 57, citing the principal case.

WESTERN UNION TELEGRAPH COMPANY v. GRAHAM.

REGULATIONS BY TELEGRAPH COMPANY *respecting their business.* Telegraph companies may make reasonable regulations concerning their business, but cannot by such rules relieve themselves from responsibility for the negligence of their servants.

REGULATION not applicable. That the plaintiff did not cause a message to be repeated as required by a regulation of the company is no defense to an action for a failure to deliver the message after it was received at the office to which it was addressed.

MEASURE OF DAMAGES in action for non-delivery of telegram. In an action against a telegraph company to recover damages for the non-delivery of a telegram, in which the plaintiff requested his agents at Nebraska City to "ship oil soon possible," the plaintiff cannot recover the profits which he might have made on the oil if the message had been delivered and the oil sent in due time.

In such action the plaintiff may recover the money paid by him for transmitting the message, the advance in the price of freight, and his expenses incurred by reason of the failure of the defendant to fulfill the contract.

Error to District Court, Arapahoe County.

HALLETT, C. J., did not participate in the decision.

Mr. ALFRED SAYRE, for plaintiff in error.

Messrs. CHARLES & ELBERT, for defendant in error.

BELFORD, J. The marked ability which has characterized the argument of this case makes it important to examine with great care the principles involved. The declaration contains three counts. It is averred that the plaintiff, on the 5th day of December, 1864, employed the defendant to transmit from Denver, in Colorado, and deliver to Ashton and Tait, in Nebraska City, in Nebraska, the following message :

“DENVER, *December 5, 1864.*

“ASHTON & TAIT, *Nebraska City :*

“Ship oil soon as possible, at very best rates you can.

“WILLIAM GRAHAM.”

It is further alleged that, in consideration of the sum of \$5.00 then paid, the defendant accepted and agreed to deliver the same, but that, by reason of the unskillfulness, negligence, and want of care of the servants and employees of the company, the message was not transmitted and delivered ; by means whereof the said Ashton and Tait did not ship the oil as requested, and the plaintiff was compelled to pay higher rates of freight on the same, amounting to the sum of \$500, and also that the plaintiff lost great gains and profits by the delay thus caused in not shipping said oil, amounting to the sum of \$1,500, and was otherwise put to great expense and incurred great loss and damage.

The defendants, for answer, plead the general issue, and four special pleas. In the special pleas it was alleged, that at the time of the delivery of the several telegraphic messages, in the several counts of the declaration mentioned, the plaintiff was notified and informed that in order to guard against mistakes in the transmission of messages over the

lines of the defendants from Denver to Nebraska City, every message of importance ought to be repeated by being sent back from the station at which it is to be received to the station from which it is originally sent, and that the defendant would charge fifty per cent more for repeating each message than for sending or transmitting such message without repeating the same; and that, while the defendant would use every precaution to insure correctness, the said defendant would not be responsible to the plaintiff or to any other person for mistakes or delays in the transmission or delivery of repeated messages, beyond an amount exceeding five hundred times the amount paid for sending the message, and that the said defendant would not be responsible for mistakes or delays arising from interruptions in the working of the telegraph of the said defendants, nor for any mistake or omission of any other company over whose lines a message should be sent to reach the place of destination. It is further alleged that the plaintiff, well knowing the premises, did not, at the time of delivering the messages, in the declaration mentioned, to the defendant, nor at any time before or since, request the defendant to repeat the messages by sending the same back from Nebraska City to Denver, nor did the plaintiff pay or offer to pay to the defendants the sum or price charged by the said defendants for repeating the said several telegraphic messages. To these several special pleas a demurrer was filed and sustained. The defendant went to trial on the general issue, and the jury returned a verdict for the plaintiff, and assessed his damages at \$1,039.69. The motion for a new trial having been overruled, the cause comes here.

The first error assigned is the sustaining of the demurrer to the special pleas.

It is claimed by the plaintiff in error that Graham, having subscribed to the conditions printed on the back of the paper on which the dispatch was written, is not only chargeable with notice of them, but that his right to recover is limited thereby. It is further insisted that, not having requested the defendant to repeat the message, he thereby

released the company from liability. It is no longer a question of doubt that a telegraph company has the right to make reasonable rules and regulations for the proper conducting of its ordinary telegraphing business, and this right has been recognized by many of the States by statutory enactments, and in others by decisions of their courts, but while this is the case, the doctrine has nowhere been carried to the length of exempting them from all responsibility for a want of fidelity and care in the exercise of the employment which they undertake to prosecute. There are duties they owe the public arising out of the nature of their employment which it would be impolitic and inexpedient to suffer them to diminish or evade. Among these duties may be mentioned the obligation to employ competent and skillful operators and other agents and servants, in all respects competent for the discharge of their particular duties; and further, to see that they not only possess such skill, but that it is continually applied in the particular business in which they are engaged. They cannot refuse to receive and forward messages, nor select the persons for whom they will act. They must send for every person who may apply at a uniform rule without any undue preference, and according to established rules and regulations applicable to all alike. In the case of *Ellis v. American Telegraph Company*, 13 Allen, 234, BIGELOW, C. J., says: "There can be no doubt that in the ordinary employments and occupations of life men are bound to the use of due and reasonable care, and are liable for the consequences of carelessness or negligence in the conduct of their business to those sustaining loss or damage thereby. We can see no reason why this rule is not applicable to the business of transmitting messages by telegraph. But the rule does not operate so as to prevent parties from prescribing reasonable rules and regulations for the management of the business, or establishing special stipulations for the performance of services, which, if made known to those with whom they deal, and directly or by implication assented to by them, will operate to abridge their general liability at common

law, and to protect them from being held responsible for unusual or peculiar hazards which are incident to particular kinds of business. Of course a party cannot in such way protect himself against the consequences of his own fraud, or gross negligence, or the fraud or gross negligence of his servants or agents, nor can he escape all liability or responsibility in the performance of the service or duty which he undertakes. Nor can there be any difficulty or danger in the application of this principle so long as it is kept within a proper limit. That limit is found by requiring in all cases that the conditions and regulations by which a party seeks to limit his liability in the conduct of his business shall be reasonable. Such only, by the rules of law, can a party be permitted to prescribe, and to none other can those who deal with them be held to yield their assent."

This brings us to the question, whether the rule relied on by the defendants in the special pleas, and which is set up in defense of the plaintiff's claim, is a just and reasonable one, and such as they have a right to prescribe, and by which the plaintiff was bound.

It has been remarked by an eminent lawyer, "that when rules and regulations are in derogation of common right, or are intended to restrict and limit liabilities to which the company would otherwise be subject, by reason of the duties imposed upon it by law, or the nature of its engagement, the validity of such rules and regulations is a question of law." Accepting this as true, how stands the rule relied upon in the special plea? The gist of the action is the failure to deliver the message. The complaint is not that the message was incorrectly sent or that it was inaccurately taken off the wires at Nebraska City. If this was the gravamen of the action, we might hold with the Kentucky and Massachusetts courts, that it was the duty of the plaintiff to insure its accuracy by having it repeated. But how could the failure to deliver the message be avoided by paying for having it repeated? Can it be said that the operator at the other end of the line could insure the safe delivery of a message by repeating, when the negligence which

occasioned the failure occurred after the receipt of the message? The object of repeating a message is to correct errors and not to avoid delays in delivering it. After transmission an incorrect message could be sent out and delivered as speedily as if it had been verified and proved to be perfectly accurate. Delays in the delivery of a message result from causes altogether different from those which produce mistakes in transmission, and it is reasonable that rules of limitation or exemption should be adapted to the nature of the case. Scott and Jarnigan on the Law of Telegraphs, § 113. A message may be correctly transmitted from one point to another, may be correctly taken off the line, and the agent of the company may, through inattention, fail to deliver it to the party to whom it is directed. It would hardly be contended that in this case the company could shield itself under the condition that the party sending the message failed to pay for having it repeated. The mere fact of having it repeated could not have insured its delivery. The failure to deliver is not caused by imperfection of instruments and appliances, by electrical changes, or by a break of the line at an intermediate point, but by the negligence of the operator, and against this inattention and want of care these rules and regulations cannot provide. To support the reasonableness of the conditions attached to the message, our attention has been called to the case of *Ellis v. American Telegraph Company*, noticed above. The counsel citing this case must have overlooked the remarks of the chief justice, on page 238: "It is hardly necessary to say that the question, whether the mistake or error in the dispatch would have been prevented or corrected by the repetition of the message, in conformity to the regulations established by the defendants, does not appear to have arisen at the trial. Whether it would have done so was a question of fact for the jury. Of course the defendants would be liable for any negligence causing damage, which would not have been prevented by a compliance with these rules."

Until the plaintiff in error can show that the failure to

transmit and deliver the message could have been prevented by having it repeated, the above case can be of little avail to him. The next authority relied on is that of *Camp v. Western Union Telegraph Company*, 1 Metc. (Ky.) 166. In this case the company, by way of defense, relied upon a notice of the terms and conditions on which messages were received by it for transmission, and which are the same as those relied on here. SIMPSON, Judge, says: "There is no allegation in the plaintiff's petition that the mistake was occasioned by negligence, or was the result of incompetency or want of proper skill on the part of the agents who were employed by the company to act as operatives in the sending and receiving of dispatches; *but the failure of the company to comply with its contract to transmit the message correctly is alone relied upon as the foundation of the plaintiff's right to a recovery in the action.*" It will be observed that the case at bar and the case cited differ in other particulars. Here the plaintiff charges that failure to transmit and deliver the message was occasioned by "the carelessness, negligence and want of skill of the defendants and their agents, and through want of due care and attention to their business." Here the act complained of is the failure to deliver the message, while in the case cited the message was transmitted and delivered, but there was a mistake made in the tenor of the dispatch, making it read sixteen cents a gallon instead of fifteen cents, as written by the sender. While we hold that it is competent for the company to provide by rules and regulations against the unforeseen disarrangement of electrical apparatus and the imperfection necessarily incident to the transmission of signs and words by electricity, yet it must be conceded that these forces or accidents do not affect the ability of the company to deliver the message to the party addressed, after it has been taken off the wires and reduced to writing. What is needed to secure delivery is fidelity, and to this the company is bound in all messages. In the case of *Birney v. New York and Washington Telegraph Company*, 18 Md. 341, 342, the plaintiff delivered to the com-

pany's agent a message for transmission, which was wholly forgotten by the agent, and he neglected to send it at all. There was no repeating price paid by the plaintiff. It was held by the court that the company's notice, with regard to the repetition of messages, would not apply to a case of neglect, when no effort was made to put a message upon its transit. Much has been said about the peculiar hazards to which telegraph companies are exposed. It is said that "the operating apparatus of the telegraph leaves no record of the work done at the place from which it is transmitted, and that, therefore, there is peculiar liability to error in the non-transmission and transmission of dispatches." This is all true, and courts and legislatures have been liberal in allowing companies to provide against such risks as arise out of atmospheric influences and kindred causes. At this point they have properly stopped. To permit them to contract against their own negligence would be to arm them with a most dangerous power, one, indeed, that would leave the public almost entirely remediless. It must be borne in mind that the public have but little choice in the selection of the company which is to perform the desired service. They do not select their agents or employees, nor can they remove them. They are bound to take the company as they find it, and to commit to these agents their messages, however valuable they may be. Such being the case, public policy as well as commercial necessity require that companies engaged in telegraphy should be held to a high degree of responsibility. I have thus far examined this case on the pleadings without alluding to the evidence elicited on the trial, and am of the opinion that the court below committed no error in sustaining the demurrer to the special pleas. Another question equally important remains for decision. On the trial below the court permitted the plaintiff, over the objection of the defendant, to introduce evidence of the price of coal oil in Denver, in December, 1864, and in January, February and March, 1865.

The introduction of this evidence was, doubtless, permitted on the ground that the plaintiff had a right to recover

damages for the loss of profits he might have made, had the dispatch been delivered to Ashton and Tait; and the oil been shipped by them and reached Denver in January or February. It is claimed by the plaintiff in error that the court also erred in giving the following instruction: "If the jury believe from the evidence that the defendant made an effort, in good faith, to transmit the dispatch given in evidence, and that the same was transmitted from Denver to Nebraska City, but that the dispatch was not delivered to Ashton and Tait, by reason of the carrier of the defendant depositing the same in the post-office at Nebraska City, then the jury are instructed that the defendant was not guilty of willful neglect or negligence, and the plaintiff is not entitled to exemplary damages or "smart money," but is only entitled to such reasonable damages as he sustained by the difference in freight, and the difference in price for which he sold his oil, and the price for which he might have sold it had the dispatch been delivered in time and the oil shipped at the next opportunity, that Ashton and Tait had to ship the oil after they should have received the dispatch." The plaintiff in error rests his objection to the introduction of the evidence above referred to, on the ground that the plaintiff's declaration contained no special averment of the loss of profits. In an action for refusing to let a lessee into possession, the plaintiff gave evidence of injury to his wife's business as a milliner, without having averred it specially; but the court held it admissible under the general allegation of damage, as going to show that "the plaintiff had sustained inconvenience." *Ward v. Smith*, 11 Price, 19; see, also, *Shepard v. Milwaukee Gas Company*, 15 Wis. 327. Before proceeding to discuss the right of the plaintiff to recover damages for loss of profits, it is proper to remark that neither the message nor declaration discloses the kind of oil that was to be shipped, nor its quantity nor quality, nor where it was at the date of the dispatch, nor for what purpose such shipment was to be made, nor whether such oil was intended for sale or for use, nor at what point the profits were lost. For any thing that appears in the declara-

tion it might have been hair oil, fish oil, or wizard oil. The element of certainty has been left out. True, the evidence shows that the plaintiff had on deposit with Ashton and Tait, as his forwarding agents, sixty-nine boxes of coal oil, but nothing of this kind appears in the declaration. Under the general averment, that the plaintiff lost profits on oil, it is claimed that the company should come prepared to dispute at the trial the value of any kind and any quantity of oil, at any place, and at any time. Under the ruling of the court below, the plaintiff could have as readily recovered for loss of profits on olive oil, as coal oil; for the profits of ten thousand gallons of oil, as for the profits on one. The defendant might have come prepared with testimony as to the value and quantity of one kind of oil, and yet have been surprised by an inquiry as to another kind or quantity. "A chief object of formal written pleadings is, to apprise the opposite party of the real cause of complaint against him, so that he may in like manner interpose the proper answer on his part, and that on the trial he may not be taken by surprise; this requires that the injury complained of should be stated with such fullness and certainty in the declaration as to leave no reasonable doubt of the particular transaction on which the plaintiff relies, and which he intends to prove to establish his right of action. These are common-place principles and apply to every pleading which is required to be special in its nature." *Relyea v. Drew*, 1 Denio, 563.

But, granting that the declaration was sufficiently specific in all these points, was the plaintiff entitled to recover damages for the loss of profits he might have made had the dispatch been delivered, and the oil been sent and received in Denver, and sold? In the case of *Staats v. Executors of Ten Eyck*, 3 Caines, 116, LIVINGSTON, J., says: "The safest general rule in all actions on contracts is to limit the recovery as much as possible to an indemnity for actual injury sustained without regard to the profits, which the plaintiff has failed to make, unless it shall clearly appear from the agreement that the acquisition of certain profits

depended on the defendant's punctual performance, and that he had assumed to make good such a loss also." To the same effect is *Thompson v. Shattuck*, 2 Metc. 618. In the case of *Freeman v. Clute*, 3 Barb. 426, HARRIS, J., says: "The defendants insist that if liable for consequential damages at all, they are only liable for such expenses as were actually incurred by the plaintiff in attempting to put the machinery in operation, and such actual loss as he had sustained in using the defective machinery; while on the other hand the plaintiff claims that he is entitled to recover, as consequential damages, the profits he could have made in the manufacture of oil had the machinery been complete and put up within the time limited. I agree with the counsel for the plaintiff in the general rule for which he contends, that the party complaining of the breach of an executory contract is entitled to indemnity for the loss which the non-performance of the obligation by the other party has occasioned him, and for the gain of which it has deprived him. But the gain contemplated by this rule is only that which is the direct and immediate fruit of the contract, such gain may as properly be regarded in estimating the damages resulting from a failure to perform a contract as any actual loss the party may sustain. But even the civil-law rule, which is more liberal than the common-law, in the measure of damages for the violation of an executory contract, confines the allowance for the loss of profits to the particular thing which is the object of the contract, and does not include such loss of profits as may have been incidentally occasioned in respect to his other affairs. I cannot agree with the counsel for the plaintiff that the estimated profits upon the manufacture of a specified quantity of flax seed into linseed oil constitutes a legitimate item of damages against the defendants; such profits are entirely too speculative and uncertain to make them a measure of damages."

The same rule is laid down in *Blanchard v. Ely*, 21 Wend. 342. In the case of *Driggs v. Dwight*, 17 Wend. 71, and *Millers v. The Mariners' Church*, 7 Greenl. 51, it was held that the plaintiffs were entitled to recover the

expenses actually incurred in their business *as a consequence* of the failure of the defendants to perform their contract, but denied their right to recover damages for profits, which they claimed they might have made. Mr. Justice STORY, in the case of *The Schooner Lively*, 1 Gallis. 315, commenting on this subject, says: "Independent, however, of all authority, I am satisfied upon principle that an allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree injurious to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets to an exactness in point of time and value which would sometimes present embarrassing obstacles. Much would depend on the length of the voyage and the season of the arrival. After all it would be a calculation upon conjectures and not upon facts." In the case of *Griffin v. Colver*, 16 N. Y. 490, the earlier New York decisions are reviewed with great care, and the conclusion reached is that the party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. They exclude only uncertain and contingent profits, not such as, being the immediate and necessary result of the breach of contract, may be fairly supposed to have entered into the contemplation of the parties when they made it, and are capable of being definitely ascertained by reference to established market rates. POTHIER says: "In general, the parties are deemed to have contemplated only the damages and injury which the creditor might suffer from the non-performance of the obligations in respect to the particular thing which is the object of it, and not such as may have been accidentally occasioned thereby in respect to his other affairs. This rule, however, applies only to cases where, by reason of special circumstances, having no necessary connection with the contract broken, damages are sustained which would not ordinarily or naturally flow from

such breach ; as when a party is prevented by the breach of one contract from availing himself of some other collateral and independent contract entered into with other parties, or from performing some act in relation to his own business, not necessarily connected with the agreement. An instance of the latter kind is, when a canon of the church, by reason of the non-delivery of a horse pursuant to agreement, was prevented from arriving at his residence in time to collect his tithes. In such cases the damages sustained are disallowed, not because they are merely consequential or remote, but because they cannot be fairly considered as having been within the contemplation of the parties at the time of entering into the contract." After examining at great length the various decisions on the subject, SELDEN, J., remarks : " From these authorities and principles it is clear that the defendants were not entitled to measure their damages by estimating what they might have earned by the use of the engine and their other machinery, had the contract been complied with. Nearly every element entering into such a computation would have been of that uncertain character which has uniformly prevented a recovery for speculative profits."

In the case of *Squire et al. v. Western Union Telegraph Company*, 98 Mass. 232, and which was an action in tort for failing to deliver a message, BIGELOW, C. J., says : " These rules, in their application to damages in actions of this nature, are well settled and familiar. A party who has failed to fulfill a contract cannot be held liable for remote, contingent and uncertain consequences, or for speculative or possible results which may have ensued on his breach of duty, although they may be traceable to that cause. The reason is, that damages of such a nature are not the natural or necessary incidents of a contract, and cannot be deemed to have been within the contemplation of parties when they agreed together. A rule of damages, which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service, would be

a serious hindrance to the operations of commerce and to the transaction of the common business of life. The effect would often be to impose a liability wholly disproportionate to the nature of the act or service which a party had bound himself to perform and to compensation paid and received therefor. The practical rule, founded on a wise policy, and, at the same time, consistent with good sense and sound equity, is that a party can be held liable for breach of contract only for such damages as are the natural or necessary and the immediate and direct results of the breach, such as might properly be deemed to have been in contemplation of the parties when the contract was entered into, and that all remote speculations and uncertain results, as well as possible profits and advantages, and other like consequences which might have arisen from the fulfillment of the contract, must be excluded, as forming no just or legitimate basis on which to determine the extent of the injury actually caused by a breach."

While in this cause the court disallowed the recovery of profits, it held that the defendants, as a contracting party, were liable for the injury actually caused by their breach of duty, and commenting on the opinion delivered by himself in *Elis v. American Telegraph Company*, 13 Allen, 226, remarks: "There is nothing in the nature of the business, which they undertake to carry on, that should exempt them from making compensation for any neglect or default on their part." There is another important case bearing on this subject, and one worthy of great attention, as it seems to have been ably argued by counsel and gravely considered by the court. I refer to the case of *Leonard v. The New York Telegraph Company*, 41 N. Y. 565. The facts in that case were as follows: On the 24th of September, 1856, Magill & Pickering, acting for plaintiffs, delivered to the Western Union Telegraph Company, at Chicago, a dispatch to be sent to one Shoals, at Oswego, as follows: "D. B. Shoals, Oswego. Send 5,000 sacks of salt immediately. Magill & Pickering." When the message was delivered, it read, "Send 5,000 casks of salt immediately." The term

“sacks,” in the salt trade, designates fine salt, containing fourteen pounds, and the term “casks” designates coarse salt, in packages containing not less than 320 pounds. Shoals received the telegram on the day it was sent, and that evening chartered a schooner to take the salt to Chicago, and shipped by her 2,733 barrels of coarse salt. The cargo of salt arrived at Chicago on the 15th day of October. There being no market for the same, it was stored away at the expense of the plaintiff. The salt was worth, at the time of its shipment in Oswego, \$1.60 per barrel. The cost of transporting the same to Chicago, exclusive of insurance, was nearly twenty-seven and a half cents per barrel, and on its arrival at Chicago it was not worth at that place to exceed \$1.25 per barrel.

The cause was tried before a referee, who found “that the measure of damages to which the said plaintiffs are entitled is the difference in the value of salt at Oswego and Chicago with the cost of transportation added thereto, with interest from the time of the arrival of said salt at Chicago.” On commenting on this finding of the referee, EARLE, C. J., says: “The measure of damages to be applied to cases as they arise has been a fruitful subject of discussion in courts. The difficulty is not so much in laying down rules as in applying them. The cardinal rule undoubtedly is, that one party shall recover all the damages which has been occasioned by the breach of contract by the other party. But this rule is modified in its application by two others. The damages must flow directly and naturally from the breach of contract, and they must be certain both in their nature and in respect to the cause from which they proceed. Under this latter rule, speculative, contingent and remote damages, which cannot be directly traced to the breach complained of, are excluded; under the former rule such damages are only allowed as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, as might naturally be expected to follow its violation. It is not required that the parties must have contemplated the actual damages which are to be

allowed, but the damages must be such as the parties may fairly be supposed to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, not violated. As both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract which they have entered into, I think a more precise statement of the rule is, that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts.

* * * I think, therefore, that the rule of damages adopted by the referee was sufficiently favorable to the defendant. The damages allowed were certain, and they were the proximate and direct result of the breach." As to the measure of damages that may be recovered in an action of tort, or for breach of contract, I call attention to the cases of *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 325; *Railroad Co. v. Howard*, 13 How. (U. S.) 344; *Masterton v. The Mayor, etc., Brooklyn*, 7 Hill, 61; *Fox v. Harding*, 7 Cush. 522; *Thompson v. Jackson et al.*, 14 B. Mon. 114; *Davis v. Talcott*, 14 Barb. 611; *Wade v. Leroy et al.*, 20 How. 24; *Waters v. Powers*, 20 Eng. Law and Eq. 410; *Fletcher v. Tayleur*, 33 id. 187; *Alder v. Heighly*, 16 M. & W. 117.

If the authorities from which I have quoted state the rule correctly, and I have no reason to doubt it, then the instruction given by the court, so far as the same relates to the plaintiff's right to recover for profits which he might have made had the message been delivered and the oil sent, etc., is erroneous, and the jury having been misled by it, the cause must be reversed. And as this cause must go back for trial, it is proper that we should add that the plaintiff is entitled to recover not only what he paid the company for transmitting the message, but also the increased price of freight he was required to pay, and also all expenses that the plaintiff incurred by reason of the failure of the defend-

ant to fulfill the contract. The length to which the opinion has already grown prevents reference to other matters that have been assigned for error.

The cause is remanded for new trial in accordance with the principles announced in this opinion, and the parties have liberty to amend their pleadings.

Reversed.

BERRY v. HART et al.

PLEADING IN TRESPASS — *justification by officer.* In trespass *de bonis* against an officer, if he justify under a writ of attachment, he must aver return of the writ.

SAME — *justification by plaintiff in attachment.* But this rule is not applicable to the plaintiff in the attachment suit.

EVIDENCE — *official character of sheriff.* Whatever rule may be enforced against an officer justifying under process, it seems to be sufficient for third persons to show that he is an officer *de facto*, and a plaintiff in attachment who is sued in trespass is not bound to show that the sheriff who levied the writ was an officer *de jure*. It is sufficient for him to show that the sheriff was performing the duties of the office and generally recognized in it.

JUSTIFICATION by plaintiff in attachment. If a plaintiff in attachment is sued in trespass by a stranger to the proceeding he need not aver the ground upon which the attachment was issued.

And if the ground of the attachment is set out in the plea, it is not necessary to support it at the trial.

AGENT — *authority of clerk in a store.* A clerk left in charge of a store during the absence of his principal, with instructions to do the best he can, has no authority to sell the entire stock valued at upwards of \$10,000 to a single creditor of his principal to satisfy a debt of less than \$7,000.

AGENT'S AUTHORITY — *may be attacked by creditor of the principal.* A creditor of the principal may attack a sale made by an agent, upon the ground that the agent was without authority to make it, but a mere stranger cannot be allowed to interfere between principal and agent.

The creditor must prove a debt and legal process against the principal in the same manner as one who seeks to avoid a sale under the statute of frauds and for the same reason.

Appeal from District Court, Gilpin County.

TRESPASS *de bonis asportatis* against Isidore H. Kastor, William Z. Cozens and appellant. Cozens and appellant

pleaded the general issue ; afterward Cozens pleaded specially that he was sheriff of Gilpin county ; 6th May, 1867, a writ of attachment came to his hands issued out of the district court of Gilpin county, at the suit of Kastor & Berry, and against Oliver S. Buell, and directed to him to execute, commanding him to attach so much of the estate of Buell as should be of value sufficient to satisfy the sum of \$659.25 and costs, etc.; that he levied the said writ on the goods and chattels in the declaration mentioned, as the property of said Buell, and that said goods and chattels were the property of the said Buell at the time when, etc. ; that the levying of said writ was the trespass complained of, etc. Appellant filed the following special plea :

And the said defendant, Julius Berry, by Royle & Butler, his attorneys, for a further plea in this behalf by leave of the court, for this purpose first had and obtained, says *actio non* because he says that on the 6th day of May, A. D. 1867, at the county of Gilpin aforesaid, and before the committing of the said trespasses above laid to the charge of the defendants herein, he and one Isidore H. Kastor were partners, doing business at the city of Denver, to wit, in the county of Gilpin aforesaid, under the firm-name and style of Kastor & Berry, and that one Oliver S. Buell, who did business under the name and style of O. S. Buell & Co. at the said county of Gilpin, was indebted to the said Kastor & Berry in the sum of \$659.25, and that the said Buell was then and there converting his property into money, with the intent of placing the same beyond the reach of the said Kastor & Berry. And defendant avers that on the said 6th day of May, A. D. 1867, and before the committing of the said supposed trespasses, at the county aforesaid, he made and filed his affidavit in the clerk's office of district court of said Gilpin county, which affidavit was duly subscribed and sworn to before an officer authorized to administer oaths, in which affidavit he alleged that the said Buell was indebted to the said Kastor & Berry in the sum of \$659.25, and that the said Buell was converting his property into money with the intent of placing the same beyond the reach of the said

Kastor & Berry, and that he was otherwise disposing of his property, with the intent of placing the same beyond the reach of the said Kastor & Berry ; and that said defendant then and there made a good and sufficient bond with good and sufficient surety, and filed the same with the said clerk of the said district court of Gilpin county. And defendant further avers that, on the day and year aforesaid, at the county aforesaid, and before the committing of the said supposed trespasses, upon the filing of the affidavit and bond in the said clerk's office of the district court of Gilpin county, a writ of attachment was issued by the said clerk of said district court at the suit of the said Kastor & Berry against the estate of the said O. S. Buell, and that, on the said 6th day of May, A. D. 1867, at the county aforesaid, the defendant caused the said writ of attachment to be delivered to William Z. Cozens, who was then and there the sheriff of said Gilpin county, which said writ of attachment commanded the said sheriff of Gilpin county to attach so much of the estate, real and personal, of the said O. S. Buell, to be found in the said county of Gilpin, as should be of value sufficient to satisfy the sum of \$659.25 and costs, and such estate so attached in his hands to secure so as to provide that the same might be liable to further proceedings thereupon, according to law, at a court to be holden at the city of Central for the said county of Gilpin, upon the second Tuesday of July, A. D. 1867, so as to compel the said O. S. Buell to appear and answer the complaint of the said Kastor & Berry, which said writ of attachment was then and there in full force and effect, and not discharged or satisfied ; and which said writ of attachment was directed to the said Cozens, as sheriff of said Gilpin county, to execute, and that the said Cozens, as such sheriff as aforesaid, by virtue of the said writ of attachment, and by the aid and direction of defendant, did, on the 6th day of May, A. D. 1867, at the county of Gilpin aforesaid, in the life-time of the said writ of attachment, take the said goods and chattels in the said declaration mentioned, and levy upon the same, by virtue of the said writ of attachment, as the property of the

said O. S. Buell ; and the defendant avers that the said goods and chattels in the said declaration mentioned were the property of the said O. S. Buell and were subject to attachment, without this, that the property of the said goods and chattels in the said declaration mentioned, or any part thereof, at the said time when, etc., was in the plaintiffs, as by the said declaration is above supposed, which are the said supposed trespasses in said declaration mentioned and none other. And this the said defendant is ready to verify, wherefore he prays judgment, etc.

In several replications the plaintiffs below denied the material facts alleged in these special pleas.

At the trial Philip M. Martin testified that he knew the Harts and Cozens and Berry and perhaps Kastor, and did know them in May, 1867. I was called on by Mr. Cozens to invoice the goods he had taken ; they were in plaintiffs' store on Main street, Central City, Gilpin county, Colorado ; Orlando North assisted us in invoicing ; they were taken from the store by Cozens ; Hart, Wiggins & Co. were doing business here at that time ; John Q. Hart was their agent ; I have the invoice list which we made ; Cozens saw and examined it, and said it was correct ; he told us to invoice the goods at the prices laid down here ; Hart told him not to take the goods away, that they were the property of Hart, Wiggins & Co. ; the list I hold in my hands is correct ; the goods were valued at \$4,017 ; Cozens saw the footings up ; he said he got a copy from North and that it corresponded with mine ; I was selling goods at that time ; have been in that business for twenty-one years ; have been in business here since 1861. If the goods had been carefully managed they might bring the invoice price ; I think they consisted of hats, caps, sacks, coats, etc. I saw Mr. Berry about there at that time, once in front of the store. The goods were taken in the county ; Cozens removed the goods from the store ; he boxed them up and took them away.

The plaintiffs then offered in evidence the list referred to by the witness, and the court admitted it.

Cross-examination : Did Cozens take the goods as an

officer? Question was objected to by plaintiffs. Court sustained objection and refused to allow witness to answer. *Defendants excepted.*

Cozens said he had to do his duty; don't recollect whether he said he had to do his duty as an officer; Hart, Wiggins & Co. had been in business here from four to six days before this; the sale from Buell to Hart, Wiggins & Co. was made in Buell's store; it was agreed between Hart and Cozens that North and I should make the invoice, I think; my understanding was that Hart bought the goods from Oliver Buell; Buell was not here at that time; they were sold by his agent Sherman; Sherman was his agent; I understand that he had authority.

The following question was then asked: Do you know, of your own knowledge, whether Sherman had authority to make the sale? to which plaintiffs objected, and court sustained objection. *Defendants excepted.*

Witness then testified: I have been the agent of Hart, Wiggins & Co. since that time in this territory, in this as well as other matters; Hart was their agent at that time.

Charles C. Post testified that he knew defendants and knew of plaintiffs; the plaintiffs were doing business here on 6th of May; I knew of Julius Berry and Cozens taking the goods of plaintiffs from their store on Main street, in the store now occupied by P. C. Johnson; it was on the 6th of May, 1867; they were putting them into boxes; I saw them roll them out of the store in boxes.

Cross-examination: Berry was working there, taking goods down and helping to pack them; I was there as attorney for Hart, Wiggins & Co.

Defendants then asked: What did Cozens say about the taking, if any thing, at any time during the taking?

Plaintiffs objected, and court sustained objection. *Defendants excepted.*

The following question was then asked: Do you know whether Cozens claimed to take the goods by virtue of a writ of attachment in his hands as an officer?

Plaintiffs objected, and court sustained objection. *Defendants excepted.*

Plaintiffs thereupon closed their case.

Defendant introduced Charles E. Sherman, who testified that he knew the agent of Hart, Wiggins & Co. ; I knew Oliver S. Buell in April and May, 1867 ; he had been in the clothing business just before that time, in the place now occupied by Clark & Sweet, as a tobacco store ; he was there at least a year in the same kind of business ; I commenced clerking for Buell in that place some time in December, 1866, and continued about five months ; while Buell remained here, I was his clerk ; when he was gone I had full charge of his business ; he went east in 1867 ; he did business under the name and style of O. S. Buell & Co. ; Buell composed the firm ; there was no other member to my knowledge ; he remained east about a couple of months ; I conducted his business during his absence ; he did not give me any written authority ; he gave me full charge of his business, and told me to do the best I could for him, and what I thought was best ; he went east to visit his friends and buy goods, to continue his business ; he returned on the 4th of May, 1867, I think ; the business was closed on the 29th of April, 1867 ; the firm sold the goods to Hart, Wiggins & Co. ; I sold them as the agent of Buell ; the value of the goods sold was somewhere between \$10,000 and \$11,000 ; the sale paid the debt of Buell to Hart, Wiggins & Co. ; I think the amount of the debt was somewhere between \$6,000 and \$7,000 with interest ; there was no other consideration besides that ; they did not pay me any money on the transaction, they gave me no notes or security ; Buell never gave me any particular authority to make the sale to Hart, Wiggins & Co. ; he gave me general authority ; I think O. S. Buell & Co. were indebted to Kastor & Berry ; I don't know whether Hart knew or was informed at the time of the sale, that O. S. Buell & Co. were indebted to Kastor & Berry ; O. S. Buell & Co. were also indebted to Berry, Hexter & Co., and Deitsch & Bro., in Denver ; I don't know whether Hart

knew of the indebtedness to the Denver folks; the sale from Buell to Hart, Wiggins & Co. included one account, and perhaps more, but no note.

Cross-examined: I had authority from Buel to take charge of his business and do the best I could.

Defendants then offered to prove by H. H. Atkins "that he knew who was sheriff of Gilpin county during the month of May, 1867, and for two or three years previous; that he had good means of knowledge, because he was clerk of the district court of said county, and frequently had business with said sheriff; that William Z. Cozens was sheriff in said month of May, and had been for a long time previous; that he was recognized as such by the district court of said county, by public officers, and by the public generally, and that his right to hold and exercise the duties of said office was not disputed."

To which plaintiffs objected, and the court sustained said objection. *Defendants excepted.*

Defendants then offered the affidavit, bond and writ of attachment, and the return of the sheriff indorsed on said writ in the suit of Kastor and Berry against O. S. Buell, and upon plaintiffs' objection the court excluded them.

The jury found for the plaintiffs \$4,017.

Messrs. ROYLE & BUTLER, and Messrs. CHARLES & ELBERT, for appellant.

Messrs. JOHNSON & TELLER, for appellees.

HALLETT, C. J. The issues in this case were not the same as in the case of *Deitsch v. Hart et al.*, *post*, 300, decided at this term, although appellant's evidence was substantially the same as that offered by Deitsch. In that case, the special plea was found to be substantially defective, and, therefore, the justification failed. In this case, appellant's plea, although, perhaps, it would have been obnoxious to demurrer, is, in our opinion, sufficient after issue joined.

It is said, that appellant should have alleged that the writ of attachment had been returned, and such is the rule

when an officer attempts to justify under a writ of this kind. *Davis v. Bush*, 4 Blackf. 330.

But we have found no case in which this rule has been applied to the plaintiff in the writ, and, upon principle, there appears to be no reason for extending it to him. It is the duty of the officer to return the process at the proper time, and he may well be required to perfect his levy by making return, if, at the time of pleading, the return day has passed. The plaintiff in the suit, however, ought not to be charged on account of an omission of the officer occurring after the alleged trespass was committed. If appellant is guilty of a trespass, he became so by suing out the attachment and directing it to be levied, and the circumstance that the officer failed in his duty after the levy will not affect his rights, unless he was in some way responsible for the omission. In *Middleton v. Price*, 2 Strange, 1184, the plaintiff in the writ and the officer jointly justified. "And it not being shown that any return was made, the court held, that the officer was a trespasser *ab initio*, and that the plaintiff, by joining with him in the plea, is equally affected by the defect of it."

If they had pleaded separately, probably the plaintiff would not have been held liable for the officer's default.

The plea being sufficient after issue joined, the question most discussed at the bar is the admissibility of the evidence offered in the court below to show the official character of the sheriff. It is conceded that the acts of officers *de facto* are valid, when they concern the public or the rights of third persons, who have an interest in the act done. *People v. Collins*, 7 Johns. 549.

The appellant was in no way connected with the sheriff, except that he procured his services in levying the writ of attachment. Desiring to enforce payment of his debt against Buell, appellant sued out process, and, if he found Cozens performing the duties of sheriff, and generally recognized as such officer, we think that he might accept his services without further inquiry as to the tenure by which the office was held. Certainly no question as to the

validity of the levy, predicated upon Cozens' title to the office, can arise between Buell and appellant, and, *a fortiori*, no such question ought to be allowed between appellant and appellees. The circumstance, that Cozens and appellant were sued jointly, can make no difference since they severed in pleading. Whatever rule may be enforced against an officer justifying under process, it seems to be sufficient for third persons to show that he is an officer *de facto*, and the evidence offered by appellant tended to prove this fact, and was, therefore, improperly rejected. From this it follows, that the affidavit in attachment and the writ and return were also excluded improperly.

And here I might pause in the discussion of this cause, but for the suggestion of counsel that the verdict must have been the same if all the evidence excluded upon the trial below had been admitted. This suggestion rests upon an alleged absence of proof upon two points in appellant's defense. In the special plea the ground upon which the attachment was issued is set out, and it is claimed that there is no evidence to support it. But we think that the allegation itself is not material in this action and must be disregarded. In *Damon v. Bryant*, 2 Pick. 411, the reason given for requiring an officer to prove a debt in cases of this kind is, that it may appear that he is acting for a creditor because it is only in that character that he can question the vendee's title to the goods.

It is plain that a creditor, when justifying a seizure out of the hands of a stranger, must show his debt upon the same reason. Proof of the relation of debtor and creditor establishes the right of the creditor to proceed against the property of the debtor wherever it may be found, but whether he shall proceed by attachment or ordinary summons is a question of no importance to any other than the parties to the suit. If the debtor should bring trespass against the creditor, there would be strong reason for requiring the creditor to show that there was cause for issuing the attachment because the debtor may question the remedy as well as the right. But a stranger to the process is in a differen:

position. As to him it is sufficient for the creditor to show his debt, and that he has resorted to legal process for its collection.

It is also urged that appellant failed to show that the sale from Buell to appellees was fraudulent, and therefore the title of the latter parties must be held good. It is to be observed, however, that appellant was not confined to that method of showing title in Buell. It seems that Buell was a merchant, and that he went east to buy goods, and visit his friends, leaving Sherman, his agent, in charge of his business, and that during his absence Sherman sold his whole stock of goods to appellees for the purpose of paying Buell's indebtedness to them. The value of the goods was upwards of \$10,000, and the indebtedness of Buell to appellees was less than \$7,000. It is difficult to maintain the authority of the agent to make this sale, for if it is conceded that Sherman had authority to sell the whole stock of goods in mass at two-thirds of their value, which is all that can be claimed upon the testimony, there is nothing to show that he had any authority whatever to pay debts. Sherman says that Buell gave him full charge of the business and told him to do the best he could. Giving to this authority the utmost latitude, Sherman had power to sell goods and perhaps pay current expenses, and the sale of the whole stock to a single creditor to satisfy one debt was entirely beyond the scope of his employment. *Nash v. Drew*, 5 Cush. 422; *Swett v. Brown*, 5 Pick. 178; *Beals v. Allen*, 18 Johns. 365.

Appellant had the right to have this question submitted to the jury under proper instructions, but he could not do so except in connection with the other evidence in the case. In this view it was not necessary that he should rely upon fraud in the sale from Buell to appellees, because if the jury should find that Sherman had no authority to pay the debt to appellees, and there had been no ratification of the act, the title was still in Buell and the property was subject to attachment under a writ running against him. That appellant was in a position to question the sale from Buell to

appellee, upon the insufficiency of Sherman's authority to make it, is decided in the case of *Beals v. Allen*, cited above.

It seems that a stranger, who seeks to attack a sale upon the want of authority in the agent by whom it was made, must show a debt and legal process against the principal in the same manner as one who seeks to avoid a sale under the statute of frauds, and, for the same reason, a mere stranger cannot be allowed to interfere between principal and agent. *Jackson v. Van Dalfsen*, 5 Johns. 44.

It was necessary for appellant to show privity between himself and Buell before he could attack the sale made by Sherman, and for this purpose the evidence of indebtedness and process, and the official character of the sheriff was material to his defense. Upon this ground, also, this case is to be distinguished from that of *Dietsch v. Hart et al.*, in which there was no sufficient plea of justification under which the appellant could attack the sale from Buell.

There are other questions in this record which probably will not arise in another trial of the cause, and, therefore, they are not noticed.

The judgment of the district court is reversed, with costs, and the cause is remanded for a new trial. *Reversed.*

ATTACHMENT — JUSTIFICATION BY PLAINTIFF. — If a plaintiff in attachment is sued in trespass by a stranger to the proceeding, he need not aver the ground upon which the attachment was issued; *McCraw v. Welch*, 2 Colo. 238.

CHENEY v. BARBER.

PRACTICE — manner of preserving objection, that written instrument has been altered after execution. It was objected to a written instrument when it was offered in evidence that it had been altered after execution by changing the name of the payee and the date, and the objection was overruled. The instrument not having been attached to the record filed in this court, the ruling of the court below on this point cannot be reviewed.

Construction of contract. Contract for payment of \$600 in four months and an additional \$600 upon the sale of certain mining property. Comments and construction.

CONDITION PRECEDENT — performance must be proved. In order to recover upon an agreement to pay \$600 when W. S. R. should sell certain mining

property on the Bobtail lode, the plaintiff must prove that W. S. R. sold property on that lode, and also that the property so sold was that which was referred to in the agreement.

Appeal from District Court, Gilpin County.

Messrs. W. S. & L. C. ROCKWELL, for appellant.

Messrs. JOHNSON & TELLER, for appellee.

BELFORD, J. This was an action of assumpsit founded on the following note and agreement in writing :

“Four months after date, for value received, we jointly and severally promise to pay J. E. Barber, or order, \$600. Signed, Wm. S. Rockwell, Hazen Cheney. October 3, 1868.

“In consideration of the above sum being without interest we promise and agree that should Wm. S. Rockwell, one of the signers hereto, effect a sale at the east or elsewhere, of certain mining property on the Bobtail lode, and receive his pay therefor, then we will pay an additional \$600. Signed, William S. Rockwell, Hazen Cheney. (Seal.)”

It is alleged in the complaint that, on the 3d day of October, 1863, the plaintiff Barber, together with certain other parties, were the owners of certain mining property situated in Gilpin county and known and described as the east sixty-six and (2-3) two-thirds feet of claim number one east, and the west twenty feet of claim number two east on the Bobtail lode. That, on the day aforesaid, William S. Rockwell applied to the plaintiff for a power of attorney from him, authorizing Rockwell to negotiate a sale of the interest of the plaintiff in said property, and also, at the same time, applied to plaintiff for the loan of \$600 in money for his own benefit. That thereupon it was agreed between Rockwell and Barber that the plaintiff would loan and advance to Rockwell the sum of \$600, and also empower him to sell and convey the interest of the plaintiff in the property above described, on the condition that Rockwell and Cheney should make a joint and several promissory note to the plaintiff (being the one above set

forth), and payable four months after date, for the sum of \$600, and that said defendants, Rockwell and Cheney, would further execute and deliver to plaintiff an agreement in writing (being the one above set forth), that upon the sale of said property they would pay the plaintiff an additional sum of \$600 to that mentioned in said note. It is further alleged that Rockwell and Cheney did thereupon execute said note, and at the same time and place make their certain agreement in writing, whereupon the said plaintiff duly empowered the said Rockwell to sell and convey the said property above described, and to execute a deed therefor. And the plaintiff further avers that afterward, to wit, on the 31st day of March, 1864, Rockwell did sell and convey the same identical property referred to and mentioned in the written agreement above set forth, and received the pay therefor. A trial was had by the court, a finding for the plaintiff, and judgment for the sum of \$1,500.

The plaintiff, to maintain his action, offered in evidence the note and agreement, to the introduction of which the defendant objected, "because said note and agreement have been altered by substituting the name of a different payee, and that the date of the said note has been changed since the same was executed." Which objections were overruled by the court, and this is the first error assigned. We have no data before us by which the tenability of these objections can be determined. There is no evidence before us, that these objections urged by counsel existed; in fact, the execution of the papers is admitted, and we are asked to conclude that the instruments offered in evidence were altered upon the simple ground that the counsel so stated when they were offered in evidence. Had the originals been attached to the bill of exceptions, we might derive some light from an inspection, but this is denied us. Neither the originals, nor any evidence showing the alleged alteration, have reached this court. The general rule is, that the material alteration of an instrument, made by a party who claims the benefit of it, without the consent of the party against whom it is sought to be

enforced, renders it void. The question of alteration is a question of fact. The true rule in regard to the burden of proof is, that when the alteration is of such a character as to defeat entirely its operation for any purpose, as in the case of an erasure of the signature of a deed or other instrument, so that, admitting all to be true that appears upon the instrument, when produced it would be void in law, it should be explained in the first instance before it should be permitted to go to the jury. In other cases the instrument should be given in evidence, and should go to the jury upon the ordinary proof of execution, although an alteration may appear in it, leaving the parties to such explanatory evidence as they may choose to offer. But if there is neither intrinsic nor extrinsic evidence as to when the alteration was made, the presumption of law is, that it was made before or at the execution of the instrument. *Stoner v. Ellis*, 6 Ind. 152. It nowhere appears that any proof was offered, tending to show that any alterations were made in the instruments, and in the absence of all evidence on the subject, we cannot say that the action of the court in admitting these instruments was erroneous.

It is claimed by the appellant that the contract sued on is an entirety in law ; that it contains but one agreement as to payment and time of payment, the latter being four months after date, the amount to be paid four months after date to be either \$600 or \$1,200, depending on the happening of an event, being the sale of certain mining property. It is very clear that the first instrument sued on is a contract to pay \$600 four months after date. This payment depends on no contingency and hinges on no condition. It is an absolute promise to pay, and, at maturity, the plaintiff might have instituted legal proceedings to enforce its collection, omitting, at the same time, any mention or notice of the contract which immediately followed it.

In the second contract it is stipulated that, as no interest has been charged for the loan of the sum secured by the promissory note, Rockwell & Cheney will pay \$600 more to Barber, should Rockwell succeed in selling the mining prop-

erty which Barber authorized him to sell. We cannot agree with the appellant in his theory that the obligation to pay the additional \$600 depended upon the sale of this property within four months, or during the time intervening between the execution and maturity of the note. The contingency upon which this second \$600 became payable was the selling of the property. When a sale was effected, and the money therefor received by Rockwell, then his promise ripened into an absolute liability. There nowhere appears in this second contract any limit as to the time when the sale was to be made, and to give it the construction claimed by the appellant, we must interpolate into the body of the contract words which the parties to it did not deem fit to incorporate. In other words, we must make a new contract for them. This clearly is not the province of a court. To construe contracts, not make new ones, is our duty.

We are, therefore, of the opinion that, upon a sale being made, Rockwell & Cheney became liable for the additional \$600.

It is further contended by the appellant that there is no evidence showing that a sale was made by Rockwell. It will be observed that the contract fails to describe specifically the property to be sold. It was on the Bobtail lode, but what particular portion of it?

To entitle the plaintiff to recover, he must show that the property, concerning which the contract was made, was sold by Rockwell. To prove a sale, he introduced in evidence a deed made by Rockwell as attorney in fact of Barber and others to George A. Hoyt. Conceding that this deed was properly admitted in evidence, there is nothing in the record showing that the land described in the deed was the same about which this contract was made. If left to enter the domain of inferences, we might conclude that the property was the same, but the plaintiff, to recover, must rely on something better than inferences. It was in his power to prove this fact, and he should have done so. The testimony of Lyon throws no light on this branch of the subject, and the statement in Rockwell's letter is entirely too ambig-

nous to be relied upon with safety. From the careful examination we have given the evidence, we are forced to the conclusion that it is not sufficient to prove a sale of the property about which the contract was made.

This cause is therefore reversed and remanded for a new trial, at the costs of the appellant.

Reversed.

SULLIVAN et al. v. CLEMENTS.

EVIDENCE must support the allegation. In an action of trespass *quare clausum*, if the *locus in quo* be described in the declaration, the evidence must be confined to the place named.

TRESPASS *quare clausum*. *Evidence of possession.* In trespass *quare clausum*, if the plaintiff does not show title, he must show that he was in possession of the *locus in quo* at the time of the alleged injury.

Appeal from District Court, Jefferson County.

Messrs. JOHNSON & TELLER, for appellants.

Messrs. BROWNE, HARRISON & PUTNAM, for appellee.

HALLETT, C. J. This was an action of trespass *quare clausum fregit* in the district court of Boulder county and thence removed to Jefferson, where appellee obtained judgment for \$1,360. The description of the *locus in quo* in the declaration is according to the government survey, and is wholly unintelligible, except the last clause, which comprehends twenty acres of land. Rejecting that part of the description which we cannot understand and accepting that which is good, the declaration is for a trespass upon twenty acres of land, described according to the lines of the public survey. The only witness who attempted to describe the premises was less successful than the pleader, inasmuch as his description is unintelligible throughout. All the witnesses speak of a tract of land, containing one hundred and sixty acres, and we find nothing to connect their testimony with the *locus in quo*, given in the declaration. Therefore the proof does not come up to the allegation, and in our opinion this is a substantial omission.

By the ancient common law it was unnecessary to name the *locus in quo* in the declaration, and if the defendant pleaded the general issue, the plaintiff could prove a trespass in any part of the parish in which the venue was laid. By the use of the common bar, asserting title to some particular close in the parish, the defendant could compel the plaintiff to describe the close by name or otherwise, and then the parties in the third pleading came to the point, which is now gained in the declaration.

This practice was virtually abolished in A. D. 1654, by allowing plaintiffs to name the close in which the trespass was committed in the declaration. 4 Robinson's Prac. 584.

Perhaps the old practice might be followed at this day in a proper case, but when the *locus in quo* is described in the declaration, it would seem, upon principle and authority, that the evidence should be confined to the place named. 2 Greenleaf's Ev. 618 a; *Fowle v. Wyman*, Quincey (Mass.) 336; *Vowles v. Miller*, 3 Taunt. 139.

Another objection to the evidence demands attention. Appellee did not introduce evidence of title, but relied upon possession of the *locus in quo*, and of course it must appear that he was actually in possession at the time of the alleged trespass, inasmuch as there can be no constructive possession in the absence of title. According to the witness Hollingsworth, appellee's possession commenced November 25, 1867, and as he alone appears to have had knowledge of the fact, his statement must be accepted as true. Now there is no evidence of an entry by appellants after this time. Appellants entered the premises on the 4th of November anterior to appellee's possession, and at other times not named by the witnesses, but it does not affirmatively appear that appellee's possession was ever disturbed. The gist of this action is injury to the possession, and the evidence must show that the possession of the plaintiff has been invaded. *Dean v. Comstock*, 32 Ill. 173.

For these errors the judgment of the district court must be reversed, with costs, and the cause remanded. *Reversea.*

TRESPASS - EVIDENCE OF POSSESSION. - To maintain trespass *quere clauum*, the plaintiff must have actual or constructive possession: *Huginin v. Cuniff*, 2 Colo. 309.

HASKINS v. TUCKER et al.

PRACTICE — *judgment when declaration not on file.* The court cannot proceed to judgment in an action at law without a declaration on file in the cause. **COSTS** will not be allowed to party in fault. Where the error complained of was occasioned by the negligent act of the attorney for plaintiff in error costs will not be allowed.

Error to Probate Court, Clear Creek County.

Mr. C. C. Post, for plaintiff in error.

Mr. L. H. SHEPHERD, for defendant in error.

HALLETT, C. J. It appears by the bill of exceptions in this case, that the declaration, although seasonably filed in the cause, was not before the probate court at the time judgment was rendered. One of the attorneys for the plaintiff in error had taken the paper from the files by consent of the probate judge and had failed to return it, and the court appears to have regarded this omission of the attorney as sufficient to warrant the court in proceeding to judgment without the pleading.

A declaration is the statement of the plaintiff's cause of action and enters into the record of the cause. Without it the court cannot be informed of the nature and extent of the plaintiff's demand, and of course cannot give to such demand the form of a judgment. If an attorney or other person shall be guilty of misconduct in taking papers from the files of a court, or in refusing to return such papers, he may be punished for his offense; but the wrongful act of a person in taking pleadings from the files will not cure defects in the record caused by such withdrawal. It was in the power of the court below to allow the loss of the declaration to be supplied by filing a copy, if defendants in error had sought to do so, but the court could not proceed to judgment without a declaration on file. As the error in this record appears to have grown out of the negligent act of the attorney for plaintiff in error, we shall not

allow the plaintiff any costs. The judgment of the probate court is reversed and the cause is remanded.

Reversed.

GALLUP et al. v. WILDER et al.

PRACTICE — *declaration must be filed before judgment.* It is error to take judgment without a declaration on file in the cause.

Error to Probate Court, Fremont County.

Messrs. CHARLES & ELBERT, for plaintiff in error.

Per CURIAM. On the 13th day of July, 1867, the plaintiff below sued out of the probate court of Fremont county a summons against the defendants below, which summons was made returnable on the 5th day of August, 1867. It was served the day it was issued on Gallup and Lothrop. On the 11th day of February, 1868, the defendants, Gallup and Lothrop, were defaulted and judgment entered up against them for the sum of \$1,200. The record states that after the default was entered evidence was thereupon introduced by the plaintiffs, and thereupon the court ordered that the plaintiffs recover from the defendants the sum of \$1,200, etc., etc.

On the 23d day of June, 1868, and after the proceedings above were had, the plaintiffs filed their declaration. This course of procedure cannot be tolerated. The filing of the declaration after the default and judgment were had would not cure the want of authority nor remove the defects that existed. *Rankin v. Crowell*, Miner, 125.

There are other errors in the record but it is unnecessary to allude to them.

The cause is reversed and remanded, with costs.

Reversed.

FORD et al. v. BROWN et al.

PRACTICE as to bill of particulars. If the declaration contain a special count on a promissory note, and the common counts, and the plaintiff stipulate that he will at the trial rely upon the promissory note only, it is not necessary to file a bill of particulars.

PRACTICE as to filing copy of instrument sued on. If a copy of the instrument on which the action is founded is filed with the declaration, and the declaration is amended, it is not necessary to file another copy with such amendment.

Error to District Court, Arapahoe County.

Mr. L. B. FRANOE, for plaintiff in error.

Mr. W. C. KINGSLEY, for defendant in error.

BELFORD, J. John S. Brown and William McKindly brought suit against William R. Ford et al., in assumpsit. The declaration consisted of a special count on a promissory note, and also the common counts. A demurrer was filed to the special counts, and an answer as to the common counts. The demurrer was confessed and leave taken to file an amended declaration. Upon the filing of the amended declaration the defendant asked for a rule on the plaintiffs to file a more specific bill of particulars. This was met by a stipulation on the part of the plaintiffs, that in the trial of the cause they would rely wholly on the note, and thereupon the rule for the filing of the more specific bill of particulars was not granted. We see no error in the court denying the rule. When the plaintiffs stipulate that their only cause of action is the note, and that they will rely on no other, we see no necessity for the filing of a bill of particulars. It is contended by the plaintiffs in error that inasmuch as no copy of a note was attached to the amended declaration, they were entitled to a continuance. There is nothing in this. A copy of the note was affixed to the original declaration, and this was sufficient. In confessing the demurrer the plaintiffs below did not withdraw the declaration. They simply took leave

to amend it. When a copy of the instrument sued on is attached to the original declaration, and this declaration is amended, we know of no rule of law that requires a copy of the instrument to be attached to the amendment.

Had the plaintiffs withdrawn their declaration at the time they confessed the demurrer the rule would be otherwise. But they did not do so. There is a wide distinction between withdrawing a declaration and amending it.

We see no error in the record, and consequently the judgment is affirmed, with costs.

Affirmed.

SOPRIS v. LILLY et al.

PLEADING — declaration on replevin bond. In actions on penal bonds in which, under the statute, the plaintiff assigns several breaches of the conditions of the bond in a single count of the declaration, the several assignments in connection with the body of the count are regarded as constituting separate and distinct counts of the declaration.

PLEA TO WHOLE DECLARATION — must answer all allegations therein. In an action upon a penal bond, a plea which goes to the whole declaration must be sufficient as to all breaches of the conditions of the bond which are well assigned therein.

In an action on a replevin bond it was alleged that the principal in the bond failed to prosecute the replevin suit with effect and to return the property replevied according to the conditions of the bond. The defendants pleaded that the property was in fact returned and the costs of the replevin suit paid. The plea was bad, for the reason that it did not answer the breach assigned upon failure to prosecute the replevin suit.

DAMAGES for detention of property. In an action on a replevin bond, in which it is assigned for breach of the condition of the bond that the principal did not prosecute the replevin suit with effect, damages for the detention of the property replevied may be recovered.

Error to Probate Court, Arapahoe County.

Mr. ALFRED SAYRE, for plaintiff in error.

Mr. L. B. FRANCE, for defendants in error.

HALLETT, C. J. The declaration in this case is upon a replevin bond, the conditions of which are alleged to have

been violated by the failure of defendant Lilley to prosecute the replevin suit with effect, and to return the property replevied, in obedience to the judgment of the court in that suit. In a plea which goes to the whole declaration the defendants set up, that the property was in fact returned, and the costs of the replevin suit paid, but nothing is said as to the failure to prosecute the replevin suit with effect. In actions upon penal bonds, in which, under the statute, the plaintiff assigns several breaches of the conditions of the bond in a single count of the declaration, the several assignments in connection with the body of the count are regarded as constituting separate and distinct counts of the declaration, and we are authorized to say, that there are as many counts in the declaration as there are breaches of the conditions of the bond. *Hibbard v. McKindly*, 28 Ill. 253. If to such a declaration the defendant wishes to plead to the count taken in connection with any of the assignments separately from the others, there can be no objection to his doing so, but in such case he must limit his plea to the breach which he proposes to answer. It has always been held, that a plea which professes to answer the whole declaration must be sufficient as to each and every count in the declaration, and this rule, applied to cases of this kind, shows that a plea which goes to the whole declaration must be sufficient as to all breaches of the conditions of the bond, which are well assigned in the declaration.

Humphrey et al. v. Taggart, 38 Ill. 228. In this case there are two assignments of breaches of the conditions of the bond, and the plea, which professes to answer both of them, contains an answer to but one of them. We are unable to perceive any reason for denying the plaintiff's right to recover for the breach of the bond, in respect to the prosecution of the replevin suit with effect. If it is thought that the plaintiff cannot recover damages for the detention of the property, we regard the case of *Shepard v. Butterfield*, 41 Ill. 76, as decisive of the question. If, in the replevin suit, Booth had recovered damages for detention of the property, such recovery would be no evidence of the

amount of such damages in this action under the breaches assigned in this declaration. If any damages for detaining the property had been awarded against Lilly in the replevin suit, perhaps an action to recover them would lie upon that provision of the bond, which provides for the payment of all damages which should be adjudged against him. But we are not concerned with that view of the case at present, and indeed we have now only to say, that the plea does not meet the whole declaration, and therefore the demurrer ought to have been sustained. The judgment of the probate court is reversed with costs, and the cause is remanded. *Reversed.*

REPLEVIN BOND, DECLARATION ON. — In actions on penal bonds in which, under the statute, the plaintiff assigns several breaches of the conditions of the bond in a single count of the declaration, the several assignments in connection with the body of the count are regarded as constituting separate and distinct counts of the declaration: *Hayes v. N. Y. Mfg. Co.* 2 Colo. 274.

LITCHFIELD v. DANIELS.

JURISDICTION OF PROBATE COURT — *plaintiff may remit excess over \$2,000, and sue in that court.* If the plaintiff's demand exceed \$2,000, he may remit the excess and sue for that sum in the probate court.

PRACTICE — *plaintiff's demand determined by ad damnum.* If the plaintiff limit the *ad damnum* in his declaration to \$2,000, this shall operate to remit the excess over that sum to the defendant.

CONTINUANCE — *to obtain testimony of absent witness — necessary diligence.* Upon affidavit for continuance on the ground of absence of witness, it appeared that defendant entered appearance Oct. 12, 1869; that he was not informed as to location of witness until January 29, 1870. *Held*, that affidavit was defective in not showing that inquiry was made for the witness between those dates.

PLEADING — *denying partnership.* Under section 6, chapter 30, Revised Statutes, 810, a plaintiff is not required to prove the joint liability of defendants sued as partners, unless the execution of the instrument sued on is denied by plea verified by affidavit.

IMMATERIAL ISSUE — *plea denying partnership.* Where in a suit on a promissory note against several defendants, as partners, one of them pleaded that at the date of the execution of the note he was not the partner of his co-defendants, the plaintiff was not required to prove the partnership.

Appeal from Probate Court, Arapahoe County.

Mr. S. E. BROWNE, for appellant.

Mr. ALFRED SAYRE, for appellee.

BELFORD, J. This was an action of assumpsit, brought in the probate court of Arapahoe county by the appellee against Abraham T. Litchfield, John W. Anthony, David Street and Henry Carlisle, copartners as John W. Anthony & Co., on a promissory note, of which the following is a copy :

“LARIMER CITY, WYOMING TERT.,

“*August* 17, 1868.

“One day after date, for value received, we promise to pay to the order of Daniels & Brown, the sum of \$1,853.81, being balance due on book account with interest from date, at the rate of seven per cent per annum, until the sum shall be paid.

“JOHN W. ANTHONY & Co.”

This note was indorsed by the payees to the plaintiff.

To the plaintiff's declaration, which consisted of a special count on the note, together with the consolidated common counts, the defendant filed the following plea verified: “And the defendant, Abraham T. Litchfield, by his attorneys, comes and defends the wrong, etc., and prays judgment, etc., because he says, that the defendant, Abraham T. Litchfield, at the time when, etc., was and is not a partner of the said John W. Anthony, David Street and Henry Carlisle, and is not jointly liable with the said John W. Anthony, David Street and Henry Carlisle as partners aforesaid, on the said supposed promises and undertakings in the said declaration mentioned in manner and form as the said plaintiff has, in his said declaration, alleged against him,” etc. Issue was joined on this plea and the trial had by the court, who found for the plaintiff. The only evidence introduced on behalf of the plaintiff was the note. The defendant called no witness. The first objection taken by the appellant to the proceedings below is, that on the day that the summons was issued, there was due on said promissory note the sum of \$2,019. It is insisted that the jurisdiction of the probate court is limited to the sum of \$2,000, and that the claim sued on exceeds that amount by \$19, and that the court had no power to try and deter-

mine the cause, for the reason that this sum of \$19, being in excess of the amount fixed by law as the limit of the court's jurisdiction, rendered all the proceedings void. Section 25 of the revised code, page 526, provides: "The probate courts in the said several counties mentioned in the first section of this act, except the county of Gilpin, shall have concurrent jurisdiction with the district courts in all civil cases at law and in equity, where the debt or sum claimed shall not exceed \$2,000."

While the amount due on the note at the issuing of the summons might have exceeded the amount prescribed in the above section, still the limit of the plaintiff's action was \$2,000. This was the extent of his *ad damnum*, and beyond this amount he sought to recover nothing. After a careful consideration of the section above cited, and of the provisions in the organic act, we are of the opinion that it is not the amount due on the instrument sued on that fixes and determines the jurisdiction of the court, but the amount and extent of the plaintiff's claim. If there be due on the instrument sued on \$10,000, still if the plaintiff limits his claim to \$2,000 the case is within the jurisdiction of the court. The limitation of his claim in the *ad damnum* operates *per se* as a remittance of whatever amount may be due in excess of \$2,000. The next error complained of is the overruling of the defendant's application for a continuance. This suit was commenced in the probate court on the 12th day of October, 1869. On the 14th of December the defendant filed his plea, and on the 14th of February, 1870, he filed his application for a continuance. The sufficiency of the application for a continuance can be determined by either of two considerations, viz., 1st. The diligence used to obtain the evidence of the absent witness. 2d. The materiality of his testimony as disclosed by the affidavit. As to the diligence used to obtain the testimony of the witness, it is alleged in the affidavit that the defendant was ignorant of the whereabouts of this witness until January 29, 1870, and he then learned that the witness was in San Francisco, but about to sail for New York. It nowhere appears that he

did sail for New York. It is nowhere alleged in the affidavit that from October 12, when the suit was commenced by the waiving of process by Litchfield, that any inquiry was made to ascertain the location of this witness or procure his testimony. If Mr. Litchfield was not a partner of Anthony & Co. at the date of the execution of the note sued on, he certainly knew that fact on the day when he entered an appearance. He knew what the issue would be, and it behooved him to make reasonable efforts to procure the testimony of witnesses by whom he might make good his defense. The court was clearly right in overruling the application for a continuance, for the reason that no diligence was shown to obtain the testimony of the witness.

It is further claimed that the court erred in finding for the plaintiff and entering up judgment in the face of the plea filed by the defendant. It is contended that it was incumbent on the plaintiff to do something more than simply introduce the note. It is insisted that it devolved on him to show that Litchfield was a partner in order to make him liable in the action.

Section six (6) of the Revised Code, page 310, provides in actions upon contracts, express or implied, against two or more defendants, alleged to have been made or executed by such defendants as partners or joint obligors or payors, proof of the joint liability or partnership of the defendants or their Christian or surnames, shall not in the first instance be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by the filing of pleas denying the execution of such writing verified by affidavit as required by law.

From a reading of this section, it is evident that before the plaintiff can be required to introduce any evidence going to show that the defendants were partners or joint obligors, the defendant must file his plea not denying the partnership or joint obligation, but denying the execution of the writing sued on.

The plea filed in this case goes to no such extent ; it simply avers that at the date of the note he was not a partner,

nor was he such partner at the time of the filing of the plea. This does not meet the requirements of the statute, nor did it render it necessary for the plaintiff to introduce other evidence than the note itself. Before the revision took place (see Laws 1861, p. 215, § 6) the law was different. The defendant could require the plaintiff to put in proof of partnership by filing a plea of abatement or by denying the execution of the writing sued on, but in the revision that part of section 6, page 215, Laws of 1861, which made it necessary for the plaintiff to establish the partnership when the defendant put it in question by plea of abatement, was omitted. The evident intention of the legislature in the revision was to relieve the plaintiff from the proof of partnership, when the execution of the writing itself was not denied under oath. And so reading the statute we are compelled to affirm the judgment rendered below, which is accordingly done, with costs. *Affirmed.*

PARTNERSHIP, PLEA DENYING: *Rogers v. Nuckolls*, 2 Colo. 282.

JURISDICTION - REMISSION OF DAMAGES. — A creditor may remit any part of his demand and sue for the balance in any court having jurisdiction thereof: *Cramer v. McDowell*, 8 Colo. 370. Thus the obligee in a bond was permitted to remit the excess of damages and sue for the balance, so as to bring his action within the jurisdictional amount: *Davis v. Wainamaker*, 2 Colo. 638.

CODY v. RAYNAUD.

JURISDICTION OF PROBATE COURT in foreign county. Section 2, chapter 70 Revised Statutes, 500, applies to actions brought in probate courts.

PLEADING in action where defendant resides in foreign county. It is not necessary to aver in the declaration the facts which will give the court jurisdiction over a defendant who resides in another county.

JURISDICTION — want of — must be pleaded in abatement. If the court has not jurisdiction of the person, the defendant must plead that fact in abatement, and she cannot raise the question by motion.

JURISDICTION OF PROBATE COURTS. Probate courts are of limited but not inferior jurisdiction.

CONTRACT, EXPRESS — may be abandoned for cause. A party may for good cause, and where the fault is not his own, abandon a special contract and recover the value of services upon an implied assumpsit.

CONTRACT, EXPRESS — if abandoned, plaintiff must resort to implied. In such case the law raises a contract for the protection of the innocent party, and the express contract is not involved except for the purpose of ascertaining whether there was cause for abandoning it.

CONTRACT, EXPRESS — abandoned without cause. Where a special contract was entered into, by which the plaintiff agreed to serve the defendant for the

term of one year, if the plaintiff voluntarily and without the fault of the defendant quit the service of the defendant, she cannot recover.

The special contract being shown, it ought to appear that there was sufficient cause for abandoning it.

EVIDENCE of abandonment of contract. As to the cause for abandoning a special contract it is not enough that a witness should testify that plaintiff quit defendant's employment because of abusive language and bad treatment. Specific acts of defendant should be proved.

EVIDENCE of acquiescence in plaintiff's demand. Where the plaintiff proved a contract for service which had not been performed, and it appeared that at or about the time the plaintiff quit defendant's service the defendant requested the plaintiff to remember that she had left and had not been discharged, the circumstance that the defendant made no objection to a bill for services rendered, which was subsequently presented by the plaintiff, is not sufficient to show an agreement on the part of defendant to pay the same.

Error to Probate Court, Arapahoe County.

THE declaration contained the common counts for work and labor and the money counts.

At the trial plaintiff read the deposition of Anna Lemon, who testified in substance, that in March, 1869, in New York city, the defendant entered into a contract with the plaintiff, by which she employed the plaintiff to go to Denver and work for her at the rate of \$50 per month for the term of one year; also that defendant agreed to pay plaintiff's traveling expenses in going to Denver.

Plaintiff also read the deposition of Wm. E. White to the same effect, except that he stated that the plaintiff was to receive \$40 per month for the term of one year, and that the plaintiff was to receive her traveling expenses if she remained with defendant the full year, otherwise the traveling expenses were to be deducted from plaintiff's salary.

Alice Mulchinock testified: "I was in Mrs. Cody's employment at the time Madame Raynaud left, and afterward Madame Raynaud left Mrs. Cody on or about July 3d, 1869; she came in the store at Central City, Colorado Territory, afterward, and asked Mrs. Cody to settle with her; Mrs. Cody asked her what the amount was, and she (Mrs. Raynaud) calculated it in my presence at \$50 per month, for three months and one week; Mrs. Cody made

no objections at the time to Mrs. Raynaud about the amount; she said to me after Mrs. Raynaud left that she did not know how she (Madame Raynaud) had got it up to that, for you know (speaking to witness) it was only forty per month. I said I did not know it because I was not present at the agreement; that she (Mrs. Cody) had told me so, but Mr. White had told me it was \$50 per month. That was all the conversation.

Question by plaintiff's counsel:

Did Mrs. Cody make any objections there in the presence of Mrs. Raynaud to paying her? Answer: She only said she would deduct her traveling expenses; I do not remember the amount of Madame Raynaud's bill. She calculated at the rate of \$50 per month. It was for three months and one week. She (Madame Raynaud) left on Saturday, July 3, 1869, and called on Mrs. Cody Monday, July 5, 1869. I was present on Saturday when Mrs. Raynaud left. I had been in Mrs. Cody's employment from May 2, 1869, to then, and continued in her employment to August 2, 1869; Mrs. Raynaud left on account of Mrs. Cody's abusive language; I told Mrs. Raynaud to go on that day; there was no reason for Mrs. Cody to use such language.

Question: State just what Mrs. Cody told you she was paying Madame Raynaud? Answer: She stated to me that she was paying her ten per week. Mrs. Raynaud was in the employment of Mrs. Cody at Central City, when I came there, and remained in her employment until July 3d. Mrs. Cody told me she sent Madame Raynaud to Central because business was better there than in Denver. Madame Raynaud had gone to Central before I came to Denver.

Cross-examined by defendant's counsel: Madame Raynaud left the employment of Mrs. Cody because she was badly treated. She was not discharged, Mrs. Cody did not tell her to go, but she was so badly treated it was impossible for her to stay.

Question: After Madame Raynaud left and came back, on July 5th, do you remember that Mrs. Cody stated to her

that she had left, and she (Mrs. Cody) had not discharged her, and do you remember the reply Mrs. Raynaud made?

Answer: Mrs. Raynaud made no reply. I am sure Mrs. Raynaud's bill, when presented to Mrs. Cody, was for three months and one week, and she calculated it at \$50 per month. She so stated to Mrs. Cody in my presence. I have a suit pending against Mrs. Cody, and have no very kind feelings for her. On several occasions Mrs. Cody abused Mrs. Raynaud in my presence, on one occasion Mrs. Raynaud got so sick on account of it that she had to go to bed, and got to spitting blood. She was not subject to any pulmonary disease. I never heard her use any abusive language to Mrs. Cody.

Re-examined: It was on the day Madame Raynaud left that Mrs. Cody said to her: "Madame Raynaud you will remember that you have left, and I have not discharged you." It was on the following Monday, July 5, that Madame Raynaud called on Mrs. Cody and presented her bill, and all that Mrs. Cody then said was, that she would deduct her, Madame Raynaud's, traveling expenses. Mrs. Cody did not state to Madame Raynaud what the amount of her traveling expenses were; all she stated was, that she would deduct the amount of her traveling expenses. Mrs. Raynaud presented her bill for the full amount, and Mrs. Cody made no objections, except she said she would deduct her (Mrs. Raynaud's) traveling expenses."

Mr. DANIEL SAYER, for plaintiff in error.

Mr. S. E. BROWNE, for defendant in error.

HALLETT, C. J. This was assumpsit in the probate court of Arapahoe county, for work and labor.

Plaintiff in error, who was defendant in the court below, was served with summons in Gilpin county, and the first assignment of error questions the power of the probate court to issue process to that county.

The jurisdiction of probate courts in civil actions, when the sum in controversy does not exceed \$2,000, was first

conferred by the legislative assembly in the year 1864. By the fifth section of that act, it was declared that the probate courts named should have concurrent jurisdiction with the district courts in all civil cases at law and in equity, where the debt or sum claimed should not exceed \$2,000. By the sixth section the rules of practice of the district courts were made applicable to probate courts, and by the ninth section the probate courts are declared to be courts of record, and "they shall have a seal, and in their respective counties shall possess all the powers now vested in the district courts in this territory in all matters in controversy where the debt or sum claimed does not exceed \$2,000."

This act did not comprehend the probate court of Arapahoe county, but in the following year an amendatory act extended the provisions of the first to all probate courts in the territory except that of Gilpin county. In section three of this last act jurisdiction was again conferred upon probate courts, but in language different from that of section five of the act of 1864, the words "concurrent jurisdiction with the district courts" being omitted from the act of 1865. But we doubt whether this omission is of any importance. The latter act comprehends "all actions, suits and proceedings at law brought for the recovery of money not exceeding in amount the sum of \$2,000," and this jurisdiction is as plainly concurrent with the district courts as if it were so expressed.

One of the purposes of the act of 1865 was to withdraw from probate courts the equity jurisdiction conferred by the act of 1864, and to this end new language was used in conferring jurisdiction, which differs of course from that used in the first act, but not significantly, except as to the purpose which the assembly had in view.

It is to be observed also, that section 9 of the act of 1864, which gives to probate courts, within the limits prescribed to them, all the powers conferred upon district courts, was not expressly or impliedly modified by the act of 1865, and the same is true of the sixth section of the first

act, which applied the practice of the district courts to the probate courts.

We are, therefore, clearly of the opinion that the second section of chapter 70, Revised Statutes, which prescribes the venue of civil actions is applicable to such actions in probate as well as district courts. By that section in certain cases actions may be brought in a county in which the defendant does not reside, and the summons served in the county of his residence. And of late it has not been thought necessary to aver in the declaration the facts which will give the process such extra-territorial force. *Kenney v. Greer*, 13 Ill. 432; *Hamilton v. Dewey*, 22 id. 490.

These cases also show that the question of jurisdiction is raised by plea in abatement and not by motion as was attempted in this case.

Much was said at the bar upon a question which was determined by this court in the case of *Cass v. Davis*. Probate courts are of limited, but not inferior, jurisdiction.

We are unable to deny the jurisdiction of the court below, and we will now consider the sufficiency of the evidence to support the judgment.

It appears from the evidence, that, in the month of March, 1869, defendant in error agreed with plaintiff in error to work for her one year as a milliner, and that she left the service of plaintiff in error after working a little more than three months. This special contract is not set out in the declaration, and if it were it is difficult to see how defendant in error could recover upon it, since it was never performed.

But a party may, for good cause and when the fault is not his own, abandon a special contract and recover the value of services upon an implied assumpsit. *Lantry v. Parks*, 8 Cow. 63; *McClure v. Secrist*, 5 Ind. 31; *Eldridge v. Rowe*, 2 Gilm. 91.

In such case the law raises a contract for the protection of the innocent party, and the express contract is not involved, except for the purpose of ascertaining whether there was cause for abandoning it.

Perhaps the price fixed by the express contract may be of some value on arriving at the compensation to be awarded under the implied contract, but the parties are not bound by it.

The measure of damages is the value of the services or materials furnished, and the aggrieved party is no more bound by the contract price than by the other provisions of the instrument.

If the defendant in error quit the service of the plaintiff voluntarily and without the fault of the latter, she cannot recover, and the special contract being shown, it ought to appear that there was sufficient cause for abandoning it. Upon this point the evidence is insufficient. A witness testified that defendant in error left the service of plaintiff on account of abusive language and bad treatment, but this is the opinion of the witness and no evidence that such language was used or that plaintiff's treatment of defendant was bad. The cause upon which defendant in error quit her employment is a fact to be proved by testimony of specific acts of plaintiff toward defendant, and not by such testimony as this. Evidence was given of a demand for wages by defendant upon plaintiff in error with a view to show the latter's acquiescence in the justice of that demand. In our opinion the conduct of plaintiff in error upon that occasion will not warrant such an inference.

The judgment of the probate court is reversed, with costs, and the cause remanded for a new trial. *Reversed.*

PROBATE COURTS — PROCESS. — Probate courts may issue process to a foreign county: *Phelps v. Sprague*, 1 Colo. 411.

WANT OF JURISDICTION OF PERSON must be pleaded in abatement, and the question cannot be raised on motion: *Western Union Tel. Co. v. Maymore*, 2 Colo. 34.

TANNATT v. THE ROCKY MOUNTAIN NATIONAL BANK OF CENTRAL CITY, COLORADO.

AGENTS — *what signature will bind principal.* If an agent sign a bill of exchange in this form, "T. R. T., agent for S. T.," and there is nothing in the body of the bill evincing an intention to bind the principal, the agent shall be regarded as the drawer of the bill.

EVIDENCE — *to explain the agent's signature.* In such case parol evidence cannot be received to show that the agent intended to bind his principal.

Appeal from District Court, Gilpin County.

HALLETT, C. J., dissented.

Mr. E. T. WELLS and Mr. HUGH BUTLER, for appellant.

Messrs. JOHNSON & TELLER, for appellee.

BELFORD, J. This was an action brought by the Rocky Mountain National Bank against Thomas R. Tannatt, on a bill of exchange, of which the following is a copy :

“BLACK HAWK, Col., *March* 11, 1869.

“At five days’ sight pay to the order of Rocky Mountain National Bank, fifteen hundred dollars, value received, and charge the same to account of

“THOMAS R. TANNATT,

“Agent for S. TAYLOR.

“To S. TAYLOR, *Providence, R. I.*”

Plaintiff recovered judgment in the court below, and the defendant brings the cause here on appeal.

On the trial, the defendant offered to prove that the bill of exchange was drawn by him in a representative capacity. That, at the time of the drawing of the same, and for a considerable period anterior thereto, he was engaged in carrying on business for Taylor ; that he drew the bill of exchange on Taylor, as his agent and not otherwise, and that the bank had full knowledge of this fact.

This evidence was excluded by the court, and is one of the grounds of complaint.

We see no error in the rejection of this evidence. If the defendant is liable as drawer of this negotiable instrument, that liability must be determined by the instrument itself. Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed. When a simple contract, other than

a bill or note, is made by an agent, the principal whom he represents may, in general, maintain an action upon it in his own name, and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. Such evidence does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another. *Nash v. Towne*, 5 Wallace, 703.

In the case of *Jones v. Littledale*, 11 Adolphus & Ellis, 486, Lord DENMAN, delivering the judgment of the court, lays down this as a general proposition, "that if the agent contracts in such form as to make himself personally responsible, he cannot afterward, whether his principal were or were not known at the time of contract, relieve himself from that responsibility."

In many cases it is held that parol evidence may be introduced to charge an undisclosed principal, but never to exonerate an agent who has made himself personally liable. 2 Smith's Leading Cases, 224 (marginal).

Is Thomas R. Tannatt personally liable on this bill of exchange? "The rule is well settled," says Mr. STORY, "that, as to agents, if they draw or indorse or accept bills in their own names, although on account and for the benefit of their principals, they are held personally liable, because they alone can be treated on the face of the bills as parties. If they would bind their principals, they must draw, indorse or accept the bills in the name of their principals, and sign for them and in their names." It is further added in a note, "that, in order to bind the principal and exonerate himself, the agent should regularly sign thus: 'A B by C D, his agent,' or 'C D for A B.' But in practice there are innumerable deviations from this simple and appropriate form, and the decisions upon the various cases which have arisen in courts of justice involve much conflict of doctrine and opinion, and do not seem always to have proceeded upon any uniform principle of interpretation." See Story on Bills of Exchange, § 97.

In the case of *The City of Detroit v. Jackson*, 1 Doug.

115, the judge, in delivering the opinion of the court, after reviewing the numerous cases on the subject, says: "In these and numerous other cases of the same class, the courts have simply looked to the form of the instrument itself in order to ascertain whether it is the contract of the principal or of the agent personally. If, by the terms of the agreement, a party describing himself as agent undertakes to do certain things, *the mere addition of the word 'agent,' or, indeed, any other designation which he may add to his name,* will not make it the contract of his principal. Such addition will be regarded as mere description, and will not have the effect of binding a third person who is not, in form, made a party to the instrument. It is not enough that the person executing an instrument have power as agent to bind a third person, he must, in fact, make it the obligation of that person in terms in order to bind him. A familiar instance of the manner of executing a contract by an agent is found in the case of bank bills. They are, *upon their face, the promise of the corporation by which they were issued,* though signed by the president and cashier with an abbreviation showing only the capacity in which they sign."

In the case of *Tucker v. Fairbanks and others*, 98 Mass. 104, GRAY, Judge, says: "The question, whether the defendants are liable upon the face of the bill, requires more consideration. The difficulty is not in ascertaining the general principles which must govern the cases of this nature, but in applying them to the different forms and shades of expression in particular instruments. In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must *not only name his principal,* but he must express, by some form of words, that the writing is the act of the principal, though done by the hand of the agent. If he expresses this, the principal is bound and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the

office and agency, is not sufficient to charge the principal or to exempt the agent from personal liability."

It is claimed that the words, "agent for S. Taylor," fully indicate that Tannatt signed the bill of exchange in a representative capacity, and that the engagement manifests an intent not to bind himself, but to bind the principal. It will be observed, however, that Taylor's name as principal nowhere appears in the body of the instrument. The money was to be charged to Tannatt's account, not Taylor's. The words, "agent for S. Taylor," may be regarded as a mere description of the general relation or office which the person signing the paper holds to another person, without indicating that the particular signature is made in the execution of the office and agency.

"Agent for a particular person," says GRAY, Judge, "may designate either the general relation, which the person signing holds to another party, or that the particular act in question is done in behalf of, and as the very contract of, that other; and the court, if such is manifestly the intention of the parties, may construe the words in the latter sense."

But how is this manifest intent to be learned? Clearly from the whole instrument. In affixing the words, "agent for S. Taylor," it is possible that he designed them as a memorandum, to be used in a settlement he might afterward make with Taylor. The signature of the defendant does not purport to have been made in behalf of a principal. They do not express an act of agency, as the words "A B" for "C D" would. They are mere description. I agree that no precise form of words is indispensable to the execution of an instrument by an agent for a principal. But it must appear in some way that the instrument is executed in behalf of the principal, or it cannot be his act.

It is not unusual for one who, as surety, executes a joint bond with the principal debtor, to annex to his name the character in which he signs. But then there is no doubt that he is liable to the creditor. Had the signature been

"Thos. R. Tannatt, agent of S. Taylor," it would hardly be contended that it was Taylor's bill of exchange.

But it is claimed that this form of signature has been repeatedly adjudged good by the supreme court of Massachusetts. I admit that it has been so held in *Ballou v. Talbot*, 16 Mass. 461, but the decision in that case, while it has been followed there, has not quieted discussion, even in that State. In the case of *Jefts and Wife v. York*, 4 Cushing, 371, the signature was "S. D. York, agent for the Freewill Baptist Church," but the body of the note sued on contained the name of the principal, and it was the principal that made the promise, and the case turned upon that fact.

In the case of *Barlow v. The Congregational Society, etc.*, 3 Allen, 461, this subject is again considered, and GRAY, J., remarks: "All the decisions of this court upon unsealed instruments, since the case of *Mann v. Chandler*, 9 Mass. 335, have required something more *than a mere description of the general relation between the agent and the principal in order to make them the contracts of the latter.*"

Again, he says: "But wherever it appears upon the face of a simple contract, made by an agent of one *named therein*, and whom he can legally bind thereby, that he acts as agent and intends to bind his principal, the law will give effect to the intention in whatever form expressed."

"In short, the note not only names the principal, describes the relation between the principal and the agent, and declares the note to be made in execution of the agency, but it cannot take effect according to its terms, except as the note of the principal. As the intention to bind the defendants thus appears upon the face of the note, the judgment must be affirmed."

If, as it has been held in this and in the case in 98 Mass., that the words "Agent for A B" may be taken as a description of the general relation between the agent and the principal, it seems to me a forced construction to say, that a signature in that form must also be taken as indicating a manifest intent to bind the principal.

In the case of *Offut v. Ayres*, 7 Monr. 356, the form of the signature was "For B. Ayres, W. B. Ayres," and the court held it to be the note of W. B. Ayres.

In the case of *Webb v. Burke*, 5 B. Monr., it is said to be well settled, that if *in the body* of a writing, A B, as agent, binds C D, and then signs it "A B, agent for C D," the writing is that of C D.

In the case of *Cook & Co. v. Sanford*, 3 Dana, the note was "One day after date we promise," etc., and signed "V. McKnight for N. B. Cook & Co." The court say, in this case, the words "we promise" show that the promise was intended to be made by a plurality of individuals, and there would be an inconsistency in supposing it to be the agent who promised.

It will be observed, that this cause is not made to rest on the form of the signature, but what appears *in the body* of the instrument, and which unmistakably shows that the principal and not the agent was intended to be bound. See, also, *Downer v. Collin*, 26 Ala. 591.

In the case of *De Witt v. Wallin*, 4 Seld. 571, the form of the signature was "David Hubbell Hoyt, agent for the churchman." GARDNER, Ch. J., says in commenting on this signature, "It is not sufficient that he describes himself as agent, he must give a right of action against the principal. Here the promise is not by the defendant or the churchman, nor by Hoyt for them or either of them, or in their behalf, but for himself. The formula used by him in the signature to the note in controversy has been determined in this and other States, to create an obligation on the part of the agent personally, and not in behalf of the principal. I can see no good reason for relaxing the principle of these decisions. We may conjecture, that the affix to the name of Hoyt was designed by him to answer some other purpose than simply to designate his person. He may have supposed that it created a contract upon the part of the defendant, or what is more probable, he may have designed it as a memorandum to enable him to determine thereafter from what fund the note should be paid, and to guide him in making up

his account with the churchman or with the defendant personally. *It is sufficient to defeat the action that this purpose is equivocal*, that the language does not necessarily, or by fair and reasonable construction, create an assumpsit on the part of the defendant, whether known as William Walton or as 'the Churchman.' There is no great hardship in requiring, that if one man undertakes to oblige another by note, bill of exchange or other commercial instrument, he should manifest his purpose clearly and intelligibly, or that his principal will not be bound, whatever may be the result in reference to himself."

I am aware that in this case PARKER, J., also delivered an opinion, but I am unable to see that it militates in any degree against the doctrine laid down by Gardiner. At all events in the case of *Fiske v. Eldridge*, 12 Gray, 474, this case is quoted with approval. See, also, 98 Mass. 106.

I confess that, after a most careful consideration of the Massachusetts cases, I fail to appreciate the soundness of a rule which declares that the words "agent for" may be taken on the one hand as a description of the general relation which the person signing holds to another, and on the other hand as showing that the particular act in question is done in behalf of, and as the very contract of, that other. If these words are open to this two-fold interpretation, when and how is the proper use of them to be determined? Under what circumstances will the court regard them as words of description, and when as indicating that the particular signature is made in the execution of the office and agency? Is it to be a matter of legal whim and caprice, or is the application to be made under fixed rules on recognized principles? In the case of *Tucker v. Fairbanks*, 98 Mass. 106, the court say that the latter construction may be given, when such is manifestly the intention of the parties. The intent to bind the principal, therefore, must be manifest before the courts should construe the words in the latter sense. If this intent is to be derived from the form of the signature, there ought certainly to be some particular shade given to the words by the writer of them, so that we

might learn when they are to be used in the one sense and when in the other. No! we must look elsewhere. Not outside the instrument, because the liability of the drawers of a negotiable instrument must be determined from the instrument itself; but look to the whole instrument and from the body of the contract, taken together with the signature, determine whether it gives a right of action against the principal. If it does, then it exempts the agent; otherwise, he is responsible. If by his act of signing he has left it doubtful whether another or himself is to be bound, the doubt is to be resolved against him, and especially in cases of negotiable paper, where the rule is well settled, that whoever takes it enters into a contract with the parties who appear on the face of it, and cannot look to others for payment. 12 Gray, 481.

While we hold that a person may draw, accept or indorse a bill by his agent, and it will be obligatory upon him as though it was done by his own hand, still the agent, in such case, must either *sign the name* of the principal to the bill, or it must appear on the *face of the bill itself* in some way or other, that it was in fact done for him, or the principal will not be bound. See *Sayre v. Nichols*, 7 Cal. 541.

If we look at the body of this bill of exchange there is nothing in it showing any intention to make Taylor liable. To hold him liable, we must rest our judgment wholly on the form of the signature. And we have already shown that a signature of that kind can be taken as a mere description of the relation which the party signing bears to another, or as showing that the particular act in question is done in behalf of, and as the very contract of, that other.

We feel that it is unsafe to adopt this latter construction, unless it appears from the whole instrument that it was the manifest intent of Tannatt to bind Taylor. In my judgment there is nothing manifesting this intent, and the judgment should be affirmed.

My brother Eyster fully concurring with me in this opinion, the judgment below is affirmed.

HALLETT, C. J., dissenting. Appellant was charged as drawer of certain drafts signed by him as follows: "Thos. R. Tannatt, agent for S. Taylor," and the question is, whether he is liable in that character. Appellant appears to have been the agent of Taylor, or at all events he proposed to show upon the trial that he was such agent, and that he had authority from Taylor to draw these drafts. If such were the facts, it appears to me that the signature was sufficient to bind Taylor, and relieve appellant from liability. This precise formula has often been held sufficient to bind the principal, and I think that as to these words, the question should be regarded as settled. *Ballou v. Talbott*, 16 Mass. 460; *Barlow v. Cong. Society of Lee*, 8 Allen, 460; *Tucker Manf. Co. v. Fairbanks*, 98 Mass. 101; *Hovey v. Magill*, 2 Conn. 680; 1 Am. Lead. Cases (4th ed.), 612, 629, and cases cited. Against these authorities is the opinion of GARDNER, C. J., in *De Witt v. Walton*, 9 N. Y. (5 Seld.) 572. In this case PARKER, J., gives another ground for his opinion, and it does not appear whether the other members of the court concurred with him or with the chief justice, and therefore it cannot be said that the court decided in that case that in this method of signing the agent binds himself and not his principal. I think that the weight of authority is against the ruling of the court below, and that the judgment should be reversed.

Affirmed.

BILL OF EXCHANGE — LATENT AMBIGUITY. — Parol evidence is admissible to explain a latent ambiguity in a bill of exchange: *Hagar v. Rice*, 4 Colo. 94, where the court say that they cannot assent to the doctrine laid down in the principal case, "a doctrine whose tendency is to defeat rather than effectuate the intention of the parties to written contracts."

ALLEN v. ELDRIDGE.

MARRIED WOMAN — *may recover her earnings.* By chapter 60, Revised Statutes, 454, a husband is deprived of all interest in the labor of his wife, rendered to third persons, and a married woman may maintain an action in her own name to recover her earnings.

MARRIED WOMAN'S ownership of property must be proved. Where husband and wife are living together, and there is no evidence as to the ownership of provisions and articles of household use, the presumption is that they belong to the husband.

INSTRUCTIONS — *must be applicable to the evidence.* Where there is no evidence to show that the plaintiff is the owner of personal property, it is error to instruct the jury that if the defendant took and used the property of the plaintiff he is liable to her for its value.

Error to District Court, Jefferson County.

Mr. S. E. BROWNE, for plaintiff in error.

Mr. JOSEPH MANN, for defendant in error.

HALLETT, C. J. The declaration in this case contains the common counts for work and labor, goods sold and delivered, etc., to which plaintiff in error pleaded a set-off and the general issue. The evidence is given in the bill of exceptions, and relates to a sale of goods to plaintiff in error, and work and labor done for him by defendant in error. The evidence shows that defendant in error was, at the time the action accrued, and at the time of trial, a married woman, living with her husband, and it is upon this fact that her right to recover in this action is denied.

At common law this action was not maintainable, and it becomes necessary to inquire whether it is sustained by chapter 60 of the Revised Statutes, entitled "Married Women." That chapter, so far as it relates to the questions to be considered, is as follows :

Sec. 1. "The property, real and personal, which any woman in this territory may own at the time of her marriage, and the rents, issues, profits and proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise or bequest, or the gift of any person except her husband, including presents or gifts from her husband, as jewelry, silver table-ware, watches, money and wearing apparel, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband, or liable for his debts."

Sec. 2. "Any married woman, while married, may bargain, sell and convey her personal property, and enter into any contract in reference to the same as if she were sole."

Sec. 3. "Any woman may, while married, sue and be

sued in all matters having relation to her property, person or reputation, in the same manner as if she were sole."

Sec. 6. "Any married woman may carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used and invested by her in her own name, and she may sue and be sued as if sole in regard to her trade, business, labor, services and earnings, and her property acquired by trade, business and services, and the proceeds thereof, may be taken on any execution against her."

The right of a married woman to the proceeds of her own labor, under this statute, cannot be doubted. The language of the act is clear and explicit, and the husband is deprived of all interest in the labor of his wife, rendered to third persons. It may be contended that the words "on her sole and separate account," in the first clause of section 6, restrict the woman's right to cases in which she declares her intention to appropriate the proceeds of her labor to her own use. But there is little room for such construction. It must be presumed that every one who labors for hire is seeking his own personal emolument; for men do not sow that others may reap. The highest claim to the fruits of labor is vested in him who performs it, and none other need be asserted. We do not doubt the right of defendant in error to recover in her own name the value of her services personally rendered to plaintiff in error, and this, whether the contract for payment is express or implied.

As to the merchandise alleged to have been sold to plaintiff in error, we have greater difficulty. It seems that in the month of July, 1867, defendant in error, with her husband, lived on plaintiff's farm, but not in the house occupied by him. While there, she was engaged by plaintiff in error to keep house for him, and with her husband removed into plaintiff's house, carrying with her a quantity of lard and other articles of household use, which she testified were purchased by plaintiff in error from her. There is no

evidence as to the ownership of these articles, except that they were in possession of defendant in error and her husband. So far as we know, the husband and wife were living together in the full enjoyment of marital rights, and the husband managing and controlling his family affairs. In such case, we think there can be no presumption that articles of food plainly intended for family use are the separate property of the wife. As we have seen, the law gives to a married woman the personal property which she has at marriage, and such as may come to her during coverture, by descent, etc., and such as she may acquire in trade or business, but there is nothing to show that these articles came in any of these ways. In the absence of evidence to show the separate ownership of the wife, the law will presume that they were owned by the husband, there being nothing in this statute to change this common-law intentment. But it may be said that there was an express promise to pay defendant in error for these goods, upon which an action would lie by her and her husband jointly, and, therefore, her suit can only be defeated by plea in abatement. We know that, upon a promissory note or covenant made to the wife during coverture, husband and wife may sue as plaintiffs, and if the wife sue alone, the non-joinder of the husband must be pleaded in abatement. *Gaters v. Madeley*, 8 Mees. & Wels. 422; *Bendix v. Wakeman*, 12 id. 97; *Dalton v. Midland County Railway Company*, 76 Eng. Com. Law, 474. But we have not found a case which goes the length of saying, that a wife may join her husband in an action upon an unwritten promise to the wife, made upon a consideration moving from the husband. Nor do we propose to discuss this question, for we are not able to ascertain from the evidence that there was an express promise to defendant in error, rather than her husband. She testifies that plaintiff in error promised to pay her, but the plaintiff denies it. And if we concede that her statement is true, it by no means follows that there was an undertaking to pay the wife instead of the husband. One who is dealing with a wife, acting for her husband, will ordinarily

address her in the second person singular, without any intention to engage with her instead of her husband. So a purchaser of dry goods will promise payment to the owner's clerk, but no lawyer would bring an action upon such promise in the name of the clerk. To enable a wife to join with her husband in an action upon an undertaking, the engagement must have been with her distinctly and unquestionably, and the evidence in this case does not show such an undertaking. Again, the jury were not instructed that an express undertaking to pay defendant in error for this merchandise was essential to her right of recovery; but they were told, that if plaintiff in error took and used the property of defendant in error, he was liable to her for its value. The instruction, as an abstract proposition of law, is not to be denied, but it is not applicable to the facts of this case. There was nothing to show that defendant in error owned the goods, and under this instruction the jury may have given undue weight to the evidence. The judgment of the district court is reversed with costs, and the cause is remanded.

Reversed.

JONES v. CARRUTHERS.

DIMINUTION OF RECORD — *will not be noticed if error appear.* A bill of exceptions in the record was not questioned, but it was alleged that another bill of exceptions remained in the court below. Error appearing in the bill of exceptions contained in the transcript on file a suggestion of diminution of the record will not be noticed.

DEPOSITIONS — *taken without notice.* Unless notice of the time and place of taking depositions be given to the opposite party, they cannot be read upon the trial of the cause.

Error to Probate Court, Park County.

Mr. L. C. ROCKWELL, for plaintiff in error.

Mr. J. MARSHALL PAUL and Mr. S. E. BROWN, for defendant in error.

HALLETT, C. J. This cause was submitted to the court upon the twenty-eighth day of July last, and the parties then entered into a written stipulation to the effect that the plaintiff in error should file abstracts and copies of his arguments by the first day of October following, and that the defendant in error should join in error and file copies of his argument by the first day of November following. The argument of counsel for plaintiff in error was filed on the thirtieth day of September last, according to the terms of the agreement, but no argument upon the error assigned has been filed by counsel for defendant in error. We find among the papers in the cause a suggestion of diminution of the record filed October 31, 1870, which charges that a bill of exceptions, differing from that now before us, has been omitted from the transcript of the record. Nothing is said as to the nature of the difference between the omitted exceptions and those now before us, nor is it alleged that the bill of exceptions given in the transcript of the record on file in this court is incorrect in any particular. Accepting the present exceptions, which we find in the transcript, as truly taken, we perceive that there is error in the record, and therefore it is not necessary to await the production of other portions of the record. Upon the trial of the cause, certain depositions were read in evidence on behalf of defendant in error, and it does not appear that plaintiff in error ever had notice of the time and place of taking such depositions. It is hardly necessary to say that depositions of witnesses cannot be given in evidence unless notice be given of the time and place of taking them, according to the provisions of the statute. Counsel for plaintiff in error objected to the reading of these depositions upon the trial below, and excepted to the ruling of the court in admitting them to be read in evidence, and therefore he may renew his objection here.

The judgment of the probate court is reversed, with costs, and the cause is remanded.

Reversed.

GALLUP et al. v. WILDER et al.

PRACTICE — *assessing damages on default.* In trespass *de bonis* upon defaulting the defendant, the damages must be assessed by a jury.

Error to Probate Court, Fremont County.

Messrs. CHARLES & ELBERT, for plaintiff in error.

PER CURIAM. This was an action of trespass *de bonis asportatis*, brought by George G. Wilder and others, as trustees of "The Colorado Oil Association," against Francis Gallup et al. There was a judgment taken in the court below by default, and the damages assessed without the intervention of a jury. In a case of this kind the assessment of damages by the court was clearly erroneous. A jury should have been called. See the case of *Jones v. Stevens, ante*, 67, decided by this court. The judgment of the court below is reversed and remanded for further proceedings.

Reversed.

FOSTER v. THE PEOPLE.

CONSTRUCTION of section 43 of Criminal Code, relating to mayhem. The effect of the proviso in section 43 of the Criminal Code (Rev. Stat. 202) is to reduce the crime in certain specified cases from a higher to a lower grade.

MISDEMEANOR — *conviction may be had upon indictment for felony.* A conviction for misdemeanor may be had upon an indictment for felony in case where the misdemeanor is included in the higher offense.

INDICTMENT for mayhem need not negative circumstances mentioned in proviso to section 43. An indictment for mayhem, in which the fact and the intent are charged, is good for the principal crime, mentioned in section 43, and also for the misdemeanor mentioned in the last clause of that section.

INSTRUCTION erroneous as to higher offense, but not as to the lesser. The jury were instructed that, if the injury was inflicted during a fight between the prisoner and the prosecuting witness had by consent, and the prisoner was the assailant, or the prosecuting witness declined further combat at the time the fact occurred, the prisoner was guilty. This charge, if applied to the higher offense, is erroneous, but, if applied to the inferior offense, it is too favorable to the prisoner.

VERDICT OF GUILTY — *a conviction of the inferior offense.* The evidence being clear that the prisoner bit off the ear of the prosecuting witness during a fight between them, assuming that the jury intended to find that the fight was by consent, which is the view most favorable to the prisoner, the verdict is still sufficient for the misdemeanor defined in the last clause of the proviso to section 43.

PRACTICE — *error in entering judgment.* The judgment of the district court, being for the higher offense, was set aside, and the court below was directed to pronounce judgment on the verdict for the misdemeanor specified in the last clause of section 43 of the Criminal Code.

Error to District Court, Arapahoe County.

Messrs. CHARLES & ELBERT, for plaintiff in error.

Mr. V. D. MARKHAM, for defendant in error.

HALLETT, C. J. The indictment in this case is founded upon section 43 of the Criminal Code, which reads as follows:

“ Mayhem consists in the unlawfully depriving a human being of a member of his or her body, or disfiguring or rendering it useless. If any person shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, ear or lip, or disable any limb or member of another, or shall voluntarily and of purpose put out an eye or eyes, every such person shall be guilty of mayhem, and on conviction shall be punished by confinement in the penitentiary for a term not less than one year nor more than three years; provided that no person shall be found guilty of mayhem where the fact occurred during a fight had by consent, nor unless it appear that the person accused shall have been the assailant, or that the party maimed had, in good faith, endeavored to decline further combat; but, in all other cases where the fact shall happen in actual fight, the party accused, being thereof duly convicted, shall be adjudged guilty of a high misdemeanor, and punished by imprisonment in the penitentiary not exceeding one year, and be fined not exceeding one thousand dollars.”

Our first duty is to ascertain the true meaning of the proviso in this section which has been the subject of much discussion at the bar, and by which the sufficiency of this

record is to be tested. In the first place, it is to be observed that in that part of the section which precedes the proviso, mayhem is defined and punished by imprisonment for a term of not less than one year nor more than three years. If the proviso were struck out of the section the crime and its punishment would remain clearly ascertained ; but it is said, that the proviso creates an exception in the statute, which ought to have been negatived in the indictment. In the printed copy of the statute a period is inserted after the word "combat," and thus the proviso is divided into two sentences, while it is very evident, from the language used, that but one was intended. If mistakes of this kind were less common it would hardly be necessary to comment upon the necessity of overlooking this one, and I shall pass to the consideration of the proviso, as if it were properly punctuated. Reading the proviso connectedly, we find in the first place that no person shall be found guilty of mayhem where the fact occurred during a fight had by consent, concerning which it is only necessary to remark that the reference is to the crime of mayhem as previously defined and punished. The language of the proviso then succeeding is as follows : "Nor unless it appear that the person accused shall have been the assailant, or that the party maimed had in good faith endeavored to decline further combat."

The negative particle which connects this clause with the preceding, shows that this also is a limitation upon the crime defined and punished in the clause which stands before the word *provided*. These two clauses of the proviso being connected by the disjunctive *nor*, we cannot say that either limits or qualifies the other, but both of them must be regarded as qualifying what comes before them. We come now to the third and last clause of the proviso, beginning with the words, "but in all other cases where the fact shall happen in actual fight," etc, and this, it will be observed, is not a denial or limitation of any thing which stands before it. It is a substantial clause prescribing a punishment different from that first mentioned, in certain cases "where the fact shall happen in actual fight." Now, we cannot say

that the "other cases where the fact shall happen in actual fight," here referred to, are those previously mentioned in the proviso, because certain of those thus mentioned, to wit: the cases in which the party maimed declines the combat before the fact, are expressly included in the punishment first prescribed.

Another construction is, however, open to us, which is so reasonable and just, and accords so perfectly with the import of the language, that we do not hesitate to adopt it. By the terms of the preceding clauses, where the injury is inflicted during a fight, had by consent, and where the accused was not the assailant, and the injured party did not decline combat before the fact, the offender is not punishable according to the provisions of the first part of the section, and these are the *other cases* referred to in the last clause of the proviso. The cases excepted out of the first part of the section, on account of the mitigating circumstances attending them, are visited with milder punishment. The only effect of the proviso, then, is to reduce the offense in certain specified cases, from a higher to a lower grade. Whether the higher offense is a felony, appears to be an open question. *Commonwealth v. Newell*, 7 Mass. 244. But this is not important, except with reference to the old rule, that a conviction for misdemeanor could not be had upon an indictment for felony. As we are not disposed to adopt that rule, it seems unnecessary to inquire whether mayhem is felony under our law. Upon the point that a conviction for misdemeanor may be had upon an indictment for felony in cases where the misdemeanor is included in the higher offense, counsel are referred to *People v. Jackson*, 3 Hill, 92; *Stewart v. State*, 5 Ohio, 145. Upon what has been said of the interpretation of the statute, we are now prepared to speak of the sufficiency of this indictment. The criminal acts prohibited by the law are: cutting out or disabling the tongue, putting out an eye, slitting the nose, ear or lip, and the circumstances attending the act, as whether it be done in a fight had by consent, whether the accused

were the assailant, etc., determine the nature and aggravation of the crime and the punishment to be administered.

The acts prohibited are criminal in a degree determinable by the circumstances attending them. Now it is always sufficient in pleading to charge the fact, leaving matters of excuse to come in by way of defense. Mr. STARKIE says "that no indictment is sufficient which alleges an act or omission in itself innocent, unless it proceed to disclose circumstances which render such act or omission illegal," and it would be difficult to find a better statement of the rule. But when the act is in itself criminal, it is sufficient to charge it, leaving the prisoner to excuse himself if he can. In *Rex v. Pemberton*, 2 Burr. 1036, the rule is laid down as follows: "It is enough for the prosecutor to bring the case within the general purview of the statute, upon which the indictment is founded; if that statute has general prohibitory words in it. For where an indictment is brought upon a statute which has general prohibitory words in it, it is sufficient to charge the offense generally in the words of the statute, and if a subsequent statute or (as Mr. Justice FOSTER and Mr. Justice WILMOT, who spoke after Lord MANSFIELD and Mr. Justice DENNISON, added), even a clause of exception, contained in the same statute, excuses persons under such and such circumstances, or gives license to persons so and so qualified so as to excuse or except them out of the general prohibitory words, *that* must come by way of plea or evidence, that the party is not within such general prohibition but excepted out of it."

So Mr. CURTIS (1 C. L. 231 a), "In general all matters of defense must come from the defendant and need not be anticipated or stated by the prosecutor."

See, also, *Commonwealth v. Hart*, 11 Cush. 130. The application of this rule to the case under consideration is obvious. The act prohibited by the law and charged in this indictment is biting off the ear of the prosecuting witness Thompson, and this act is criminal in a high or low degree, according to the relations of the parties, as whether they were in combat,

etc., at the time of the injury. In either case, the prosecutor can do no more than charge the fact with the intent, because this is all that is necessary to make out the crime. To require the pleader to negative the circumstances, which would reduce the crime to the lower grade, would be to anticipate the defendant's case, and this is as unnecessary as it is unreasonable.

We think that the indictment is good, not only for the principal crime, but also for the misdemeanor defined in the last clause of the proviso. As before observed, the criminal act is the same whatever the circumstances attending its commission. It is like a case of homicide which may be murder or manslaughter, according to the relations of the prisoner and deceased at the time of the fact. As we have seen, the pleader could not do more than negative the circumstances which will reduce the crime, and if this had been done the indictment would still be good for the smaller offense. The greater includes the less, and the indictment without such negative averments must still be good for the smaller offense.

Upon the trial below, the jury were instructed that if the injury was inflicted during a fight between Foster and Thompson, had by consent, and Foster was the assailant, or Thompson declined the combat at the time the fact occurred, the accused was guilty. Considered with reference to the higher crime, this charge does not conform to the views expressed in this opinion, but applied to the inferior offense, the charge is too favorable to the plaintiff in error. There is evidence tending to show, and probably the jury found, that Thompson, the prosecuting witness, entered into the combat voluntarily. That Foster and Thompson did fight, and that during the struggle the former bit off the ear of the latter, under circumstances peculiarly atrocious, is upon the evidence beyond all doubt. Whether the fight was by consent is not so clear, but upon the evidence and the instructions of the court the jury may have found that fact. Assuming that the jury intended to find that the fight was by consent, which is the view most favorable to the plaintiff in error, this ver-

dict is still sufficient for the misdemeanor defined in the last clause of the proviso. Beyond all doubt he is guilty of the inferior offense, and admitting the full force of every objection that he makes to this record, he stands convicted of it. The new testimony which he desires to introduce upon another trial of the cause would not free him from this guilt, and therefore it would be useless to give him an opportunity to present it. The judgment of the district court is too large, and therefore it must be reversed and set aside. But the ends of justice do not require that another trial of the cause shall be had, and therefore the district court of Arapahoe county is directed to enter judgment upon the verdict of the jury, as for the misdemeanor mentioned in the last clause of section 43 of the Criminal Code, and the said plaintiff in error shall attend before said district court on the first day of the next term thereof, and from day to day thereafter until discharged by that court, in order that judgment may be pronounced against him.

Reversed.

DEITSCH v. WIGGINS et al.

TRESPASS — plea of justification. In trespass *de bonis* against an attaching creditor who justifies under the writ he must aver and prove a debt due from the attachment defendant to him.

PLEADING — must be good as to all. If two or more in pleading join in a defense which is sufficient for one but not for others, the plea is bad as to all.

The sheriff who levied the writ of attachment joined with the attaching creditor in a plea of justification insufficient as to the latter, and the defense was not available to either of them.

PLEA DEFECTIVE — issue thereon. A plea defective in substance is not cured by joining issue thereon unless the defects are supplied in the replication.

Plea defective in substance. A plea substantially defective presents no defense to the action, and evidence of the facts alleged therein, or of those omitted therefrom, cannot be received although issue is joined thereon.

In trespass *de bonis* by a vendee of goods against creditors of the vendor, who have taken the goods in attachment, the latter cannot show that an agent who made the sale acted without authority from the vendor, unless they also show a debt due from the vendor to them.

PLEA OF JUSTIFICATION *must be special*. In trespass *de bonis* the defense that the goods were taken under attachment against a third person is not admissible under the general issue.

MEASURE OF DAMAGES *in trespass*. In trespass *de bonis* the plaintiff may recover the highest market price of the goods taken.

Appeal from District Court, Gilpin County.

TRESPASS by the vendees of merchandise against creditors of the vendor, who had taken the goods in attachment and the sheriff who levied the writ.

The pleadings are sufficiently stated in the opinion of the court.

P. M. Martin testified, that the goods were taken by the sheriff from the possession of appellee's agent, and that he invoiced the goods by the direction of the sheriff, at cost and freight added; that the invoice price was \$2,315.90; that the goods might be sold for this amount with good management; but that he did not think them worth more than seventy-five cents on the dollar of the invoice price; that he would not give more than that amount; but that it would not be difficult to get cost for them, that the cash valuation is the amount added upon the invoice.

Charles C. Post testified, that he was present when the goods were taken away, and saw the sheriff and appellant there, that appellant was engaged in selecting the goods from the shelves as they were being packed.

Defendants below offered to prove, by Charles E. Sherman, that the goods taken were part of the stock of merchandise of Oliver S. Buell, who did business under the name and style of O. S. Buell & Co.; that the witness, Charles E. Sherman, was the clerk of said O. S. Buell for the space of about six months prior to the 6th day of May, 1867; that for two or three months prior to the 2d or 6th day of May, 1867, the said Buell was absent from the said territory of Colorado; that during the absence of the said Buell, said Sherman was the clerk of said Buell, to carry on the regular business of said Buell in Central City, which was retailing clothing and merchandise; that the

said Sherman had no right or authority whatever to sell or dispose of the entire stock of goods of said Buell, but was only authorized to sell in the regular course of business; that on the 29th day of April, 1867, John Q. Hart, agent of the plaintiffs, well knowing that the said Sherman was not authorized to sell the entire stock of goods, fraudulently agreed and combined and confederated with the said Sherman to make a pretended purchase of the entire stock of goods, for the purpose of hindering, delaying and defrauding the defendants, Moritz Deitsch, Isidor Deitsch and Jonas Deitsch, defendants herein, and other creditors; that the said Hart well knew that the said Jonas Deitsch, Moritz Deitsch and Isidor Deitsch were creditors of said Buell to a large amount, and that such sale was designed by him to cheat, hinder and defraud said defendants; that said stock of goods was worth \$10,000, but was sold to said Hart, Wiggins & Co., for a grossly inadequate sum; that whatever money was paid, if any, or securities given, were so concealed, smuggled and managed as to protect and place it beyond the reach of the defendants and for the benefit of the said Buell, Hart, Wiggins & Co., John Q. Hart and said Sherman, to which evidence plaintiffs objected, and the court sustained the objection.

Defendants then offered the affidavit, bond and sheriff's return in the suit of Deitsch & Bros. against Buell, to which plaintiffs objected, and the objection was sustained.

The court gave the following instructions to the jury at the request of the plaintiffs below:

The court is asked to instruct the jury, that the defendants are not entitled to have the goods and chattels taken by them appraised or valued at the wholesale price, but the jury may find the goods and chattels of the value they would bring in market at retail.

If the jury believe, from the evidence in the case, that before the commencement of this suit the plaintiffs were possessed of a quantity of personal property, and the defendants, William Z. Cozens and Moritz Deitsch, took the said goods and chattels, and carried the same away

without the consent of the plaintiffs, such acts were acts of trespass.

The court instructs the jury, that, when the goods of another are taken without his consent, and against his will, and it is shown that the taking was wrongful, the highest market price or value of the goods so taken, at the time of the taking, will be allowed to the owner.

If the jury believe, from the evidence, that, at the time defendant, Cozens, was packing up the goods and chattels mentioned in the declaration, Moritz Deitsch was there, assisting in selecting the same, without the consent of plaintiffs, then he was guilty of trespass, and, if he had the consent of plaintiffs, it is incumbent on the defendant Deitsch to prove such consent.

The court instructs the jury, that if they believe, from the evidence, that the goods mentioned in the declaration were in the possession of the plaintiffs at the time of the taking of the goods by the defendants, or either of them, if said goods were taken by them, or either of them, the law presumes they, the said plaintiffs, were the owners of said goods, and it is incumbent on the defendants to rebut that presumption by proof that they were not the goods of the plaintiffs, and if said defendants have failed to make such proof, they should find for the plaintiffs such sum as, by the evidence, such goods were shown to be worth.

On behalf of defendants the court gave the following instruction :

To enable the plaintiffs to recover against the defendants in this action, the plaintiffs must show, by evidence to the jury, that the said plaintiffs, at the time of the taking, were rightfully in possession or entitled to the possession of the property alleged to have been taken as against the defendants.

And the said defendants also moved the court to give the jury the following instructions :

Unless the jury believe, from the evidence, that defendant, Moritz Deitsch, was present, in some way aiding, counseling and abetting the taking of the goods in question, they will find defendant, Moritz Deitsch, not guilty.

The jury are instructed by the court, that, to enable plaintiffs to recover in this action, plaintiffs must, at the time of such taking, have had rightful possession of the premises in question.

If the jury believe, from the evidence, that Moritz Deitsch was present at the time of the alleged taking of the goods in question, but that he neither counseled nor took any part in said taking, they will find defendant, Moritz Deitsch, not guilty.

But the court refused to give said instructions, and defendants excepted.

Messrs. ROYLE & BUTLER, for appellant.

Messrs. JOHNSON & TELLER, for appellees.

BELFORD, J. This was an action of trespass, *de bonis asportatis*, commenced by appellees against William Z. Cozens and Moritz Deitsch, Isidor Deitsch and Jonas Deitsch in the district court of Gilpin county, in which the appellees recovered a judgment against said William Z. Cozens and Moritz Deitsch for the sum of \$2,315.90, and from this judgment Deitsch appeals. The declaration alleged that the defendants took and carried away certain goods and chattels in the declaration mentioned, on the 4th day of May, 1867, of the value of \$2,315.90.

The defendants jointly plead the general issue, and also a special plea alleging that the goods and chattels in the declaration mentioned were the goods and chattels of O. S. Buell & Co., on the said 4th day of May, 1867, and that, on the 3d day of May, 1867, a writ of attachment was issued out of the district court of Gilpin county in favor of the firm of Deitsch & Bro., directed to the sheriff of said Gilpin county, commanding him to attach so much of the estate, real and personal, of the said O. S. Buell & Co., as should be of sufficient value to satisfy the sum of \$1,478.90, and costs; that, on the said 3d day of May, 1867, the said William Z. Cozens was sheriff of Gilpin county; that, on said day, the writ of attachment was delivered to said Cozens to

execute, and that, on the 4th day of May, 1867, he levied upon the goods and chattels mentioned in the declaration as the property of the said O. S. Buell & Co., by virtue of said writ of attachment, which were the supposed trespasses complained of. Appellees filed several replications, denying that the goods and chattels mentioned were the property of O. S. Buell & Co., on the 4th day of May, 1867; also denying that the writ was issued as alleged in said plea, and that Cozens levied upon said goods under and by virtue of such writ, and that Cozens was sheriff of Gilpin county. The above is a brief and, we believe, a correct abstract of the pleadings. During the progress of the trial, the defendants offered in evidence a certain affidavit, bond and writ of attachment, and sheriff's return indorsed thereon, in case of Moritz Deitsch, Jonas Deitsch and Isidor Deitsch, against said Oliver S. Buell & Co., then pending in said court, and being the writ of attachment under which the defendants sought to justify. To the introduction of this evidence the plaintiffs objected. The objection was sustained and the defendants excepted. The action of the court in excluding this evidence is the principal matter complained of.

It is urged by the appellant that the appellee, having joined issue on the special plea, was by the joinder precluded from objecting to the introduction of evidence under it; that the filing of the replication cured whatever defects existed in the special plea. Under the ruling of the court below three questions present themselves. First, was the special plea defective in substance? Second, did the appellee, by pleading over, waive any substantial defects that existed in the special plea? Third, the plea being defective, could the appellees object to the introduction of evidence under it? It must be admitted, at least it will so appear after a careful examination, that there is no allegation in the special plea that O. S. Buell & Co. were, at the time of the alleged trespass, indebted to Deitsch & Bro. Giving the plea the most liberal construction, it simply avers that on the 3d day of May, 1867, a writ of attachment was issued

out of the district court of Gilpin county, at the suit of Moritz Deitsch, in favor of said Moritz Deitsch, Isidor Deitsch and Jonas Deitsch, partners doing business under the firm name of Deitsch & Bro., and which said writ commanded the sheriff to attach as much of the estate, real and personal, of Oliver S. Buell & Co., as should be of the value sufficient to satisfy the sum of \$1,478. It might be inferred that this sum of money was due from Buell & Co. to Deitsch & Bro., but it is not so averred. The omission to aver an indebtedness we regard as a substantial and fatal defect. When a creditor, sued in trespass by a vendee of goods, contests the plaintiff's title on the ground of fraud, if he justifies under a writ of attachment against the vendor he must show a debt against him, or a judgment if he justifies under an execution. *Damon v. Bryant*, 2 Pickering, 411, and authorities cited; *Noble v. Holmes*, 3 Hill, 194. There was no allegation of an existing debt in the plea, nor was there any offer made to prove one on the trial. The plea is bad for another reason. It does not show that an affidavit was filed before the writ was issued, nor does it show the return of the writ. *Davis v. Bush*, 4 Blackford, 330. But there is still another objection which we regard as fatal, and one that applies equally to Cozens & Deitsch. They both joined in the special plea. In the case of *Moors v. Parker et al.*, 5 Mass. 310, it is held, that when several defendants join in pleading in bar, if the plea is bad as to one defendant it is bad as to them all. The rule on which it is founded is correctly laid down in 1 Saund. 28, n. 2. "If two or more in pleading join in a defense which is sufficient for one but not for others, the plea is bad as to all—for the court cannot sever it, and say that one is guilty and the others not, when they all put themselves upon the same terms." This is upon the principle that a plea is entire and not divisible, and, therefore, if bad in part is bad in whole.

In the case of *Bradley v. Powers*, 7 Cow. 330, it is held, that when two plead a justification jointly or a plea involving a justification which fails as to one, the plea, being entire, fails as to both. To the same effect is *Middleton v. Price*,

11 Strange, 1184, and see *Merrill v. Forbes*, 5 Wend. 238. Were it deemed necessary, authorities on this point might be greatly multiplied. The plea being thus substantially defective, was it cured by pleading over? We think not. A judgment entered on the plea could have been arrested. While all merely formal defects in a pleading are aided and cured by pleading over, except on special demurrer, assigning this for cause, yet such defects as would be fatal on general demurrer are not aided or cured by pleading over. Gould on Pleading, § 11, p. 496. While a plea that states a fact, but states it defectively, would be cured by pleading over, still the authorities nowhere hold, that an omission to state a substantial and material fact will be cured by pleading over, unless the party replying to the plea affected by the omission supplies the omitted fact by setting it up in his own plea. If one party expressly avers a material fact, before omitted on the other side, the omission is cured. For the defect in the pleading of the one party is thus supplied by the other; and it may thus appear from the pleadings on *both* sides taken together, that he, on whose part the omission occurs, is entitled to judgment, although his own pleading, taken *by itself*, be insufficient. Thus, when in trespass the plaintiff complained of the defendant for taking a certain iron hook without alleging possession in himself (which in that action is material), the defendant's plea, in which he confessed and justified the taking of the hook from the *plaintiff's hand*, was held to aid the declaration, inasmuch as it expressly *acknowledged* the plaintiff's possession. Gould on Pleading, § 192, p. 166.

The special plea being defective, could the plaintiff below object to the introduction of evidence under it?

It is claimed by the appellant that the plaintiff below, having failed to demur, and having joined issue on this plea, was estopped from objecting to the introduction in evidence of matters alleged in it. If the plea was substantially defective, and so we adjudge it to be, and was not cured by pleading over, then it was no defense to the action, and being no defense to the action, it was entirely competent

for the court to disregard it and exclude the evidence sought to be introduced under it. *Kemp v. Moundel*, 11 Leigh, 12. The mere fact that a party joins issue on a plea fatally defective does not and cannot impose upon a court the duty of hearing and admitting evidence under it, when it becomes apparent that no judgment could be sustained if rendered on such plea. Having said this much on the subject of the special plea, it is proper to inquire, whether, under the general issue, it was competent for the defendants to introduce in evidence the writ of attachment with the affidavit annexed. In the case of *Rosenburg v. Angel*, 11 Mich. 509, it is said: "In trespass *de bonis*, the defense that the goods were taken under attachment against a third person, alleged to be the owner, is not admissible under the general issue."

The same rule is laid down in Chitty's Pl., vol. 1, p. 500, 502. In an action for trespass for injuries to real or personal property, the plea of not guilty puts in issue the trespass alleged in the place mentioned, and operates as a denial of the plaintiff's possession or right of possession. The substance of the declaration is, that the defendant has forcibly and wrongfully injured property in the possession of the plaintiff, and under the general issue the plaintiff must prove, first, that the property was in his possession at the time of the injury, and this rightfully as against the defendant. Second, that the injury was committed by the defendant with force. Under the general issue the defendant may give in evidence any facts tending to disprove either of the propositions which we have seen the plaintiff is obliged to make out to maintain his action. Every defense which admits the defendant to have been *prima facie* a trespasser must be pleaded specially, but any matters which go to show that he never did the act complained of may be given in evidence under the general issue. Puterbaugh's Pr. 464. In the extended examination given this subject, we have found but two cases where proof tending to justify a trespass has been allowed to be introduced under the general issue. The first is the case of

Anthony v. Gilbert, 4 Blackf. 348, in which the supreme court of Indiana held, that "the defendant may show, in mitigation of damages, under the general issue, that the goods at the time of taking belonged to a third person, and that the *plaintiff was not liable for them to the owner.*"

In the case of *Squire v. Hallenbeck*, 9 Pick. 551, it is held that "in trespass *de bonis asportatis* the defendant may prove, in mitigation of damages, that the goods did not belong to the plaintiff, and that they came *to the use of the owner*, although in taking them the defendant acted without authority." But the ruling in each of these cases is made to rest on special grounds. In New York, by statutory provision, the plea of not guilty is equivalent to a plea of justification. *Merrill v. Forbes*, 5 Wend. 239. It is further claimed by the appellant that the court erred in refusing to allow the defendants below to introduce proof of Sherman's want of authority to sell the goods to Hart, Wiggins & Co. It must be borne in mind, that Deitsch's interference with the property in controversy could only be justified on the ground that he was a creditor; that he had a valid subsisting debt against O. S. Buell & Co., and that, as such creditor, he was assailing the title of Hart, Wiggins & Co. These matters could only be introduced under a special plea, and we have already held that the special plea was fatally defective and no proof could be admitted under it. It is therefore not necessary for us to discuss or decide whether the sale made by Sherman to plaintiffs below was a valid sale, or whether it could or ought to be upheld against existing creditors of Buell. It is further urged by the appellant that the court below erred in the instructions given the jury on the subject of damages. We have carefully considered this point and find no error. In the case of *Anthony v. Gilbert*, *supra*, it is said: "We know of no standard by which damages in action of trespass can at all times be measured. The nature of the injury complained of renders it impracticable to establish such a rule. the first inquiry should be the amount of injury actually sustained, which, together with interest, is a good general

measure of damages in the absence of circumstances of aggravation. But to limit the investigation to the pecuniary loss of a plaintiff would frequently do him injustice, and always to extend it beyond such loss would as often be unjust to the defendant." If, however, we confine the measure of damages to the value of the property when taken, we see no injury sustained by the defendant for the reason that the damages assessed by the jury did not exceed in amount the value of the goods as fixed by the evidence.

We have carefully considered the other objections urged, and find no reasons why the judgment should be reversed.

Judgment affirmed, with costs.

Affirmed.

Judgment reversed: 15 Wall. 539. Justification by officer: *Williams v. Mellor*, 12 Wall. 11; *Wyatt v. Freeman*, 2 Colo. 14. Informality in plea: *Berry v. Hart*, 1 Colo. 282. Joint plea: *Wilson v. Hawthorne*, 14 Colo. 535.

FARNUM v. UNITED STATES.

AMENDMENT of caption of indictment. If in the caption of an indictment the court is misdescribed, it may be amended on motion of the district attorney.

INDICTMENT for secreting or embezzling letters—description of letters. In an indictment against a mail carrier, for secreting or embezzling letters deposited in the mail, and intrusted to him to be carried, it is not necessary to describe the letters by stating to whom they were addressed, and by whom they were written.

CONSTRUCTION of section 12, act of 1864—what is an offense by mail carrier. A mail carrier who secretes, embezzles or destroys a letter, packet, bag, or mail of letters intrusted to him to be carried, offends against the first clause of section 12 of the act of 1864 (13 Stat. at Large, 336), and if the letter, packet, bag or mail of letters contain any article of value, he offends against the last clause of that section.

INDICTMENT under section 12, act of 1864—what it must contain. In order to convict under the last clause of that section, it must be alleged in the indictment that the letter, packet, bag, or mail of letters contained an article of value.

EVIDENCE—under same section. And the evidence must support the allegation at the trial.

PRACTICE—where the conviction was proper, but the law was misapplied. Where the law of the case was misconceived in the court below and the judgment is erroneous, a new trial will be granted, although the evidence was sufficient to warrant a conviction upon two counts in the indictment.

Error to District Court, First Judicial District.

THE indictment was entitled, "The district court of the United States of America, within and for the first judicial district of Colorado territory, of the term of June, in the year of our Lord one thousand eight hundred and seventy. At a regular term of the district court of the United States of America, within and for the first judicial district of Colorado territory, begun and held at Denver City, on the fourteenth day of June," etc., etc.

The defendant below moved to quash the indictment, upon the ground that it was entitled of a court not known to the law. He also objected, that there was no offense charged. The district attorney filed a cross-motion to amend the caption of the indictment by striking out the words "of the United States of America," so as to make the same read "the district court within and for the first judicial district."

Defendant's motion was overruled, and the cross-motion allowed. The evidence and the indictment are sufficiently set forth in the opinion. The jury found the defendant guilty.

Messrs. BROWN, HARRISON & PUTNAM, for plaintiff in error.

Mr. L. C. ROCKWELL, U. S. District Attorney, for defendant in error.

BELFORD, J. The defendant was indicted at the July term, 1869, of the Arapahoe district court, for secreting and embezzling one package of letters and two sacks of gold dust, with which he had been intrusted, as mail carrier, and which were intended to be conveyed by post. There are seven counts in the indictment, all charging the same offense, but in the first, sixth and seventh counts, the defendant is charged as a carrier of the mail on the route from Fairplay to Helena, and as being then and there a person employed in a department of the post-office establishment

of the United States. The defendant moved to quash the indictment for error in the caption, whereupon the attorney-general filed a cross motion and asked leave to amend the caption, which leave was granted, and the motion to quash overruled. The defendant then entered a plea of not guilty, and was put upon his trial. The jury found him guilty on the first, third, sixth and seventh counts, and not guilty on the second, fourth and fifth counts. Motions for new trial and in arrest of judgment were overruled.

The first error assigned is the overruling of the motion to quash and permitting the attorney-general to amend the caption of the indictment. It is claimed by the plaintiff in error, that the caption is a part of the indictment, and cannot be amended. In this view we are unable to concur. Bishop in his work on Criminal Procedure, vol. 1, sec. 151, says: "In matter of legal principle, this extended commencement or caption is no part of the indictment, as sworn to by the grand jury; it is a mere formal statement, which, though placed at the head of the indictment, is still of no higher nature than is an entry on the docket, made in court by the clerk—a thing, which, if erroneous, is subject like a docket entry to be corrected by an order of the judge, or, when it becomes transferred into the permanent records, to be amended to the same extent as any other part of those records. And it is believed, that though the decided cases may not be very distinct to this effect, and though some of them may even seem to come short, this doctrine is, on the whole, sustained by adjudged law."

In Archibald's Criminal Practice, vol. 1, page 260, it is said: "But, though the caption, like the indictment itself, may, if defective, be either quashed by the court or demurred to on the part of the defendant, it differs materially from it in its capacity of amendment, for the return to the court is merely a ministerial act and ministerial acts may be amended at any time according to the common law."

In the case of the *United States v. Thompson*, 1 McLean, 57, the same objection urged to this indictment, namely, "that the court is not properly entitled," was passed upon,

and Judge WILKINS says : " We consider that this objection has been long settled, both in England and in this country." The caption forms no part of the indictment or presentment of the grand jury, and he adds : " It is only matter of astonishment, that such a technical exception should now be gravely urged in court." *Moody v. The State*, 7 Blackf. 424 ; *The State v. Gilbert*, 13 Vt. 647.

Before proceeding to examine the action of the court in overruling the motion for new trial, and in arrest of judgment, it may be proper to allude to some objections made to the form of the indictment. It is claimed by the plaintiff in error, that the indictment is bad, because it fails to describe the letters which it is alleged the defendant secreted and embezzled. In the case of the *United States v. Lancaster*, 2 McLean, 433, the court say : " Is it essential that the letter charged to have been embezzled should be described by stating to whom it was directed, and by whom it was written ? This description is generally given when it is procurable. But it is seldom in the power of the prosecuting attorney to state these facts, much less to prove them. A post-master or carrier, after having stolen a letter from the mail, will not be likely to preserve it as the evidence of his guilt. When the act is done deliberately, as may be presumed to be the case, generally, when done by a post-master there is not one instance in a thousand perhaps, when the letter is not destroyed. And, if a particular description of it be essential to the validity of the indictment, a conviction under this or any other similar provisions of the act would be hopeless. The security of individuals does not seem to demand this particular description of the letter, and to require it would, in most instances, defeat the great purposes of justice."

It is further claimed by the plaintiff in error that the evidence shows that the route over which Farnum carried the mail is different than that described in the indictment. We do not think so. The indictment would be good if the description of the route had been entirely omitted. It has been held, that whatever is not necessary to constitute the

offense may be treated as surplusage. This is particularly the case when the offense is statutory, and in such a case it is always sufficient to charge the offense in the words of the statute, although more particularity is required in bringing the offense within it. Whenever, as in this case, more words are used than are necessary to make out the offense, I think the remaining may be rejected as surplusage. *Crichton v. The People*, 6 Parker's Crim. Rep. 370. If reference is had to the evidence of Taber, it will be seen that a description of the route, as laid in the indictment, was proven.

In the case of the *United States v. Paterson*, 6 McLean, 466, it was held that a general averment that the party was employed in the post-office establishment of the United States is sufficient.

Did the court err in overruling the motion for a new trial? Inasmuch as the defendant was acquitted on the second, fourth and fifth counts, it will not be necessary to advert to them in this opinion. In the first count it is charged that Henry P. Farnum, being a person then and there employed in a department of the post-office establishment as mail carrier, etc., did embezzle and destroy two packages of letters and two packages of gold dust and two sacks of gold dust, with which he was then and there intrusted, and which packages of letters and packages of gold dust had then and there come to his possession, and was then and there intended to be conveyed by post, etc. The third count charges that the defendant did feloniously take the mail of the United States of America, and two certain packages of letters, and two certain sacks of gold dust, and packets therefrom, and did open, embezzle and destroy such mail, packages, letters, sacks of gold dust and packets; the said two packages of letters and packet containing articles of value, and the said two sacks of gold dust being of the aggregate value of \$1,200. In this count it is not alleged that he is an employee of the post-office establishment. The sixth count charges that the defendant, being employed in a department of the post-office establishment.

did embezzle and destroy a letter and two sacks of gold dust with which he was then and there intrusted, and which had then and there come into his possession, and were then and there intended to be conveyed by post, etc. The seventh count charges that the defendant, being a person employed in a department of the post-office establishment, did, with force and arms, secrete and embezzle two sacks of gold dust of the value, etc., with which he had been intrusted, and which was intended to be conveyed by post, etc. The evidence in the case was substantially as follows: Horace A. W. Tabor testifies that, on the 21st day of June, 1869, the day named in the indictment, he was postmaster at Oro city, Lake county, Colorado; that, on the morning of that day, he put the mail up and put in the mail sack two bags of gold dust; they were tied with a string, and to them a tab was attached, on which were the directions; an envelope was wrapped around them. When Farnum reached the post-office at Granite, and the mail sack was opened, a package of letters and the sacks of gold dust were missing. It further appears that there was a rent in the mail bag. Search was instituted for the missing letters and gold dust, and, at a point between Oro and Granite, and some distance from the trail usually pursued by Farnum in carrying the mail, a package of letters was found, which Tabor swears was mailed by him on the twenty-first.

The defendant was thereupon arrested, and a few days subsequently search was made for the missing gold dust on Farnum's premises, and discovered in a tin can under a corn chest in Farnum's stable. There was evidence also going to show that Farnum had previously stated, that, unless he was paid for the labor he had performed in transporting the mail, "a mail bag would turn up missing some day." It nowhere appears that the letters, which it is alleged Farnum secreted and embezzled, contained any article of value. To the introduction of evidence in reference to the bags of gold dust, the defendant below objected, on the ground that the same was notailable

matter. This objection was overruled, and this ruling is assigned for error. The statute on which the first, sixth and seventh counts of this indictment are based will be found in the thirteenth volume of the United States Statutes at large, page 337, section 12, which reads as follows: "That if any person employed in any department of the post-office establishment shall unlawfully detain, delay or open any letter, packet, bag or mail of letters with which he shall be intrusted, or which shall have come to his possession, and which are intended to be conveyed by post; or if any such person shall secrete, embezzle or destroy any letter or packet intrusted to such person as aforesaid, and which shall not contain any security for, or assurance relating to, money as hereinafter described, every such offender, being thereof duly convicted, shall, for every such offense, be fined not less than \$300, or imprisoned not less than six months, or both. And if any person employed as aforesaid shall secrete, embezzle or destroy any letter, packet, bag or mail of letters with which he shall be intrusted, or which shall come to his or her possession, and are intended to be conveyed by post, containing any bank note, * * * or any other article of value, such person shall, on conviction, be imprisoned not less than ten nor more than twenty-one years."

It will be observed that this section defines different offenses, and prescribes different punishment. The secretion, embezzling or destroying of a letter containing no article of value is defined to be one offense, and the punishment adjudged is fine not less than \$300, and imprisonment not less than six months.

The secreting, embezzling or destroying a letter containing any article of value is another offense, and a different punishment is prescribed.

It must be further observed that this section applies to persons employed in the departments of the post-office and to none others.

In neither of the counts in the indictment, in which the defendant is designated as a person employed in the depart-

ments of the post-office, and on which he has been adjudged guilty, is it alleged that the letters secreted and embezzled contained any article of value, nor is it charged that the gold dust was contained in any letter or packet of letters, or bag or mail of letters. Before a jury can find a person guilty under the latter portion of this section, which adjudges a ten years' term of imprisonment, they must find that he secreted, embezzled or destroyed a letter or packet of letters, or bag or mail of letters containing some articles of value. It must be so charged in the indictment, and so established in the evidence. After a careful examination of this provision we have reached the conclusion that the secreting and embezzling of the gold dust by the defendant is not an offense against the law under consideration, for the reason that it nowhere appears that the gold dust was contained in a letter or packet of letters, and for the further reason that it is not charged in any of the counts of the indictment that the defendant secreted, embezzled or destroyed any bag or mail of letters containing the gold dust.

If the defendant is liable to conviction and punishment at all, it must be under that provision of the section which declares that, if any person employed in any of the departments of the post-office establishment shall secrete, embezzle or destroy any letter or packet intrusted to such person as aforesaid, and which shall not contain any article of value, such person shall, for every such offense, be fined not less than \$300, or imprisoned not less than six months.

The cause seems to have been tried entirely upon the hypothesis that the defendant was answerable, as charged in the indictment, for the embezzling of the gold dust. On this theory the instructions were based and given, and on this theory the jury acted in making up their verdict, and the court in assessing the punishment.

The third count of the indictment, and on which he was adjudged guilty, charges him with secreting and embezzling a letter containing an article of value, but it does not charge that he was employed in any department of the post-office

establishment. This count is based on the eighty-first section of the act defining crimes. 1 Brightley's Digest, 217. The conviction on this count cannot be supported. There is not a shred of testimony tending to show that the letters secreted and embezzled contained any article of value. The seventh count cannot be sustained, for the reason that it refers exclusively to secreting and embezzling the gold dust, and does not allege that it was contained in any letter, packet of letters, bag or mail of letters.

We have, then, the first and sixth counts left, with the defendant charged in each with secreting and embezzling a packet of letters containing no article of value.

If the defendant, under the evidence, could have been convicted at all, it must have been under these counts and for the offense of secreting letters containing no article of value, and for this crime he could only be punished by the imposition of a fine not less than \$300, or imprisonment not less than six months, or both. The judgment of the court, in sentencing him to ten years' imprisonment, is not warranted by the law. Inasmuch as this case has been tried under a misconception of the law, the judgment of the court below is reversed, and the same remanded for a new trial.

Reversed.

PAUL v. LUTTRELL.

REPLEVIN *will not lie for taking without detention.* Under the statute the action of replevin, whether in the *cepit* or *detinet* lies, as at common law, only for the recovery of goods *in specie*, and a mere unlawful taking not followed by detention will not suffice to maintain it.

PLEADING IN REPLEVIN — *detention of property may be put in issue.* The detention of the goods is a material fact, necessary in either form of action to maintain the plaintiff's case, and may always be put in issue, either by the plea of *non detinet*, or, perhaps by the plea of *non cepit*, where the plaintiff declares in the *cepit* or by special plea.

EVIDENCE OF DETENTION in replevin — *what shall be.* Upon such issue the plaintiff may maintain the affirmative, by proof of the taking, or by proof of demand and refusal before action brought, or by proof of other circum-

stances warranting the inference that a demand would have been unavailing. Upon such issue the defendant may maintain the negative by showing that, before suit brought, he restored the goods to the plaintiff's possession, or that the goods were, before action brought, destroyed by the act of God, or possibly by his own act.

PLEADING—*a fact in issue shall not be regarded as admitted by previous pleading.* Where any particular fact is affirmed on the one side and denied on the other, no previous admission in the pleadings can be taken as evidence of the existence or non-existence of that fact.

PLEADING IN REPLEVIN. *Non detinet is good.* Therefore if, to a declaration in the *capit*, the defendant plead *non detinet*, this shall not be regarded as an admission of the taking alleged in the declaration in such sense as to relieve the plaintiff from making proof of the detention.

NEW TRIAL.—*evidence insufficient in replevin.* In replevin in the *capit* and issue joined upon plea of *non detinet*, if there is no proof of the taking or of demand and refusal, or of equivalent circumstances to show detention, the evidence is not sufficient to support a verdict for the plaintiff, and a new trial should be awarded.

Appeal from District Court, Jefferson County.

At the trial the evidence was, in substance, as follows:

John D. Parmelee testified that the property in controversy was a small portable engine, with saw-mill attached, circular saw, lath saw and belting; in the fall of 1867 it was in possession of Hendry; in September it passed into the hands of plaintiff; in January, 1868, it was sold by the sheriff, and passed into defendant's hands; plaintiff bought the saw which was there in January, 1868; there was a saw carriage, made partly by Hendry and completed by plaintiff; plaintiff set up the mill the second time; it was done in January, 1868; there was some belting bought by plaintiff, also a new truck; I hired the property from plaintiff in December, 1867, for six months; was to pay \$150 per month.

James S. Danford testified that the mill was in plaintiff's possession in September, 1867; that the property was worth \$1,000 in January, 1868.

The plaintiff introduced a letter from Paul, the defendant below, to the witness Parmelee, in which the latter was notified by Paul that he had purchased the property at the sheriff's sale; that the property had been sold under an

execution, issued out of the probate court of Park county, in favor of Alex. Ray & Co. and against the Union Mill Company, and that he should not pay rent for the mill.

The defendant offered a certified copy of an alias execution, issued out of the probate court of Park county, with the officer's return thereon, against the property of the Union Mill Company and in favor of Alexander Ray and William Shellinger, also a transcript of the judgment in the same cause, which is authenticated by the clerk's certificate in the following form: "I certify that the preceding is a true copy of the docket of an original record of judgment remaining on the files of this office."

The defendant also offered the original execution and the officer's return thereon in the same cause; the defendant also offered an appeal bond in the same cause, all of which were, upon plaintiff's objection, excluded by the court. The defendant also offered to prove, by the sheriff of Jefferson county, that he sold the property under the execution before offered in evidence, but the court refused to receive the testimony.

Mr. J. MARSHALL PAUL, *pro se*.

Mr. S. E. BROWN, for appellee.

WELLS, J. The defendant in error brought replevin against plaintiff in error, and declared in the *cepit*; defendant in the court below pleaded *non detinet* and property in himself; issue was joined upon these pleas, and the cause was submitted to a jury, who found for the plaintiff below upon both issues. Upon the trial, the evidence offered by the defendant in support of his plea of property was excluded, and we think properly; there was also evidence of a possession by the plaintiff of the goods in controversy at some time prior to the bringing of his action; the finding of the jury upon the second issue is therefore supported by the evidence.

But we think there is no evidence to support the finding upon the plea of *non detinet*.

All of the evidence which can, in any way, be applied to this issue is entirely consistent with the supposition, that the defendant derived possession of the goods in controversy (if indeed he ever had possession of them) by a delivery; there was no evidence given of a taking by the defendant, or of a demand and refusal to surrender them, or of equivalent circumstances.

The question is, therefore, presented, whether in this form of action the plea of *non detinet* presents a material issue.

In this territory replevin lies "whenever any goods or chattels have been wrongfully distrained or otherwise wrongfully taken, or shall be wrongfully detained." According therefore as the plaintiff declares in the *cepit* or in the *detinet*, either the taking or the detention is the gist of the action; but we think that the plaintiff must establish a detention in either case, if put in issue, for the words of the statute above quoted are manifestly qualified by other words which follow in the same section, whereby it is provided that, in the cases before therein specified, "an action of replevin may be brought for the recovery of such goods and chattels." That is to say, the action of replevin in either form lies, as at common law, only for the recovery of goods *in specie*; and a mere unlawful taking, not followed by a detention, will not suffice to maintain it. It follows, therefore, that the detention of the goods is a material fact necessary in either form of the action to maintain the plaintiff's case, and may always be put in issue, either by the plea of *non detinet*, or perhaps by the plea of *non cepit*, where the plaintiff declares in the *cepit*, per ROGERS, J., in *MacKinley v. McGregor*, 3 Whart. 398, or we think by special plea, and when so put in issue the plaintiff may maintain the affirmative by a mere proof of the taking, from which the law presumes that the goods continue in the defendant's possession, and that the defendant remains of the purpose in which he committed the wrong, and intends to retain them, or by proof of demand and refusal before action brought, or by proof of other circumstances

warranting the inference that a demand would have been unavailing. *Johnson v. Howe*, 2 Gilm. 342.

The defendant, on the other hand, may maintain the negative of the issue by showing, if he can, that, before suit brought, he restored the goods to the plaintiff's possession, or that the goods were before action brought destroyed by the act of God, or possibly by his own act, for it cannot well be said that one unlawfully detains that which is not in being.

It is argued, however, that, by his failure to traverse the taking, the defendant has admitted the allegations of the declaration in this regard, and that from this admission a detention may as properly be inferred as if the taking had been affirmatively proven upon the trial.

But we cannot subscribe to this conclusion. It is every day practice that a defendant pleads two pleas, one admitting material facts denied by the other: *e. g.*, in assumpsit, the general issue and payment, or accord and satisfaction; in trespass, not guilty and a justification, and the like in other cases; yet it never was thought that, in such case, the latter plea might be read to the jury to establish the affirmative of the issue under the former, or could operate against the defendant in any way. If this were so, manifestly the affirmative would in such cases rest wholly with the defendant, and he, it might well be said, would be entitled to begin and conclude to the jury, which was never seen.

The approved doctrine is, that, "where any particular fact is affirmed on the one side and denied on the other, no previous admission in the pleadings can be taken as evidence of the existence or non-existence of that fact." 1 Phill. Ev. (5th Am. ed.) 796; *ALDERSON, B., in *Edmunds v. Gores*, 2 Mees. & Wels. 642; CRESSWELL, J., in *Fearn v. Filica*, 7 M. & G. 513; *Kirk v. Newell*, 1 Term R. 125; *Harrington v. McNaughton*, 5 Taunt. 232; *Whittaker v. Freeman*, 1 Dev. 271.

We are of opinion, therefore, that the admission of the taking cannot be received to supplement the defect in the plaintiff's proofs upon the issue under the first plea,

and because there is no evidence to support the finding upon this issue the judgment of the district court must be reversed with costs in this court and this cause remanded, with directions to that court to award a new trial.

Reversed.

ROACH v. BINDER.

REPLEVIN in detinet — demand and refusal. In replevin against one who has acquired the property replevied in good faith, it is necessary to prove a demand before suit brought or something equivalent to it.

EVIDENCE — acts and declarations of plaintiff not admissible in his favor. An instruction to the jury that a demand may be inferred from the actions, conduct and conversation of the parties is erroneous.

Appeal from District Court, Arapahoe County.

Mr. ALFRED SAYRE, for appellant.

Messrs. MILLER & MARKHAM, for appellee.

HALLETT, C. J. Replevin before a justice of the peace, to recover a cow and calf, thence removed to the district court by appeal. The calf was not found, and appellee took judgment for the cow. It seems that the animal strayed from appellee's herd, and subsequently appellant purchased her from one Rooney who had possession of her, and who in turn had purchased her from some other person. As appellant acquired the animal in good faith by purchase from one in possession, we do not understand that he can be made liable in replevin, unless upon demand before suit or something equivalent to it. *Ingalls v. Bulkly*, 13 Ill. 315; *Clark v. Lewis*, 35 id. 423, is not opposed to this view. In that case the purchase was made at a sale under a town ordinance, and the purchaser was affected with notice of the illegality of the proceeding.

The district court instructed the jury that a demand was necessary, and added: "The jury may infer a demand of

the property from the actions, conduct and conversation of the parties.”

In so far as this comprehends the actions, conduct and conversation of the appellee, who was plaintiff below, which did not occur in the presence of appellant, it is of course erroneous. We regret that the evidence of demand and refusal is not clear enough to authorize us to overlook this error, but, as the jury may have been misled by the instruction, the judgment of the district court must be reversed with costs, and the cause remanded.

Reversed.

DEITZ v. CITY OF CENTRAL.

LEGISLATIVE POWER — *to create a city.* Under the organic act the legislative assembly has power to establish a municipal corporation.

LEGISLATIVE POWER — *to change the official title of a justice of the peace.* The legislative assembly has no power to confer upon a justice of the peace a denomination not warranted by the organic act, and, in so far as the charter of the City of Central confers upon the justice of the peace exercising jurisdiction under the ordinances thereof, the name of police magistrate, it is void.

JURISDICTION of justice of the peace under ordinances of city. But, notwithstanding the attempt of the legislative assembly to confer a wrong name upon him, the justice of the peace has jurisdiction of cases arising under the ordinances of the city.

ORDINANCES of city — *when reasonable.* Where authority was conferred upon a corporation to suppress and prohibit the sale of intoxicating drinks, as well as to license the same, an ordinance which imposes a penalty for selling such drinks without license, which penalty exceeds that fixed by the general law of the territory, is reasonable.

INTEREST OF MAGISTRATE in result of suit — *what will disqualify.* Where a citizen of a municipality is elected a justice of the peace, according to the charter, that he is, in virtue of his citizenship, entitled to share in the penalties adjudged against the accused, is no objection to his competency. In such case the provisions of the charter amount to an express declaration that interest shall not disqualify.

WAIVER OF OBJECTIONS — *on appeal from justice of the peace.* Section 46, chapter 50 of the Revised Statutes, 407, relating to proceedings in district court on appeal from justice of the peace, is applicable to cases arising under the ordinances of the city of Central.

Objection that summons was returnable on the day it was issued, cannot be made in district court.

Nor that the justice of the peace assumed a title not warranted by law.

Nor that the plaintiff's demand was not indorsed on the summons.

PRACTICE in actions to recover penalty under city ordinances. Where the charter of a city provides that to recover a penalty, fine or forfeiture, prescribed by ordinance, it shall be sufficient to declare generally, in debt, it is not necessary to file a written declaration in the common-law form.

PRACTICE — when to make objections. Objections to the competency of witnesses must be made at the trial.

PLEADING AND PROOF — as to time. In an action to recover a penalty for selling intoxicating liquor without license, evidence may be introduced of sales made anterior to the earliest day named in the complaint.

EVIDENCE of refusal of city officers to issue license. In such action the defendant cannot show that the city clerk improperly refused to issue a license to him.

VERDICT — in an action of debt to recover a penalty. In such action a verdict of guilty is substantially responsive to the issue.

JUDGMENT — when defendant may be imprisoned. Where the charter provides that if the defendant has no property whereof the judgment can be collected, the defendant may be committed to jail, it is error to enter judgment that the defendant stand committed until the fine and costs are paid. In such case execution should be awarded, and if no property can be found the defendant may be committed to jail.

Appeal from District Court, Gilpin County.

ACTION of debt upon an ordinance of the city of Central, which provides that if any person shall sell or give away any intoxicating or fermented liquors without license, in quantities less than one quart, without first obtaining a license therefor, he shall for each offense forfeit and pay to the city a sum of not less than \$25, nor more than \$50.

This ordinance is based upon section 20 of the charter of the city (3 Sess. 245), which is as follows: "To license, restrain, regulate, prohibit, and suppress tippling houses, gambling houses, bawdy houses, and other disorderly houses, and the selling and giving away of any intoxicating or malt liquors by any person within the city, except by persons duly licensed."

A general law of the territory authorized the county commissioners in each county to license the sale of intoxi-

ating liquors, and imposed a penalty of \$20 for the violation of its provisions.

Mr. Justice BELFORD dissented from so much of this opinion as affirms the lawful existence and powers of the person styling himself police judge, before whom these proceedings were instituted.

Mr. I. N. WILCOXEN and Mr. S. B. HAHN, for appellant.

Mr. L. C. ROCKWELL, for appellee.

WELLS, J. The errors assigned in this case question, first, the existence of the corporation which was plaintiff below ; second, the reasonableness and validity of the ordinance under which the conviction was had ; third, the existence and powers of the functionary before whom the process was instituted ; fourth, the regularity of the proceedings.

We have examined the multitude of questions urged in this case, with the careful consideration to which the elaborate diligence of counsel entitles them.

As to the first question : It is solemnly argued that the legislature of this territory have no authority to create municipal corporations, for that congress, not having such power, could not confer it upon the legislature of the territory, which is its mere creature.

But upon what ground of reason can it be said that congress has not such authority ?

Whether it be referred to an express constitutional grant or to necessity arising out of its sovereignty and proprietorship, we think it can scarcely, at this day, be doubted that the authority of congress to govern the territories is absolute and supreme.

It may be that the inhibition against laws prohibiting the free exercise of religion, or abridging the freedom of the press, against the taking of private property without compensation, and the other express restraints imposed by the constitution, extend as has been contended, *proprio vigore*, to the territories, but beyond these, the power of congress

to govern in the territories by such means and agencies as in its wisdom it may select, is indisputable.

They might themselves enact laws operating directly in the territory, or appoint a governor and judges invested with legislative powers, both of which were done in the north-west territory.

Or they might enact, that all authority, whatever, should be invested in such person or persons as the president might appoint; this was done in the case of Florida.

Or they might provide for a legislature to be appointed by the president, as was done, in the first instance, for the Territory of Louisiana.

Or they might, we conceive, organize each community in any or all of the territories into a municipality, with power of local self-government.

The whole of this authority, so far as concerns the local affairs of the citizens, and within the restrictions contained in the organic act, congress has conferred upon the legislative assembly of this territory, subject at all times to a revocation of the grant in its own pleasure, and subject, in its exercise, to a conformity with the constitution and the acts of congress, including the organic act.

Within these restrictions and limitations, and subject to the power of revocation in congress, the legislature of this territory may do whatever congress might do, if assuming to govern by its own enactments.

It is said, that, admitting the power of congress, the legislative authority of the territory rests upon other grounds; and being a mere delegated authority cannot, itself, be the subject of a delegation.

But the authority of every State legislature is also a derivative and delegated authority, and the maxim here relied upon has always, in a proper case, been held to avoid their enactments when in conflict with its principle; nevertheless it may safely be assumed, that in no State of the Union was there ever an express constitutional provision authorizing the erection of municipal corporations, nor probably is there any State in which the legislative au-

thority has not, from the earliest periods, assumed and exercised the power now brought in question. In no case to which we have been referred have the courts denied its existence; and, on the contrary, in numerous cases and by the most respectable courts, it has been expressly affirmed.

And, if we shall now declare, that in this territory the power does not exist, it will be to destroy and prohibit within our borders all these local municipalities and miniature republics, which are the very womb and nursery of our free institutions.

The reasonableness of the ordinance under which appellant was prosecuted is denied, upon the ground that it imposes a penalty greater than that provided by the law of the territory.

But when we consider, that, by the express words of the statute, this corporation is authorized not only to license, but to suppress and prohibit the sale of intoxicating liquors, which the legislature has not attempted to do, how can it reasonably be said, that the general law is, in any respect, the measure of the powers of the corporation? In no one of the cases relied upon by counsel has this been decided.

In *Austin v. Murray*, 16 Pick, 121, the by-law was held void because not warranted by the charter, while the amount of the penalty did not come in question.

In *Mayor of New York v. Nichols*, 4 Hill, 209, the ordinance in question prohibited any sale of hay without having the same inspected and weighed; the court held it to be void as against the provisions of the general statute, which expressly provided that hay pressed and put up in a particular manner might be sold "by any standard weight which shall be agreed upon between the buyer and seller."

In *The City of Boston v. Shaw*, 1 Metc. 130, the only question was, whether the method prescribed by the ordinance for the apportionment of the expenses of sewerage among property owners was or was not a reasonable one.

In *Dunham v. Robertson*, 5 Cow. 462, the charter authorized the village to make such prudential by-laws as they may from time to time deem meet * * * relative to taverns,

gin shops and hucksters' shops in said village * * * provided, always, that such by-laws be not contrary to, or inconsistent with, the law of this State. The by-law provided that hucksters should be licensed, and that every person keeping a huckster's shop without license should pay a penalty named. The court held the ordinance void, as in restraint of a trade upon which no restriction was apparently necessary.

By-laws, the court say, must accord with the laws of the State and the general principles of law; and by this we understand that the by-law must not countervail any express provision of the statute or the recognized principles of common law; not that necessarily the corporation may not go further in legislating for their own members than the legislation of the State upon like subjects.

If we admit the rule contended for, we practically nullify a very large part of the provisions of this charter. Here is an express authority given to suppress tippling houses and to do many other things that no law of the territory has yet assumed to do, and if the penalty recovered in this case was unauthorized, then, for the same reason, every attempt of the corporation to exercise the numerous special powers contained in the charter relating to subjects, upon which the legislature has not prescribed a rule, must be forever ineffectual.

The cases of *City of Pekin v. Smelzel*, 21 Ill. 465; *City of Burlington v. Keller*, 17 Iowa, 369; S. C., 18 id., are directly in point, and, we think, directly against the position assumed by counsel for the appellant.

As to whether there is such an officer as the one before whom this prosecution was instituted, it will be observed that the officer subscribes himself in the process police magistrate. It is said that by the organic act of the territory no such officer is recognized, but that all judicial power is vested in the supreme court, district courts, probate courts and justices of the peace.

By the charter of this corporation it is provided that at the first election there shall be elected, among other officers,

“one justice of the peace, to be denominated police judge for the city of Central, * * * and on the first Monday of April, in every second year, one police judge,” and in another section, that “the police judge shall have jurisdiction in all cases of violation of the city ordinances, and shall have the same jurisdiction in all civil and criminal proceedings as is now, or hereafter shall be, conferred upon other justices of the peace of this territory, and in all courts of this territory, said police magistrate shall be held to be a justice of the peace.”

In other portions of the charter, as well as in the section just quoted, the officer is termed, as will be observed, indiscriminately, a police judge and police magistrate.

The majority of the court think that so much of the charter as confers or authorizes the power to assume a denomination not warranted by the organic act may well be held void; but, in determining whether the office exists or not, we are inclined to the opinion, that we ought to look rather to the substance of the powers conferred upon the incumbent, than to the name by which he is designated; guided by this principle, we have no difficulty in concluding that the officer designated by the charter police justice or police magistrate lawfully possessed the powers which he assumed in this proceeding.

Whether in the exercise of this power he is not required to act as, and assume to be, a justice of the peace, and to disregard the unwarranted title with which the legislature have invested him, is a question which, in the view we take of this case, it is not necessary for us to determine.

It is said, that the police judge, being entitled to participate in the penalties adjudged against the defendant, was interested in the event of the prosecution, and was therefore incompetent to give judgment, or issue process, or entertain the proceeding in any stage. The argument assumes (what is not shown in the record) that the magistrate was a citizen of this municipality, and this we think it is fair to assume, and perhaps the necessary conclusion from the fact of his incumbency in the office: for the charter clearly contem

plates that all officials therein provided for should be elected by the qualified voters of the city from among their own number; but if we are correct in this, then the provisions which confer jurisdiction upon the police judge, in causes arising under the charter and ordinances, is equivalent to an express declaration that his interest in the penalties shall not disqualify.

The objections as to the existence and competency of the officer are thereupon overruled.

As to the manner of the proceedings it is objected that the summons was made returnable on the day of its issuance. If in this proceeding the justice was bound to observe the rule prescribed by the general law, upon which we express no opinion, the judgment might for this reason have been set aside upon certiorari brought, or the defendant might have disregarded the judgment and brought his action against the justice if he issued execution thereon.

But, by appealing from the judgment of the justice, he has, we think, waived all irregularities in the process by which he was brought into that court.

The statute declares that no exception shall be taken to the form or service of the summons issued by the justice of the peace, nor to any of the proceedings before him, but the court shall hear and determine the cause in a summary way, without pleadings in writing, and nothing can be clearer, we think, than that the intention of the legislature was to require a trial upon the merits, without objections to any of the proceedings before the justice.

We do not feel called upon to reconcile with this statute what is said by the supreme court of Illinois. *County Commissioners, etc. v. Robertson*, 5 Gilm. 563; *Adams v. Miller*, 12 Ill. 27; *Walsen v. Nettleton*, 13 id. 62.

It is sufficient to say that the construction we have given the statute appears to us the true one, and we are supported by the later cases of *Swingley v. Haynes*, 22 Ill. 216, and *Ohio and Mississippi Railroad Company v. McOutchin*, 27 id. 9.

It is urged that the provisions of the justices' act were

intended to apply only to civil causes, and that this prosecution is a criminal one ; and the case of *Edwards v. Vander-marok*, 13 Ill. 633, is referred to ; but we are not prepared to admit that this is not a civil case in such sort that an appeal might not lie even though not allowed by the charter ; and by that section of the charter which allows the appeal, it is expressly declared that appeals "shall be granted in the same manner and with like effect as appeals are taken from and granted by justices of the peace, under the laws of this territory."

This disposes of the objection, that the process was signed with a title which the officer had no right to assume, and that no demand was indorsed thereon ; as to this latter the statute has been held to be directory merely, and a failure to comply with it immaterial. *Eaton v. Graham*, 11 Ill. 620.

As to the complaint, the charter provides that "it shall be lawful to declare generally in debt for such penalty, fine or forfeiture, stating the clause of this act, or the by-laws or ordinance, etc., and to give the special matter in evidence."

It is argued that under this provision the city attorney should be required to file a declaration, as in the common-law action of debt ; but we think the statement, account or complaint which was filed in this cause, indefinite and informal as it is, must be regarded as a compliance with the intention of the legislature. We cannot believe that the legislature intended to introduce into a court not of record, and in this class of proceedings, which, in many instances, must be summary in their nature or else altogether ineffectual, the subtleties of the common-law action of debt, with the delays incident to it. Having reference to the subject-matter to which this legislation is applied, we think the language may well receive a construction less restricted than in another case we might be compelled to adopt.

As for the objection, that inhabitants of the city were permitted to testify on behalf of the prosecution, it is a

sufficient answer to say that no objection to their competency was made upon the trial.

It is further urged that the prosecution upon the trial were permitted to put in evidence of sales by the plaintiff, anterior to the earliest day named in the complaint. The cases from Massachusetts, which were cited in support of this objection, are not in accord with the authorities elsewhere, and we are not satisfied with the reasons upon which that court proceeds.

As for the objection that the absence of the license to the plaintiff was not established, we think that if the burden of proof, as to this, rested in the first instance upon the prosecution, upon which we express no opinion, sufficient was shown to devolve upon the defendant the duty of establishing the fact of his license, if he had one. It was proved that by the ordinance of the city, the city clerk was required to keep a register of all licenses issued by him; that register was produced, and the clerk testified, as we understand him, though his testimony was conflicting, that no license had in fact been issued to the defendant for the period in which the alleged unlawful sales were made. The jury were the proper judges of the effect to be given to the whole testimony, and they have found that the defendant had no license.

On the trial the defendant offered to show that, before the sales charged, he had applied to the mayor for license to sell intoxicating liquors, and that his application was approved; that thereupon he had made application to the clerk of the city to issue the license, and made tender in gold coin of the proper license fee, but that the clerk refused him such license.

This evidence, it is assigned for error, the court below excluded.

We think the ruling of the district court was correct.

If the clerk refused to issue the license where the defendant was entitled to it, the remedy was by mandamus to compel the clerk to perform his duty, or by action on the case for the wrongful refusal.

It cannot be said that this was the act or default of the corporation, for the clerk, if the agent of the corporation in any sense, was so only within the limit of his duty. If he refused to issue the license, where he was bound by law to issue, it was of his own wrong, and the defendant must seek his remedy against him alone.

The verdict seems to us to be substantially responsive to the issue. Although the proceeding is in form of an action of debt, the real question in issue was, whether the defendant had been guilty of a violation of the ordinance, and this issue is certainly settled by the verdict of guilty. The only other finding which, upon any principle, could have been made, is the common-law verdict, in the action of debt, that "the defendant doth owe the said plaintiff the said sum of, etc., above demanded," but it cannot be said that there is any specific debt or sum certain sought or demanded in such prosecution as this: the fine to be imposed, which is the only thing recovered, might be greater or less within certain limits, and in the absence of any regulation by ordinance, it appears to us that the jury could have nothing to do with fixing the amount of this fine.

No such regulation is shown by the record, and we express no opinion as to its effect if it were shown.

The proceedings were, therefore, we think, sufficiently regular in these respects.

But in the entry of the judgment the court clearly erred.

The charter warrants a commitment of the accused in prosecutions of this sort only when he has no real or personal estate which can be taken to satisfy the judgment, and the district court in this case ordered that the defendant stand committed until the payment of the fine and costs, without reference to whether he had property liable to execution or not.

For this error the judgment will be reversed, and the cause remanded, with instructions to the district court to enter judgment upon the verdict, and to award execution thereon to the sheriff of Gilpin county, and to further order that in case estate of the defendant sufficient to satisfy the

judgment and costs be not found, execution issue against the body of the defendant, and that thereon the defendant be committed to the common jail of Gilpin county, there to be confined, until at the rate of one day's confinement, for each dollar of the said fine and costs, the judgment be fully satisfied, such imprisonment not to exceed, however, the term of six months.

The judgment is reversed, with costs, in this court. *Reversed.*

JUSTICE OF PEACE—TITLE OF POLICE JUDGE: *People v. Curley*, 5 Colo. 42; *People v. John*, 7 Colo. 500, 501.

LICENSE—MANDAMUS TO COMPEL ISSUE.—If an officer refuses a license where a party is entitled to it, the remedy is by mandamus: *Harding v. People*, 10 Colo. 305.

TAKING APPEAL FROM JUSTICE'S JUDGMENT confers jurisdiction of the person of the appellant, and is a waiver of all defects in service: *Colorado Cent. R. R. v. Caldwell*, 11 Colo. 561.

MILLS et ux. v. ANGELA.

MARRIED WOMAN—*may defend actions.* A married woman is under no disability in respect to the time or manner of making her defense to an action brought against her.

PRACTICE—*defense must be interposed at earliest opportunity.* An objection which was not made in the court below will not be considered in this court.

DEMURRER TO BILL IN CHANCERY—*does not reach defects not apparent in the bill.* In a bill against husband and wife to foreclose a mortgage, it was averred that the defendants made, executed, acknowledged and delivered the mortgage to complainant. No copy of the mortgage was attached to the bill. Objections to the sufficiency of the certificate of acknowledgment appended to the mortgage were not raised by demurrer to the bill.

PRACTICE—*bill to foreclose need not be put in under oath.* A bill to foreclose a mortgage need not be put in under oath. The signature of counsel is a sufficient authentication.

Appeal from District Court, Clear Creek County.

Mr. Justice WELLS, having been of counsel, did not participate in the decision of this cause.

Mr. R. S. MORRISON and Mr. HUGH BUTLER, for appellants.

Mr. H. R. HUNT, for appellee.

HALLETT, C. J. This was a bill to foreclose a mortgage to which appellants demurred, and the demurrer was overruled. No other defense being made, the bill was taken

pro confesso. The argument at the bar was mainly directed to the certificate of acknowledgment attached to the mortgage, which is said to be insufficient as to Emiline, one of the appellants. If, however, it shall appear that this question was not presented in the court below, upon what ground may appellants base their claim to be heard in this court?

Generally a party must seek the earliest opportunity to make his defense, and if he does not do so, the law will presume that he has none. This salutary rule ought not to be disregarded unless the case is exceptional, and we do not see that the coverture of Mrs. Mills makes this one so. A married woman is under no disability in respect to the time or manner of putting in her defense to an action brought against her. In the absence of statutory regulation, the husband must be joined with her as a defendant, but this was doubtless for his protection as well as hers, and did not interfere with her defense. 1 Daniell's Ch. Pr. 140.

But our statute admits a married woman to the courts upon the same terms as if she were sole, and for this reason, if for no other, she cannot claim indulgence on the ground of coverture. She is not like an infant, who is incapable of acting for himself, and is compelled to rely upon a guardian *ad litem*, who may be careless or unfaithful. The law clothes her with power to manage her own affairs, and she ought to accept the responsibility which attends upon free agency. If the sufficiency of the certificate of acknowledgment was denied in the court below, it must have been by the demurrer, for appellants made no other appearance in that court. The certificate is not in terms referred to in the demurrer, and the defect of which complaint is made does not appear in the bill. It is alleged that "appellants made, executed, acknowledged and delivered to the complainant their mortgage deed of conveyance," and although it is stated that a copy of the mortgage is attached to the bill, no such copy appears in the record. Granting that every matter appearing in the bill was questioned *ore tenus* upon the argu-

ment of the demurrer the certificate of acknowledgment was not reached. That the allegation in the bill of the execution of the instrument was sufficient upon demurrer, see *Moore et ux. v. Titman*, 33 Ill. 364. In this case, a copy of the mortgage was attached to the bill, and the court examined the certificate of acknowledgment, but they, at the same time, declare that the sufficiency of the acknowledgment could not be questioned after default in answering. In the case at bar there was no exhibit attached to the bill, and therefore no question as to the propriety of examining a copy of a mortgage accompanying a bill upon demurrer to the bill, or otherwise, for the purpose of ascertaining whether the proof supports the allegation. In demurring to the bill, appellants admitted the averment of the acknowledgment of the mortgage to be true, and they did not afterward deny that averment. The master's report, which contained the mortgage, passed unchallenged, and appellants have come here in search of relief, for which they should have asked in the court below. *Reigard v. McNeil*, 38 Ill. 401.

These remarks apply also to the objection respecting appellee's name, concerning which, as well as the certificate of acknowledgment, appellants were wholly indifferent in the district court.

As to the fourth assignment of error, we are not acquainted with any rule which requires a bill for foreclosure to be put in under oath, or signed by the complainant. The signature of counsel appears to furnish sufficient authentication. Story's Eq. Pl., § 47.

The decree of the district court is affirmed, with costs.

Affirmed.

CITY OF DENVER v. KENT et al.

TRUST—TOWN SITE—*under legislative control.* Under the act of congress of May 23, 1844 (5 Stat. at Large, 657), and the amendatory act of May 28, 1864 (13 Stat. at Large, 94), the execution of the trust is under the sole and exclusive direction of the legislative assembly.

TRUST — TOWN SITE — who are beneficiaries. Portions of the town site of Denver, not subject to individual claim, are held by the trustee for the use and benefit of the community at large.*

TRUST — unauthorized sale by trustee. A sale by the trustee of any portion of the town site of Denver, not according to the rules and regulations prescribed by the legislative assembly, is wholly unwarranted and absolutely void.

TRUST — duty of trustee. In the absence of authority to sell any portion of the town site of Denver, it was the duty of the trustee to await the action of the legislative assembly.

STATUTE — repugnant to acts of congress. Section 6 of the act of the assembly of 1866 (5 Sess. 88), by which unclaimed lots were granted to the city of Denver for the use of common schools, is repugnant to the acts of congress relating thereto and therefore void.

TRUST — abuse by trustee — who may bring suit. The city of Denver, in its corporate capacity, may institute and maintain suits to set aside sales of unclaimed lots made by the trustee of the town site of Denver, without authority of law, and may keep watch over the property until the legislature shall authorize the sale thereof.

TRUST — town site — disposition of estate. The legislative assembly has power to direct the sale of unclaimed lots in the city of Denver, and may apply the proceeds of such sales to the erection of public buildings for the use of the city, or for the support of its public schools, or any other general purpose that will conduce to the interests of the community.

BILL IN CHANCERY — multifarious. Several plaintiffs cannot demand by one bill several matters perfectly distinct and unconnected against one defendant, nor can one plaintiff demand several matters of different nature against several defendants.

A bill to set aside and cancel several conveyances alleged to have been fraudulently made to different parties at several times by the trustee of the town site of Denver, is multifarious and cannot be maintained.

Appeal from District Court, Arapahoe County.

THE bill was filed by the city of Denver, as trustee for the use of common schools, against Omer O. Kent, probate judge, and a large number of persons, who, it was alleged, had obtained title to lots in the city of Denver. The several acts of congress and of the legislative assembly, relating to the matter of town sites, were referred to in the bill. It was alleged that James Hall was probate judge of the county of Arapahoe when the act of congress of 1864 was passed, and that he entered the lands mentioned in that act with the

*Appeal of D. R. Cash et al., 6 Michigan R. 193.

funds of the city and obtained title to the same ; that the trust was not fully executed by him ; that he was succeeded by Omer O. Kent, who proceeded in the execution of the trust until his term of office expired in September, 1867 ; that Jacob Downing then succeeded to the office and remained in office until the bill was filed in September, 1868 ; that about seven hundred and thirty-five lots have been wrongfully conveyed to persons having no right to the same ; that these lots belonged to the city as trustee for common schools ; that the probate court combined and confederated with the persons to whom such lots had been conveyed, to defraud the city and the common school fund of the proceeds of such lots ; that many persons named as grantees in the conveyances made by the probate judge have no existence, and that such conveyances were made with intent to defraud the city and the common school fund.

Numerous conveyances alleged to have been fraudulently made were described in the bill. It was also alleged that a large number of lots, within the tract of land mentioned in the act of congress, had not been conveyed, and that the city of Denver was entitled to the same for the use and benefit of common schools ; the prayer of the bill was that the several conveyances, made by the probate judge in fraud of the several acts of congress and of the legislative assembly, be declared void, and that the title of the city of Denver be perfected ; that the probate judge be directed to convey to the city all lots so wrongfully disposed of, and all lots to which the city was entitled under the said acts, etc.

The bill was taken as confessed by some of the defendants and other defendants demurred. The district court sustained the demurrers and dismissed the bill.

Mr. ALFRED SAYRE, for appellant.

Messrs. CHARLES & ELBERT, for appellees.

Mr. Justice WELLS dissented.

BELFORD, J. The bill in this case was filed by the city of Denver, as trustee for the use of the common schools,

etc., against Omer O. Kent and others, to set aside and cancel a large number of deeds made by different probate judges to various persons. Separate demurrers were filed, assigning as grounds of demurrer :

First, that the complainant had no right to maintain the suit; and secondly, that the bill was multifarious. The demurrers were sustained, and this action of the court constitutes the error complained of.

The bill alleges that in 1865, James Hall, being probate judge of Arapahoe county, under and by virtue of an act of congress passed the previous year, entered a large tract of land that had been occupied as a town site by the citizens of Denver, and that he held that land in trust for such purposes. It is further alleged that he and his successors in office greatly abused their trust by making deeds of conveyance to numerous parties who were not entitled to receive them, and that, by reason of these fraudulent deeds, the community has been greatly injured. It further appears, that on the 9th day of February, 1866, the territorial legislature passed an act having direct reference to the disposition of certain portions of this land, and in which act it is provided that all lots and parts of lots in the city of Denver then held by Hall in trust by virtue of said act of congress, and to which there was no claimant, and to which no valid claim could be shown, should vest in the city of Denver for the use of the common schools of said city; and that the city of Denver should have the power, by suit, in any court having competent jurisdiction, to secure and perfect the legal title to the same.

The bill prays that these fraudulent conveyances be set aside, and that the title of the city to the lots in controversy be established and quieted. On behalf of the appellees it is insisted that the city of Denver has no title; that the act of the legislature was *ultra vires* and void, and that the claims of those now exercising ownership over these lots cannot be called in question. A correct decision of this case involves a review of the legislation of congress so far as the same is applicable to the entry of lands for town sites.

At an early period in our national history, it became the fixed policy of the government to aid in the settlement of the public domain. To this end, at various times laws were passed by which settlers upon such lands might, upon showing a compliance with certain prescribed rules, and for a small consideration, acquire the legal title to one hundred and sixty acres. These laws and rules, however, were only for the benefit of such persons as settled upon the public domain for agricultural purposes. In process of time settlements of widely different character were made. In eligible places large numbers of persons congregated, and towns and cities were built up. This kind of settlement was outside of the contemplation of the pre-emption laws, as they then existed, and it soon became a serious question how the title to this land so occupied should be secured. To meet this question congress passed the act of May 23, 1844, which provides:

That whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful, in case such town or place shall be incorporated, for the corporate authorities thereof, and if not incorporated, the judges of the county court of the county in which such town may be situated, to enter at the proper land office, and at the minimum price, the lands so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests. * * * The execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be provided by the legislative authority of the State or territory in which the same is situated: Provided, that the entry of the land intended by this act be made prior to the commencement of the public sale of the body of land in which it is included, and that the entry shall include only such land as is already occupied by the town, and be made in conformity to the legal

subdivision of the public lands authorized by the acts of the 24th of April, 1820. * * *

And provided further, that any act of said trustees, not made in conformity to the rules and regulations herein alluded to, shall be void and of no effect." Under the terms and provisions of this law, the lands embraced in many town sites that had been theretofore settled, and of many towns subsequently settled and occupied, were conveyed to the proper and rightful occupants thereof. In the year 1859, a large number of persons associated together, under the name of the Denver Town Company, and took possession of a portion of the public domain now known as the city of Denver, which they surveyed and laid off into streets, alleys, blocks and lots, and which they commenced to improve as a town, by the erection of dwelling-houses, stores and offices. When the lands on which this city was built became surveyed, and the lots and buildings acquired value, the owners became anxious for a title. The laws of 1844 limited the entry for town purposes to three hundred and twenty acres, and the city of Denver covered more than a thousand; so that there was no law by which a proper title to this land could be made to the men who were the occupants of the same, and the owners of the improvements thereon. To remedy this difficulty congress was applied to, and in response to this application passed the act May 28, 1864, which provides :

"That the provisions of an act of congress entitled 'an act for the relief of the citizens of towns upon the land of the United States, under certain circumstances, approved May 23, 1844,' be so extended as to authorize the probate judge of Arapahoe county, in the territory of Colorado, to enter at the minimum price in trust for the several use and benefit of the rightful occupants of said land and the *bona fide* owners of the improvements thereon, according to their respective interests, the following subdivisions of land, or such portions thereof as are settled and actually occupied for town purposes by the town of Denver aforesaid, to wit: Section number 33, and the west half of section number 34,

in township number 3 south of range number 68, west of the sixth principal meridian. That in all respects, except as herein modified, the execution of the foregoing provisions shall be controlled by the provisions of said act of the 23d of May, 1844, and the rules and regulations of the commissioner of the general land office." From an examination of these two acts it will be observed that the power of the "corporate authorities" mentioned in the law of 1844, and the probate judge in that of 1864, is limited to the act of entry, and when the land is entered the party or parties so entering it become invested with a trust, the execution of which is under the sole and exclusive direction of the local legislature. Until the legislature points out the method and prescribes the rules of procedure, the trustees are wholly incapable of conveying the legal title to the beneficiaries of the trust, or of disposing of the land for any purpose, or to any person. But what is the character of this trust? It will be observed that, while the entry under the act of 1844 is only allowed to cover such land as is actually occupied by the settlers, it must nevertheless be made according to government subdivisions, as the law does not permit them to be broken in upon. Under this rule some land would be found in each subdivision not actually built upon or otherwise occupied for town purposes. What, then, is to be done with this land not occupied or improved? To whom is it to go? Clearly not to general government, for its title has ceased by the issuing of the patent. Not to the territory, for it never had any interest. Not to the trustee, for he is a mere conduit or channel through which the title passes from the government to the *cestuis que trust*. Not to the individual citizen, for the act of congress defines the extent of his individual interest. The trust is manifestly a double one. The first, a trust for the occupants of the town as individuals; the other, a trust for them collectively, as a community; the act authorizing the corporate authorities to enter the land in the first case, and making them trustees, and the judge of the probate court to enter the land and become the trustee in the other. If we pass from

the law of 1844 to that of 1864, we find that the land to be entered is designated by sections and subdivisions, and we encounter the same question: What becomes of the land not occupied and covered with improvements? And to this question we are forced to answer that the probate judge holds it in trust for the community. In neither of the laws does congress attempt to define or mark out the line that distinguishes the individual from the public trust; that is, to what extent individual occupancy shall be permitted to displace public occupancy or the occupancy of the community as such. This whole matter is left to the local legislature. To it belongs the creation of the tribunal before whom individual rights shall be adjudicated. It prescribes the kind of evidence necessary to make good a claim of title. It prescribes what kind of disposition shall be made of the money arising from the sale of lots, and, in fact, has full and plenary power over the whole subject-matter of the trust, and to strengthen this power conferred by congress the law declares that any act done by the trustee, inconsistent with or in violation of the rules and regulations prescribed by the legislature for the execution of the trust, shall be void and of none effect. Congress seems to have contented itself with declaring simply who might enter the land and denominating the *cestuis que trust*, all else it hands over to the territorial legislature, which is better fitted, on account of its proximity to the subject-matter of the trust, to supervise and direct its details. There can be but little difficulty in comprehending the whole subject if we keep steadily in view the object had in the passage of the acts, namely: To extend protection to citizens of the towns and cities that had grown up on the government lands for commercial and mechanical purposes, and to secure to them severally, at the minimum price, all land actually occupied by them respectively for city or town purposes, and to them collectively such other lands as might be included within the limits of the town or city.

Before the rights of the individual claimants could be fully secured it became the duty of the legislature to pre-

scribe the rules and regulations which would not only put the trustee in motion, but define the manner and extent of his action. This it did. It pointed out the method in which the trust as to these parties should be executed. It prescribed what steps should be taken to secure their legal titles, and empowered the probate judge or trustees to make conveyances to those justly and rightfully entitled to receive them. These rules and regulations were imperative upon him. They were the charter of his power and could not be disregarded. What they authorized, he could do, and beyond them he could take no step. By an oversight, the legislature made no provision for the disposition of portions of this land to which no individual claim existed, and there is nothing in either act of congress from which a power of sale in the trustee can be inferred, and much to repel such an inference. The acts of congress leave it altogether to the territorial legislature to determine what disposition shall be made within the objects of the trust of town lots belonging to the community at large, and of the proceeds of such of them as may be sold. This part of the trust most clearly cannot be executed without the intervention of local legislation.

The trustee cannot sell under the acts of congress, because they do not authorize him to sell any portion of the trust property, or to make any disposition whatever of moneys that might come into his possession on such sale. It being evident that it was the intent of congress that the lands included within the town site, and to which no rightful claim exists on the part of any individual, should be sold and the proceeds disposed of under the directions prescribed by the legislature, who are to establish rules and regulations for the whole execution of the trust, and it being further evident that the legislature failed to provide for the disposition of the same, it is clear to us that any sale of such land, made by the probate judge or trustee, in the absence of these rules and regulations, was wholly unwarranted, and absolutely void. It was an exercise of power of which he was not possessed. It was entirely

competent for him to make conveyances to those having a valid and rightful claim to land at the date of the entry, provided they furnished the proper and requisite proof—beyond this, his acts were *ultra vires*, and could in no manner affect the rights of the community. It was his duty to await the action of the legislature. Section 6 of the act of February 9, 1866, does not provide for a sale of this land, but affects to give the lots to the city of Denver, and is, therefore, void.

But, notwithstanding this fact, we are clearly of the opinion that if the probate judge made sales of these lands, it is competent for the city of Denver, in its corporate authority, standing as the guardian of the interests of the community within the limits, to institute and maintain suits to have such sales set aside, and conveyances canceled, and to keep watch over this property until such time as the legislature shall authorize the sale, and when sold it is competent for the legislature to order that the money arising therefrom shall be applied to the erection of public buildings, for the use of said city, or be appropriated for the support of its public schools, or any other general purpose that will conduce to the interests of the community.

While we are thus clear that the city of Denver is entitled to relief, another question remains, namely, whether it must seek it by separate suits against each individual implicated in the transactions, or whether it is at liberty to bring them all into court at one time. The bill in this case charges that the conveyances which are sought to be set aside were made by different probate judges, at different times, and to numerous persons, and it is, therefore, claimed by the appellees that the bill is multifarious. In the case of *Salvidge v. Hode*, 5 Maddock's Ch. 94, the vice-chancellor says: "In order to determine whether a suit is multifarious, or, in other words, contains distinct matters, the inquiry is not whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the bill be single, but it happens that different persons have separate interests in distinct questions, which

arise out of that single object, it necessarily follows that such different persons must be brought before the court, in order that the suit may conclude the whole subject." The case of *Brooks v. Lord Whitworth et al.* was a case where an estate was put up and sold in several lots, and the bill was filed against various purchasers, six in number, praying that an account might be taken, and that the sales to the purchasers might be completed, and the remainder of the purchase-money paid in. To this bill a demurrer was filed, charging that it contained several and distinct matters that had no relation to each other, and in the greater part of which the defendant was in no way interested, and ought not to have been implicated. In deciding upon this demurrer the vice-chancellor says: "The court is always averse to a multiplicity of suits; but certainly a defendant has a right to insist that he is not bound to answer a bill containing several distinct and separate matters relating to individuals with whom he has no concern. A decisive objection to the bill is that the purchases of the different lots were made by distinct persons, each agreement being separate and distinct. The circumstances attending the sale of one lot may be very different from those relating to other lots. One may have objections, another has not." 1 Maddock's Ch. 58. In the case of *Rayner v. Julian*, 2 Dickens, 677, the bill was demurred to on the ground that it was multifarious. Lord KENYON says: "Suppose an estate is sold to different persons, a plaintiff could not include them all in one bill for specific performance; for each party's case would be distinct, and would depend upon its own peculiar circumstances, and there must have been a distinct bill upon each contract." See, also, *West v. Randall et al.*, 2 Mason, 200. We cannot see why a different rule should apply in this case.

We are aware that it is a favorite object with courts of equity to prevent multiplicity of suits. For this purpose it is a general rule in chancery that all persons materially interested must be made parties; the forms of proceeding in chancery and the power of the court to mold its decrees,

so as to suit the various equities of the case as established by the proof, enable it advantageously to settle and adjust in a single suit, rights and interests which, according to the rules of pleading in the courts of common law, would necessarily result in various issues incapable of being tried in a single case and disposed of by a single judgment. But, notwithstanding this disposition of a court of equity to prevent the multiplication of suits, it will not permit several plaintiffs to demand by one bill several matters perfectly distinct and unconnected against one defendant, nor one plaintiff to demand several matters of different natures against several defendants; and the reason of the rule is said to be that such a proceeding would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with a statement of the several claims against the other defendants with which he has no connection, and also to prevent confusion and to preserve some analogy to the comparative simplicity of declarations at common law. See *Fellows v. Fellows*, 4 Cowen, 680.

We see no error in the action of the court in sustaining the demurrers to this bill, on the ground that the same was multifarious; we have not considered whether an absolute dismissal of the bill may prejudice the right of the city to institute another suit, but, to save all questions of that nature, we reverse the decree of the district court and direct that court to enter a new decree dismissing the bill without prejudice to the rights of the complainant therein, this, of course, without costs.

WELLS, J., dissenting. I think the complainant's bill shows no equity, and that the decree of peremptory dismissal, given in the district court, ought to be affirmed.

The question turns upon the construction to be given to the act of May 23, 1844, and as this case is one of great importance, I shall briefly set forth the reasons which compel me to differ from the other members of the court.

No bill in regard to the subject-matter of this action will lie at the suit of the present complainant, unless by the act

of congress a trust was created in some portion of the town site for the citizens of Denver as a community ; or unless the legislature are by that act authorized to create such a trust.

I think that neither of these positions can be maintained.

The act of May 23, 1844 (5 Stats. at Large, 657), was intended to supply a defect in existing pre-emption laws. It is part of a system. It declares, in the opening clause, that, because lands settled upon as a town site are not subject to entry under existing pre-emption laws, therefore this legislation ; it must therefore be supposed to have been inspired by the same reasons of policy, as the several preceding acts in addition and supplement to which it was enacted, that is to say, to encourage actual settlement in the public domain, and it ought not to be taken by intendment that the purpose of congress was to encourage or permit speculation in town sites, or to give special bounties to a few ; or to so provide, that a few or many speculators might engross great tracts of the public domain, the prospective centers of population, which before that act were the common property of all citizens of the United States. The consequences here alluded to are, I think, the legitimate and almost necessary result of the doctrine of the majority opinion in this case ; for, as I understand that opinion, the first ten men, or a less number, who settle at a frontier post may engross the whole of three hundred and twenty contiguous acres : so much as they severally occupy they may procure to be conveyed to them in severalty, and the residue which no one occupies and in which but for this enactment certainly no one of them, nor all of them collectively, would have any right whatever, is to be sold for their benefit, and they themselves may become the purchasers at nominal prices.

It is not certain of course, that such an abuse of the supposed donation will in any case occur ; but it will be exceedingly probable in every case, and the more certain the future of the particular location and the greater the necessity and the propriety that it should not be engrossed

by a few for purposes of speculation, the greater is the probability that it will be.

Before I can accede to the doctrine that it was the intent of congress to create a trust so liable to fraud and abuses, and so contrary in its probable results to the spirit of all prior legislation, I must find a clear warrant for it in the words of the act, and I think the words of the act admit of no such interpretation.

The act declares that the entry of the town site shall be made "in trust for the *several* use and benefit of the *occupants thereof according to their respective interests.*"

Now, when ten or twenty or more families or individuals congregate and so form what is termed a town or vill, there is always an occupation of lands in severalty by each of the community ; this is the usage of our race. Generally, I believe, at least in the west, a survey into lots and blocks has preceded or shortly followed the first settlement, in order to precisely mark out and ascertain the bounds and extent of the right and possession of each individual settler, but whether there be such survey or not, I think it may be said invariably, the right and occupation of each settler has been wholly several and separate ; there are no common fields as with the early settlers of French and Spanish extraction, but they hold their lands like their goods, each his own, to and for himself.

This habit and usage of severalty in the occupation and ownership of lands was certainly within the knowledge of congress, and from the language used may be inferred to have been in contemplation in the passage of this act ; and it was, I think, the several and separate occupancies of the individual settlers, which it was intended to protect and secure.

Nor do I think, that it was the intent of the act to extend its benefits beyond this ; for beyond those separate lots and parcels which come within the several occupancy of the individual settlers, every thing is vacant ; it cannot be fairly said that, in such case, the community collectively occupy the whole of the town site. An invading army are said to

occupy the towns and cities of the nation invaded, and each individual settler or inhabitant of the town occupies his own close and premises ; but if this word is ever used to express the residence of the whole population of a town upon the several quarter sections of land upon which it is built, this is not the common and ordinary use of the word, and it is the common and ordinary sense in which the words of the statute are to be received. But the statute limits the trust estate to the several use and benefit of the occupants, according to their respective interests ; beyond the several occupation of the individual settlers as before shown, there is no occupation, and beyond this, no settler has any interest whatever.

It follows then, that, except as to those lots which are actually occupied at the date of the entry, the trust does not then inure. But there is no provision that the land shall revert, nor certainly can the trustee hold it discharged of the trust ; the result is, that the trust remains in abeyance until, by subsequent occupations from time to time, the beneficiaries are appointed.

But, in the clause of the act which follows what I have already quoted, it is provided that the execution of the trust "as to the disposal of the lots in such town, and the proceeds of the sales thereof to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or territory," etc.

It is thought that by these words it was contemplated that some portions of the domain shall be sold, and the argument is, that there can be no sale of the occupied lots ; that, as to them, the sole duty of the trustee is to convey to the several occupants ; that whatever is implied from the words now under consideration, must therefore apply to the unoccupied portions only, and herefrom is deduced a power and duty in the local legislature to direct a sale of these portions, and prescribe the manner of it and the disposition of the proceeds which it is said may be appropriated to any public uses in their discretion.

The reasons which compel me to dissent from these conclusions are, briefly, as follows :

The clause of the act now under consideration relates to a matter merely incidental and subordinate to what precedes it. In what precedes this clause, as I have attempted to show, the trust estate is granted, and the trustee and the beneficiaries are appointed, and the several interests of the latter are fixed and determined. What follows relates merely to the execution of the trust ; and I take it to be a rule of construction that, where, by statute, a particular thing is clearly granted, and other words follow regulating the mere incidents of the principal thing, such as time, place, manner, etc., the latter word shall not have the effect to enlarge or limit what is before granted or prescribed, unless this is necessary to give them effect.

Is it necessary, in order to give effect to this latter clause, to say that there should be a sale of some portion of the several lots within the location ? I think not. In order to every entry of a town site under this act, the minimum price for the lands must first be paid by the trustee, either of his own moneys, or by provision of the State or territorial authorities, or of the citizens of the town or some of them ; these moneys, at least it will be agreed, the local legislature may require the occupant to pay to the trustee before he shall be entitled to receive a conveyance ; and this is the price which each occupant pays for his several interest and portion. The transaction may, I think, be fairly enough termed a sale, and the moneys paid by the settler to the trustee the proceeds of such sale. Unless the trustee had advanced his own moneys, legislation would be necessary to insure the proper disposition of the proceeds in his hands, and this is, I think, what was intended by the words in question. If, however, I am in error as to the construction to be placed upon these latter words—if it was contemplated that, under the act, there must be a sale of all lots which might in any particular case be unoccupied at the date of the entry—then I am clearly of the opinion that the proceeds must be divided among those who were occupants at the date of the

entry (or possibly at the inception of the proceedings for entry), and that no other persons are, or can become, entitled to share therein, for the trust is expressly declared to be for the "several use and benefit of the occupants," and there is no syllable in the act which negatives or qualifies this intention, or gives color to the idea that a joint use was intended either in the lands or their proceeds.

The city of Denver, therefore, has no interest whatever in these lots or their proceeds, and can have none by any legislation of the territory, for this would be to create a joint use where the statute has prescribed a several one, and a use not alone to the occupants at the date of entry (who, according to the majority opinion in this case, are the sole beneficiaries), but to them and to all who may come after them to the end of time.

I dissent, therefore, from the reasoning of the court, and from so much of the order as directs a modification of the decree which was given in the court below. *Reversed.*

TOWN-SITE TRUST — POWER OF LEGISLATURE: *Coffield v. McClellan*, 1 Colo. 372.
RIGHTS OF MUNICIPALITY: *Aspen v. Eucker*, 10 Colo. 189, 190.
RIGHTS OF BENEFICIARIES: *Murray v. Hobson*, 10 Colo. 99.
DISPOSITION OF RESIDUE: *Jackson v. Winfield Town Co.* 23 Kan. 545, 546, citing the principal case.

THE PEOPLE ex rel. BAXTER et al. v. HALLETT.

JURISDICTION — *mandamus to district judge.* This court has jurisdiction of an application to compel a judge of a district court to recognize a district attorney.

DISTRICT ATTORNEY — *qualifications.* Whether one who was not a licensed attorney at the time of his election was eligible to the office of district attorney, the court was not agreed.

PRACTICE — **MANDAMUS** — *where the court is divided in opinion.* Upon application for mandamus, if the court is equally divided in opinion, the writ will be denied.

Petition for mandamus.

THE proceeding was against the chief justice, and BELFORD and WELLS, JJ., were not agreed upon the principal point, and therefore the writ was denied.

Mr. H. C. THATCHER and Messrs. MILLER & MARKHAM,
for petitioners.

Mr. W. C. KINGSLEY and Mr. N. HARRISON, for re-
spondent.

BELFORD, J. This is an application for a peremptory writ of mandamus to issue against Moses Hallett, judge of the third judicial district, to compel him to recognize Marmaduke Green as the prosecuting attorney of that district.

It appears that at the election, held in September, 1870, Green was, by the votes of the qualified electors of the third district, elected prosecuting attorney. He received his certificate, took the prescribed oath, filed a suitable bond, received his commission from the governor, and entered upon the discharge of his duties. At the December term of the Pueblo district court the respondent, then presiding as judge, refused to recognize Green as such prosecuting attorney, because he was not, as the order of the court alleges, an attorney of said court, or authorized to appear therein. It is admitted on both sides that, at the date of the election, Green was not a licensed attorney. On behalf of the relators, it is claimed that the people having elected him to this office, he is entitled to discharge the duties and receive the emoluments of the same, and that the action of the court in refusing to recognize him is not only revolutionary in its character, but, if permitted to ripen into a precedent, would subvert the principles of our government and overthrow the rights of its citizens. On the other hand, it is contended that the statutes of the territory prescribe who shall be attorneys, and make it an indispensable prerequisite to the practice of the law in our courts, that a license shall be obtained from the supreme court, and until it is obtained, no man, however great may be his abilities, is entitled to standing or recognition at the bar of the judiciary. I fully conceive the vast importance of the principles involved, but shall not shrink from their discussion. If permitted to have any choice as to the causes that should come before me, this is one of the last I would desire to entertain, but no

choice is left. This court is bound to a single duty, and that is, to decide the causes brought before it according to law, leaving the consequences to fall where they may.

It has been well said that, in order to maintain a system of government which will be able to secure to the citizen his rights, it is necessary to have persons appointed or chosen to administer the law. And, when persons are thus clothed with the power and have assumed the duties of a public officer, they have taken upon themselves the obligation to perform those duties, and if they neglect or refuse to do so, any one whose rights are thereby injuriously affected is entitled to demand relief. The remedy provided by our system of law, as well as that of England, is a process, issuing from the judicial branch of the government, which seeks to compel the officer to go forward and to do that which is enjoined upon him by the position he holds. This process is denominated a writ of mandamus, and when there is a right to execute an office, perform a service, or exercise a function, more especially if it be a matter of public concern or attended with profit, and a person having such right is wrongfully kept out of possession or dispossessed of such right, and has no other specific legal remedy, the court will interfere by mandamus upon reasons of justice and of public policy to preserve peace, order and good government. But, while the judiciary is thus clothed with this extraordinary power, it is never exercised, except to enforce a *legal right*. It cannot be invoked to place one in office or to secure him in the enjoyment of the same, if it is manifest that he has no title. If, at the date of the election, Green was an ineligible candidate, and legally disqualified from holding the office of prosecuting attorney, the people who elected him were bound to take notice of this ineligibility and disqualification, and no vote that they could cast and no commission that he could receive could remove or cure the infirmities or disabilities which attached to him. While the will of the people is sovereign, still it must be expressed in accordance with recognized public law, and when it exceeds the limits of this, it is the duty of courts to interfere and by judicial

checks afford the people time for reason and reflection. Before proceeding to an examination of our statutes on this subject, it will not be out of place to inquire what an attorney is. "An attorney at law," says Blackstone, "answers to the *procurator* or proctor of the civilians and canonists. And he is one who is put in the place, stead or turn of another, to manage his matters of law. These attorneys," he adds, "are now formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster Hall and are in all points officers of the respective courts in which they are admitted, and as they have many privileges on account of their attendance there, so they are peculiarly subject to censure and animadversion of the judges. No man can practice as an attorney in any of those courts but such as have been *admitted and sworn an attorney*." So early as the statute 4 Henry IV, chapter 18, it was enacted that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned and sworn to do their duty. And many subsequent statutes have laid them under further regulations. The statute in this territory is not much unlike those in England. Section 1 provides: No person shall be permitted to practice as an attorney or counselor at law, or to commence, conduct or defend any action, suit or plaint in which he is not a party concerned, in any court of record within this territory, either by using or subscribing his own name or the name of any other person, without, having previously obtained a license for that purpose from some two of the justices of the supreme court, *which license shall constitute the person receiving the same an attorney and counselor at law*, and shall authorize him to appear in all courts of record within this territory and there to practice as an attorney and counselor at law, according to the laws and customs thereof; * * * and to demand and receive all such fees as are or hereafter may be established for any services which he shall or may render as an attorney and counselor at law in this territory. Section 2 provides that no person shall be entitled to receive a license until he shall have obtained

a certificate from the court of some county of his good moral character, and also a certificate from one or more respectable counselors at law, that he has been engaged in the study of the law for two successive years prior to the making of such application. Section 4 makes it the duty of the clerk of the supreme court to make and keep a roll or record, stating that the persons whose names are therein written have been regularly licensed and admitted to practice as attorneys at law within this territory. Section 5 provides: And no person, whose name is not subscribed to or written on said roll, with the day and year when the same was subscribed thereto or written thereon, shall be suffered or admitted to practice as an attorney or counselor at law within this territory.

From reading this statute it is evident that the intent of the legislature in passing it was to elevate the standard of the legal profession, by excluding from it those who had not made the science of the law a matter of study. To guard the interest of the community, and to preserve from violence and injustice the rights of individuals, the legislature emphatically declares that no person shall be permitted to practice as an attorney at law, or to commence, conduct or defend any action in which he is not a party concerned, without having previously obtained a license. He may commence and manage his own case, but if he declines to do this, he cannot employ another individual to attend it for him, unless that individual has qualified himself for the task by two years' study. This evidence is the license under the sign manual of two of the justices of the supreme court, and, in the language of the statute, "this license shall constitute the person receiving the same an attorney at law, and authorize him to appear in court." Without that license he cannot appear; it is his passport to the bar. It is the charter that gives him a right to be heard; it is the authority which empowers him to collect fees for services rendered, and if he does not have it, the court can rightfully and properly refuse to recognize him, although his talents may not be inferior to those of a Webster or a Choate.

Can it be said that the legislature intended to confine this statute to civil suits alone? Does all this legislative solicitude center upon dollars and cents, while the rights of life and liberty are turned adrift to be sported and trifled with by any one whom the people in their partisan madness and frenzy may elect and call prosecuting attorney? And, can it be said that this court ought to issue a writ of mandate to compel the judge below to violate this clearly-expressed public law? When the statute says, "that no person shall be permitted to commence, conduct or defend *any action* without a license as an attorney," do the words, "*any action*," simply mean any civil action, or do they apply to all kinds of actions entertained and heard in courts? Is there any less necessity for a knowledge of the law when a man is on trial for his life than there is when the contest is confined to property? Shall we impute to the legislature a shameful disregard of man's dearest and most vital interests, by holding that an act, designedly passed, to preserve the character and dignity of a profession that in all ages has been the bulwark of society, and into whose hands the most sacred trusts are and have been committed, fails to give protection when protection is most required? And this we will do, if this statute is so construed as to confine its provisions to attorneys merely employed in the trial of civil cases. It must be observed, also, that this act, defining the duties of the district attorney, devolves upon him the necessity of appearing in behalf of the territory and the several counties of his district in all indictments, *suits and proceedings*, where the territory or the people thereof, or any county of his said district may be a party. His duties, therefore, embrace something more than criminal business. It touches upon — nay, he must enter into the domain, where admission as to all others is only secured by a license. But it is contended that the act creating the office of district attorney does not require that such officer shall have been admitted and licensed as an attorney. True, it does not, but it is a well-settled principle that, in giving construction to any statute, the legislature must be understood

to have used terms and phrases in the sense in which those terms and phrases for long years prior had been understood and received in relation to a particular subject. Another well-established and fundamental rule of construction is, that all acts and provisions of the law, in *pari materia*, are to be taken and considered together. It follows, therefore, that, in construing the act under examination, we must look to the object and purpose of the legislature as gathered from the light of surrounding circumstances, and as illustrated and explained by the previous legislation in this and other States relating to the same subject.

Another rule of construction is, that where the same or similar words are used in a statute, which are found in a previous statute, relating to the same subject-matter, the latter act must receive the same construction as the former. In many of the States this representative of the people is selected by the courts. The manner of creating the office can make no difference; the question is, can such an officer be selected from among those who are not attorneys — officers of the court? It cannot be done, because no attorney can appear as an officer of the court who has not been admitted to practice. Appointment by the governor or election by the people confers no authority to appear in court. The person elected is not called prosecutor but prosecuting or district attorney. The very words pre-suppose the individual to be an attorney, and, while in such capacity, to be elected a district attorney or an attorney to prosecute the pleas of the territory. The election does not confer on the individual the privilege of being considered an attorney if he was not one before, but, having the attorney's privilege in court, he can, by appointment or election, appear in behalf of the people to prosecute and have his designation "district attorney" or "prosecuting attorney." The experience of every member of the bar will teach him that this is the universal and accepted construction given to acts of the character now under consideration. But, to make clearer this principle, let me illustrate it by an example: A B is elected prosecuting attorney, qualifies and enters upon the

discharge of his duties. During a term of court he is disabled and becomes incapable of attending to his duties. To prevent a failure of justice, the court must appoint a prosecutor; can it be contended that the judge could appoint to such office one who had never been admitted to practice law, or, if he should assume to do so, would it not be an abuse of his powers? But, it is said, that the statute fixes no grade of ability for this office. True, it does not, and, generally speaking, eminent qualifications have nowhere been held to be indispensable to the occupation of office; but the statute has, at least, enjoined one thing, and that is, whether the individual has one or ten or twenty talents, he shall not be permitted to display them, as an attorney at law, in the courts of justice, until he has spent two years in burnishing them up, and has a certificate to that effect. Fortunately we are not without authority on this subject.

In the case of *The People ex rel. Hughes v. May*, 3 Mich. 598, it is held by the court that no person who has not been previously admitted as an attorney at law is eligible to the office of prosecuting attorney. The Michigan statute is like our own. The people there elected May district attorney. Prior to the election, he had not been admitted as a member of the bar, and had not received a license, and the supreme court held that he was clearly ineligible, and sustained a judgment of *ouster* on that ground. MARTIN, J., in delivering the opinion of the court, says: "Among the well-settled rules of construction of statutes are these: 1st. The natural import of the words of any legislative act, according to the common use of them when applied to the subject-matter of the act, is to be taken as expressing the intention of the legislature, unless the intention so resulting from the ordinary import of the words be repugnant to sound acknowledged principles of public policy.

"The *natural* import of words is that which their utterance promptly and uniformly suggests to the mind, that which common use has affixed to them; the *technical* is that which is suggested by their use in reference to a science or profes-

sion, that which particular use has fixed to them, and when the natural and technical import unite upon a word both their rules combine to control its construction, and, indeed, it is difficult to understand how any other signification, than that which they suggest, can be affixed to it, unless upon the most positive declaration, that a different one was designed. Now, the word "attorney," when used in connection with the proceedings of courts, and the authority to conduct business in them, as well as when employed in a general sense with reference to the transaction of business, usually and almost necessarily confided to members of the legal profession, has a fixed and universal signification on which the technical and popular sense unite. The legislature and the judge, the lawyer and the layman, understand it alike as having reference to a class of persons who are, by license, constituted officers of courts of justice, and who are empowered to appear and prosecute, and defend, and upon whom peculiar duties, responsibilities and liabilities are devolved by law in consequence. That the natural and technical import of the words or title "prosecuting attorney," are identical, I shall not stop to argue at length, and common experience teaches us that they suggest to every person alike the idea of an *attorney at law*, set apart to conduct the public business, whether of a civil or criminal nature, and perhaps primarily, that of a criminal character."

In the case of *The Commonwealth v. Adams*, 3 Metc. (Ky.) 6, it was held that one elected to the office of county attorney to which he was ineligible, not having been a licensed practicing attorney for two years, and exercising the functions and receiving the emoluments of the office, is guilty of usurpation of office and liable to indictment. It is insisted, however, that the right to an office cannot be determined by an action, other than a proceeding in the nature of a writ of *quo warranto*. Mr. Blackwell, in his treatise on tax titles, says, in writing of officers *de facto*, "the only appropriate mode of testing the title of a person to an office is, by an information in the nature of a writ of *quo warranto*, in which, after notice and impartial hearing, he will

be ousted from the office, if it turns out that he has been exercising official functions without the warrant of the law. Until then, he holds the office by sufferance of the State, and the silence of the government is construed by the courts as a ratification of his acts. When the government acquiesces in the acts of such an officer, third persons ought not to be permitted to question them." Id. 117. While I yield my assent to the doctrine here enunciated in the broadest extent, I am not unmindful of the existence of another principle equally well settled, namely, that when a party having been deprived of the use of an office comes into a court and applies for a writ of mandamus to restore him, the writ will never be awarded when it is clear and manifest that the party applying for the same was, at the date of his election, ineligible, and when it is patent that if restored he could be immediately ousted by a writ of *quo warranto*.

The papers in this case show that, at the date of Green's election, he was not a licensed attorney, and he was not entitled to practice in the courts of this territory, and, I think, I have already shown that the absence of this license rendered him incompetent to exercise the office of district attorney. Can it be said that one who shows himself not entitled to an office has a right to this writ? I know of no case that sanctions such a claim. It is, perhaps, the correct theory in reference to an office elective by the people, that the fact that an *eligible* person is duly chosen to fill the same, confers upon him the right, the title to such office, or the certificate of election or commission, is, in some respects, something like a deed to land, the mere evidence of such title. This title gives the right to exercise the accustomed or fixed duties of the office, and receive the fees and emoluments therefor. In this right, it has been often contended, there may exist a franchise to which the rights of property may attach for certain purposes. But this title vests in and these rights inure only to an eligible person. See *Glasscock v. Lyons*, 20 Ind. 2; *Allen v. McKean*, 1 Sumn. 317.

In coming to the conclusion that I have reached, I have not been unmindful of the delicacy and importance of this

question, nor regardless of the rights of the people to exercise the electoral right, untrammelled by any conditions or restrictions, except such as are expressed by law. But such conditions and restrictions, when established, are to be enforced as well as the right itself. I am not at liberty to disobey the law as an individual, nor do I possess that right when acting with thousands of others. Nor can I consent that a writ of mandamus shall issue to the judge below, when its force and effect is to compel him to do an act, the performance of which is a palpable violation of law. For the reasons I have given the writ should be denied.

WELLS, J. Although I at first doubted, I am now satisfied that the court has jurisdiction to entertain this application; the court to which the writ is prayed is within the supervisory jurisdiction of this court; the duty sought to be enforced is of public concern, and is not judicial in its nature, nor one about which that court is called upon to exercise a discretion.

The election of Mr. Green, his qualification in office, and his entry upon the duties thereof, are admitted, and the sole ground of his exclusion was that he had not been admitted to the bar of this court, and that, by reason of ignorance of the law and the usage and practice of courts, he was incompetent to discharge the duties of his position.

But the statute has not prescribed any qualification of learning or admission as an attorney, to confer eligibility to this office, and I think courts ought to be slow to give to the general words of a statute such effect as to limit the right of the people to exercise their preference in filling the offices within their gift. Undoubtedly it is more proper that the person elected to manage the causes of the people should be a member of the bar and in practice, for this affords an assurance in some degree of his competency to discharge the duties of that position. Probably, too, it was generally supposed, when the act creating the office of district attorney was passed, that an attorney at law would

be chosen by the people, but I see nothing in this mere propriety, nor in the name by which the law designates the official, to warrant me in concluding that the legislature intended to restrict the suffrage of the people to a single class. The people have the power and the right, both by their inherent sovereignty and by prescriptive usage, to elect incompetent men to office; and if the legislature may lawfully limit the exercise of this right, and say that certain privileged classes shall exclusively exercise certain offices, they have not clearly said so as to this particular office, and I think we ought not to strain the text of the statute to limit the exercise of the elective franchise. It is a precedent full of danger. The authorities which are cited in support of the contrary view are not, in my opinion, entitled to controlling consideration.

In May's case, 3 Mich. 598, the opinion of the court is based upon the construction of a series of statutes which never were in force here.

In Adam's case, 3 Metc. 7, it appears that there was an express statute prohibiting any one not a licensed attorney from exercising this office. The opinion of my associate, therefore, rests solely upon the fitness and propriety that the legislature should have made this restriction and the mere circumstance or accident, that the legislature in denominating this office have used a word which indicates a person licensed by the courts to manage the causes of others for a reward.

But however this may be, it appears that in this case Mr. Green had not only been elected and commissioned, but he had entered upon his office and was in the actual exercise of its duties and functions. He was, therefore, an officer *de facto* by a colorable title, and he had a property in his possession of the office, however ineligible, of which he could lawfully be ousted only *by due process of law*, and due process of law is, in this case, nothing less than the judgment of a court of competent jurisdiction in a direct proceeding after notice to the incumbent and opportunity given him to be heard upon the question of his right.

It is not as if the prior incumbent had refused to yield the office and asserted the invalidity of Mr. Green's election ; in such case upon *quo warranto* brought, I apprehend the court might have investigated the question of the relator's eligibility.

But the prior incumbent yielded the office, and Green entered into it and had possession, and whether lawfully elected or not, he had a property in that mere possession of which he could no more be deprived by a summary order of court than of a freehold in lands. It is idle to say that he does not now show a lawful title to the office, his possession was his title, and that must suffice until lawfully dispossessed. If the courts may, for any supposed disqualification, exclude by a mere order the district attorney elected by the people, the same power certainly extends to the sheriff, and for any thing I can see, if Mr. Green may be excluded of his office, so may the attorney of the United States ; the official denomination of the two is identical ; the statutes of this territory, upon which the opinion of my associate is based, certainly govern both ; the one is as much an officer of the court as the other, and the former, quite as truly as the latter, holds his office from a power above and beyond the courts.

And if the authority which was claimed and exercised in the case of Mr. Green exists at all, it is difficult indeed to say that it does not extend to all public officers whatever ; unless those who exercise their functions beyond the precincts of the courts of law hold by some superior tenure, and this cannot be admitted.

I am of opinion that Mr. Green was unlawfully excluded from the office of district attorney, and that a peremptory mandamus ought to issue according to the prayer of the relator.

Writ denied.

THACKARAY v. HANSON.

CONTINUANCE — *affidavit must set out material facts.* If the facts set out in an affidavit for continuance are not competent in defense under the state of the pleadings, the continuance should be denied.

In an action on a promissory note, one of the defendants moved for continuance upon the ground, that an absent witness would testify that the words "president" and "secretary" had been cut from the signatures to the note. These facts were not material except to show that the note was executed on behalf of a corporation, and was not the note of the defendants. The execution of the note was not denied by plea, verified by affidavit, and therefore the evidence was not admissible, and the motion for continuance was properly overruled.

PROMISSORY NOTES — *all are negotiable.* Under our statute (Rev. Stat. ch. 1084), all promissory notes and instruments for the payment of money are negotiable, whether so expressed or not, and a note which does not contain the words "or order," is negotiable in the same manner as if it did contain those words.

PLEADING AND PROOF — *variances in description of promissory note.* A promissory note expressed to be given for cash borrowed may be described in the declaration as given for value received.

Error to Probate Court, Clear Creek County.

Mr. HUGH BUTLER and Mr. R. S. MORRISON, for plaintiff in error.

Messrs. JOHNSON & TELLER, for defendant in error.

WELLS, J. The defendant, in his affidavit for continuance, swore that he expected to show, by the absent witness, that the promissory note sued upon was executed by the witness and defendant as president and secretary respectively of a certain mining corporation, and on behalf thereof, and that after its execution, and before the commencement of the action, it had been fraudulently altered without the knowledge or consent of either witness or defendant, by cutting from the end thereof the words "president" and "secretary" appended to the signatures of witness and defendant respectively.

A continuance ought not to have been granted, unless the facts set forth by the affidavit were competent matters in

defense, under the state of pleadings. These matters cannot be said to be competent or admissible, except as tending to show that the note declared upon never was the undertaking of the defendant, for the liability of the defendant was not affected by the alteration, unless made in a material part, and there was nothing material in the words stricken from the note, unless they are to receive effect as rendering parol evidence admissible to show that the note was executed in a representative capacity, and was, therefore, the note of the principal and not of the agent. It is manifest, therefore, that the evidence to obtain which a continuance was sought, whether directed to the avoidance of the note by reason of the alteration, or to the capacity in which the defendant contracted, involves the same substantial matter of defense, that is, that the note was not the undertaking of the defendant, and in either view, the defendant having failed to verify his plea, such evidence could not be received even though the witness had been present.

What is here said will not, however, be understood as going beyond the particular case here presented, nor certainly as impairing or denying the rule that an alteration apparent on the face of the instrument must be explained in order to its admission in evidence, for, whether such apparent alteration may or may not be taken advantage of under an unsworn plea, is a question not presented by this record, the alteration alleged in this case being one which it seems to us could not be apparent upon the face of the paper.

The motion for a continuance was, therefore, properly overruled.

The note counted upon is described in the declaration as payable to the order of the plaintiff for value received; the note offered in evidence upon the trial was payable to the plaintiff without other words, and was expressed to be for cash borrowed; objection was made on the ground of variance in these respects, which objection being overruled, an exception was saved, and this decision of the court is now assigned for error.

Under the English statutes, and in most of the States of the Union, words of negotiability are requisite to give an assignable quality to commercial paper; where the law is so, such words are a material part of the note, and the instrument must, in pleading, be correctly described in this respect. Under our statute, however, all promissory notes and instruments for the payment of money are negotiable whether so expressed or not, and whether the particular instrument contains the words "or order," or equivalent words or not, its legal effect is the same as if it did contain such words. In describing such instrument, therefore, if it be declared upon as payable to the plaintiff directly, when, in fact, it is payable to his order, or, as payable to his order, when, in fact, payable to him directly, in either case there is no variance, for the contract is described according to its legal effect.

The second allegation of variance seems to be equally without foundation. It is said, in Byles on Bills, 64,* that, "though the nature or particulars of the consideration appears on the bill or note, it is not necessary to state it in the declaration, or it may be stated generally as value received."

We perceive no error in the record, and the judgment is therefore affirmed.

Affirmed.

PROMISSORY NOTES—WHAT NEGOTIABLE.—All promissory notes and instruments for the payment of money are negotiable in Colorado, whether so expressed or not, and a note which does not contain the words "or order" is negotiable in the same manner as if it did contain these words: *Cowan v. Halleck*, 9 Colo. 577.

SCHOOL DISTRICT NO. 8, JEFFERSON COUNTY, v. ERSKIN.

ATTORNEY IN FACT — *to execute appeal bond.* If authority is given by statute to the president of a school district to execute an appeal bond on behalf of the district, the district may nevertheless confer the same authority upon its secretary. A party may have several agents appointed to do the same thing.

APPEAL BOND *may be amended.* If, on appeal from a justice of the peace, the bond was executed by the secretary of the district in good faith, but without authority from the district, it was amendable. The statute (Rev. Stat. ch. 50, § 45, 407) on this subject applies to every case in which an honest effort is made to appeal the cause.

Appeal from District Court, Jefferson County.

Mr. A. H. DE FRANCE, for appellant.

No appearance for appellee.

HALLETT, C. J. Appellee brought suit against the school district before a justice of the peace, and recovered judgment, from which the latter appealed to the district court, and filed a bond, to which the name of the district was signed by the secretary thereof.

In the district court, appellee moved to dismiss the appeal upon the ground that the bond was not executed by appellant, which motion was allowed, and a motion by appellant for leave to file a good and sufficient bond was denied.

The school law (Rev. Stat. 580) provides as follows: "The president shall appear in behalf of his district in all suits brought by or against the same, but when he is individually a party this duty shall be performed by the secretary;" and probably it was thought that this conferred upon the president alone power to execute an appeal bond in behalf of the district, and that such power could not be exercised by any other person.

Under the law, school districts are simple democracies in which educational matters are managed by the electors themselves, or by a district board composed of the president, secretary and treasurer, if the electors shall so declare. With such an organization it is convenient, if not necessary, to clothe an officer with power to conduct all legal proceedings on behalf of the district, and it is reasonable to presume that the section recited was intended to supply this want. It will be observed that the president is to appear on behalf of the district, that is, as the agent of the district and obviously for the purpose of protecting the interest of his principal. While the president is thus made the agent of the district to attend to its legal controversies, we do not discover in the act any limitation upon the power of the district to act through other agencies. The appointment of the presi-

dent is made to serve the convenience and to protect the interests of the district and not to circumscribe its powers in the matter of choosing its agents. If it be granted that the president has power to appear in behalf of and conduct the causes of the district, *non constat*, that such authority is not possessed by any other person, for a principal may have several agents appointed to do the same thing. The authority of the secretary to execute the appeal bond in this case was denied upon the ground, that such authority could not be conferred upon him, which is not tenable. If he had authority to execute the bond it was binding upon the district, and before appellee could call upon the court to dismiss the appeal, the absence of authority in the secretary must have been shown at least *prima facie*. In some courts a rule obtains which requires that evidence of the authority under which an agent acts shall be filed with the instrument executed by him, but, in the absence of any such rule, courts will not assume that an agent has acted without authority from the principal until a showing is made.

Upon proper application the district court would doubtless require appellant to exhibit the authority under which the secretary acted, or the want of such authority may be shown by affidavit.

But if the bond was executed in good faith it was amendable even if the secretary had no authority from the district to sign it. The statute upon this subject is very liberal, and it applies to every case in which an honest effort is made to appeal the cause. *Patty v. Winchester*, 20 Ill. 261.

The judgment is reversed with costs, and the cause is remanded with directions to the district court to permit appellant to file a new bond, according to the prayer of its motion.

Reversed.

COFIELD v. McCLELLAN et al.

DENVER TOWN SITE — title to. When title was acquired to the town site of Denver, under the act of May 28, 1864 (13 Stat. at Large, 94), the prior act of the legislative assembly of the territory (8 Sess. 189), came into effect and governed the trustee in the disposal of lots within the town site.

By the act of congress the regulation of the details of executing the trust was entirely remitted to the territorial legislature, and it was eminently proper that in the very threshold they should fix a period within which the claim of every beneficiary should be asserted.

TERRITORIAL ACT — regulating execution of trust. The provision of the fourth section of the act of the territorial assembly, requiring claimants of land within the town site to assert their claims within ninety days after notice of the entry, was as to claims and rights existing at the date of the entry dictated by public interest and clearly within the power delegated by congress to the territorial legislature.

Every person who, in virtue of an occupancy or improvement existing at the date of the entry of the town site or prior thereto, seeks to bring in question the right of one holding by conveyance from the trustee, must show affirmatively a compliance on his part, with the requirements of the fourth section of the act of assembly, or at least must excuse his failure to comply therewith.

FAILURE TO OBSERVE — section 4 of act of assembly. Where a bill was filed against one who had obtained title, under the act of congress and of the territorial assembly, to a lot in the city of Denver, by one who claimed title to the same lot which accrued in the year 1869, to have the defendant declared a trustee for the benefit of the complainant, and it was not averred that the complainant or his grantors had filed a declaratory statement, as required by the fourth section of the act of the assembly, the relief was denied.

Appeal from District Court, Arapahoe County.

MR. ALFRED SAYRE and Mr. H. R. HUNT, for appellant.

MR. S. E. BROWNE and Mr. G. W. PURKINS, for appellee.

WELLS, J. The act for the relief of the citizens of Denver, in the territory of Colorado (13 Statute at Large, 94), authorizes the probate judge of Arapahoe county to enter certain specified lands, the site of the city, in trust for the occupants and the *bona fide* owners of improvements thereon, and declares in substance that the execution of the provisions shall be controlled by the provisions of "An act for the

relief of the citizens of towns upon lands of the United States, under certain circumstances," approved May 23, 1844. This latter act (5 Statutes at Large, 657), provides, that, upon the entry, in pursuance of its provisions, of any town site upon the public domain, the execution of the trust for the occupants therein created shall be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or territory within which the same is situated.

In pursuance of this delegation, the legislature of this territory, by the act of March 11, 1864 (Laws 1864, p. 139), had, in advance of the passage of the act of congress for the relief of the citizens of Denver, prescribed rules and regulations for the administration of the trust, in case of the entry thereafter of any town site, in pursuance of the act of congress of May 23, 1844.

There can be little question, we think, that, upon the entry of the town site of Denver (which was made in pursuance of the act of May 28, 1864), the act of the territorial legislature came into application and governed the trustee in the disposal of the lots within the town site; and, in order to the determination of this case, it is necessary, therefore, to refer to the provisions of that act.

By this act, then, it was provided that, in case of the entry of any town site under the act of congress, May 23, 1844, the corporate authorities or the probate judge making such entry should, within thirty days, give notice thereof by posting in three public places within the town, and by publication in a newspaper printed and published within the county; and by the fourth section it was provided, that "each and every person or association, or company of persons claiming to be an occupant or occupants, or to have possession, or to be entitled to the occupancy or possession of such lands, or to any lot, block, share or parcel thereof, shall, within ninety days after the first publication of such notice, in person, or by his, her or their duly authorized agent or attorney, sign a statement in writing containing an accurate description of the particular parcel or parts of land

in which he, she or they claim to have an interest and the specific right, interest or estate therein, which he, she or they claim to be entitled to receive, and deliver the same to or into the office of such corporate authorities, judge or judges; and all persons failing to deliver such statement within the time specified in this section shall be forever barred the right of claiming or recovering such lands or any interest or estate therein, or in any part, parcel or share thereof, in any court of law or equity."

By the act of congress, the regulation of the details of executing the trust was entirely remitted to the territorial legislature, and it was eminently proper that, in the very threshold, they should fix a period within which the claim of every beneficiary, or one pretending to be such, should be asserted; for, in the absence of such a limitation, neither could the trustee understandingly determine at what period he might lawfully perform the trust, and convey to an occupant the lots within his occupancy, nor could any citizen, whether before or after such conveyance, at no matter how remote a period, be confident that his title might not be clouded by assertion of an adverse claim. To have omitted such legislation would have been to encourage the prosecution, in later years, of dormant claims and possessory rights long before abandoned, and to render doubtful and uncertain all titles accruing under the trust. Such a regulation as that contained in the fourth section before quoted was, therefore, as to claims and possessory rights, existing at the date of the entry, dictated by public interest, and as to those claims and rights, was clearly within the power delegated by congress to the territorial legislature. Whether any several beneficial interests in the trust could, under any circumstances, arise subsequent to the entry, is a question upon which I have heretofore expressed my opinion in *The City of Denver v. Kent et al.*, ante, 336, decided at the present term, and the effect of this legislation upon rights not acquired or asserted to be acquired, until after the date of the entry, it is not necessary in this cause to advert to.

And, though the period fixed within which those claiming

to be entitled to share in the trust may appear to be a more limited one than a liberal policy might have dictated, yet we cannot, for this reason, declare the statute invalid ; for this, like all other questions of mere detail, was exclusively within the legislative discretion.

We are of opinion, therefore, that every person who, in virtue of an occupancy or improvement existing at the date of the entry of the town site, or prior thereto, seeks to bring in question the right of one holding by conveyance from the trustee, must show affirmatively a compliance on his part with the requirements of the fourth section of the act of the territorial legislature of March 11, 1864, or at least must excuse his failure to comply therewith. As to what state of circumstances will amount to such excuse, or whether any circumstances whatever will excuse such omission, is a question not presented by this record, and upon which, therefore, we express no opinion.

Now, in this case, the entry of the town site was made on the 6th day of May, A. D. 1865, and though there is no proof that notices of the entry were posted, as required by the act, yet we think that, in support of the subsequent proceedings of the probate judge, we ought to indulge the presumption that he performed what the law required of him in this respect. On the 11th day of August, A. D. 1865, the probate judge conveyed the premises in controversy to the defendant Louisa McClellan, who subsequently conveyed to the defendant Mary Davis.

The complainant now seeks to have this defendant declared a trustee, for his benefit, on the strength of a prior occupancy and improvement of the premises by one Preston, under whom he claims. It is averred that Preston erected a cabin upon the premises in the year 1859, and in the same year conveyed to one Hall, who, by tenants, occupied the cabin, at different times, down to about the year 1862 ; in October, 1866, Hall conveyed to Felter, and subsequently Felter to Bates, and Bates to the complainant ; in April, 1869, Felter, Bates and the complainant being, at the date

of the several conveyances to them, respectively residents of the city of Denver.

The bill which was filed on the 22d day of April, 1869, nowhere avers that Hall ever presented to the probate judge his declaratory statement required by the fourth section of the act of March 11, 1864; nor is any excuse shown for his omission so to do, or for the long delay of the complainant and those under whom he claims to assert their right.

The complainant is, therefore, not entitled to the relief prayed, and the decree of the district court dismissing the bill must be affirmed.

Affirmed.

DENVER TOWN SITE, TITLE TO.—On appeal to the United States supreme court, it was held that the bill to compel a conveyance from the defendant, to whom the probate judge had in pursuance of the statute conveyed a lot, was properly dismissed. The judgment below was affirmed: *Coffeld v. McClelland*, 16 Wall. 331. In *Tucker v. McCoy*, 3 Ohio. 286, also, it was held that a failure to file the statement within the time prescribed would operate to forever bar the right of the claimant, both at law and in equity.

CLEAR CREEK, COLORADO, GOLD AND SILVER MINING COMPANY et al. v. ROOT et al.

PRACTICE—assigning errors. Errors should be assigned with such particularity as to give information of the objections to the record upon which the plaintiff intends to rely.

PRACTICE in cases of mechanic's lien. In cases arising under the act relating to mechanic's liens (Rev. Stat., ch. 54, 427) the chancery practice is to be observed.

PRACTICE—evidence to support bill confessed. Upon bill confessed, the court may proceed to a decree, with or without evidence, to support the bill, and this rule is applicable to lien cases.

INTEREST on demand secured by lien. A debtor may agree to pay interest on a demand secured by mechanic's lien as well as upon any other, and, whatever its effect among creditors, the debtor cannot object to pay the interest.

PLEADING AND PROOF—decree must not exceed demand in bill. A decree cannot be entered for more than is claimed in the bill.

SERVICE BY PUBLICATION—what evidence sufficient. Where the decree recites this there was notice by publication, and the record is not complete, the decree will not be reversed because the certificate of publication is not found in the record.

TIME TO REDEMPTION—discretionary. Where the court has allowed ninety days before sale in which the premises may be redeemed, the decree will not be disturbed on that account.

Error to District Court, Clear Creek County.

Mr. L. C. ROCKWELL, for plaintiff in error.

Mr. WILLARD TELLER, for defendant in error.

HALLETT, C. J. The sufficiency of the petition, and the extent of the premises subjected to the lien, are not questioned by the assignment of errors, and although allusion has been made to those questions in the argument, we shall not consider them. The first, second and third causes of error are upon the sufficiency or the want of evidence to support the decree. The fourth cause appeals to the service of process, and the sixth to the time allowed for payment of the sums found due. The only assignment upon which other objections to the record can be founded, is the fifth, and this is substantially *quod in omnibus erratum est*, and bad according to Bacon's Abridgment.

To say that the decree is contrary to law, equity and good conscience, without specifying in what particular, serves no practical purpose. The plaintiff in error might as well refuse to state his objection as state it in such general terms, and, if such practice were allowed, defendants in error would never know, in advance of the argument, what points were in issue. Errors should be assigned with such particularity as to give information of the objections to the record upon which the plaintiff intends to rely.

By the twenty-third section of the chapter of the Revised Statutes relating to liens, it is provided, that in proceedings under the act courts are vested with all the powers of courts of chancery, and shall be governed by the rules of proceeding and decision in those courts, so far as those rules of proceeding and decision are applicable to cases and questions presented for adjudication and decision under the act.

With propriety, this has been regarded as establishing the chancery practice in cases of this kind, subject, of course, to such modifications as are provided by the act relating to liens. *Sutherland et al. v. Ryerson et al.*, 24 Ill. 517.

The nineteenth section of the act relating to chancery

practice has been held to confer upon the court power to proceed to a decree, upon bill confessed, with or without evidence to support the bill, as the court shall, in its discretion, deem best. *Stevens v. Bicknell*, 27 Ill. 444.

It is contended that a different rule should be applied to lien cases, but we do not discover any ground for doing so. The rule in question is quite as applicable to this proceeding as any other rule of chancery practice, and it is therefore precisely within the terms of section 23 of the act relating to liens. The bill in this case having been taken as confessed by plaintiffs in error, the want of evidence to support it is no ground for reversal.

Another question arises as to the amounts of money awarded to defendants in error respectively by the court below, which, it is said, exceed the demands of the bill. It appears that a portion of Root's demand was secured by promissory note, bearing interest at the rate of two per cent per month after maturity, and as this contract for interest was within the provisions of the statute upon that subject, we see no objection to its allowance. Surely a debtor may agree to pay interest upon a demand secured by mechanics' lien as well as upon any other.

Perhaps a question might arise among creditors or subsequent incumbrancers as to the effect of an agreement by the debtor to pay interest, by which the demand of one creditor would be increased to the prejudice of another. But no such question is presented in this case, as we are confident that the debtor himself cannot rely upon such an objection. It may be well to notice, in this connection, that the Franklin Silver Mining Company, one of the plaintiffs in error, has not disclosed any connection with the property mentioned in the bill, or shown any right to complain of the amount of the demands of defendants in error. We do not perceive that the amount adjudged to Root exceeds the claim made by the bill, for it is no more than the note with interest, and the account which was not included in the note added. But Waterman claims in the bill \$168.42, and the decree in his favor is for \$192. There was no agreement to pay interest

to him, nor was there any settlement of the account upon which such an agreement could have been implied. In so far, then, as the decree exceeds the demand stated in the bill it is erroneous and must be modified.

The next question in the order in which they are presented by the assignment of errors relates to the service of process, which, we think, was not deficient, or, at all events, no deficiency was shown. The Franklin Company appeared voluntarily in the court below, and, as to the other, the decree shows that there was notice by publication. Perhaps this would not be sufficient, without the certificate of publication itself, if the record was full and complete. But the certificate of the clerk does not show this to be a full and complete record, and we will, therefore, presume that the court below acted upon sufficient evidence of the notice by publication.

As to the last point, it was within the discretion of the court to fix the time for the payment of the sums found due to defendants in error, although it has been held that the time ought not to be less than the life of an execution upon a judgment at law. This period was allowed in this case, and there appears to be no reason for questioning the correctness of the decree in this respect.

The decree is reversed, with costs, and the cause is remanded, with directions to the court below to enter a decree according to the view here expressed. *Reversed.*

MECHANICS' LIENS — EQUITY PRACTICE. — Statutory proceedings to enforce mechanics' liens are in their nature equitable, and prior to the code practice were, as is held in the principal case, administered by the chancery side of the court, and governed by the chancery rules of practice; *San Juan & St. L. M. & S. Co. v. Colo.* 221.

CODY v. BUTTERFIELD.

CONTINUANCE to obtain testimony of absent witnesses. A party seeking a continuance to obtain the testimony of absent witnesses must, in his affidavit, set forth the facts to be proven with such particularity that the opposite party may, if he see fit, admit them and proceed to trial.

Action upon a promissory note; defense, that note was given for the carriage of certain goods which were damaged *in transitu* through the negligence and carelessness of the carrier. Affidavit for continuance to obtain testi-

mony of absent witnesses did not set forth to what extent the goods were injured, nor that the defendant could show, by these or other witnesses, the amount of the damage occasioned by the alleged negligence of the plaintiff, nor what the amount of this damage was. *Held*, that the continuance was properly denied.

The party seeking a continuance ought to make it appear affirmatively to the court, not only that, upon a possible or supposable state of facts, the testimony may become important, but that, upon the facts as they are, it is and will be so.

CONTINUANCE — *diligence in obtaining depositions.* Where the issues were made up in February, 1868, and application for continuance in June, 1869, and the defendant made no effort to obtain the testimony of absent witnesses until some three months before the sitting of the court, there was not sufficient diligence.

The matter of diligence in obtaining testimony discussed.

PRACTICE — *ground of objection to testimony should be stated.* If the nature of an objection to testimony is such that, by the production of further testimony, the evidence objected to is susceptible of being made admissible, the particular ground of objection must be stated, and, if it is not stated, a court of review ought to regard the evidence as properly admitted.

In an action upon a promissory note against a woman, it appeared that she was married previous to the execution of the note, and it did not appear that the note was executed in or about the sole trade or business of defendant, or in relation to her separate estate; and it was urged in this court that, upon these facts, a presumption arises that the marriage existed at the time of the execution of the note, and that the burden of showing that the note was given in relation to the separate business or estate rested upon the plaintiff. These objections, not having been made in the court below cannot be urged here.

EVIDENCE OF PAROL ASSIGNMENT *in action by one to use of others.* In an action upon a promissory note, brought by one for the use of others, it is not necessary at the trial to prove a parol assignment of the note to the persons to whose use the suit is prosecuted.

Appeal from District Court, Gilpin County.

Messrs. JOHNSON & TELLER, for appellant.

Mr. HUGH BUTLER, for appellee.

WELLS, J. This was an action of assumpsit commenced in the Arapahoe district court; the venue was afterward changed to the Gilpin district court, where a trial was had and judgment given for the plaintiff.

The plaintiff below, in several counts, declared upon a promissory note, purporting to have been executed to him

by the defendant by one Elijah Cody, her agent. The defendant pleaded the general issue, without verification and payment *post diem*. The cause was put at issue on the 20th day of February, A. D. 1868.

On the 3d day of June, A. D. 1869, and at the May term in that year of the Gilpin district court, the defendant moved for a continuance, upon her own affidavit of the absence of certain witnesses, the material portions of which are hereafter set forth ; this motion the court overruled.

On the trial the plaintiff produced a note corresponding to that described in the declaration, and proved that the signature thereto was in the handwriting of Elijah Cody. That, from 1861 to 1866, Elijah Cody resided in Denver, and was the agent of plaintiff, who was engaged in the sale of millinery and dry goods ; that, in 1865, defendant had accounts with different banking houses in Denver ; that Elijah Cody generally made the deposits which went to the credit of these accounts, and defendant generally checked against them ; that Elijah Cody attended to defendant's affairs during the periods of her absence, when engaged in the purchase of goods, that he was about defendant's store both then and at other times ; one witness spoke of this relation of the parties as existing from 1861 to 1866, and upon cross-examination, testified that Elijah Cody was the husband of defendant (though at what time, was not expressly stated), and that they resided together. It was further proven that Elijah Cody died at some time prior to the trial, though the date of his decease was not shown.

Upon this evidence, the defendant prayed instructions, substantially as follows : 1st. There is not sufficient evidence in the case to enable plaintiff to recover. 2d. There is no evidence that any of the plaintiffs for whose use this suit is brought have any interest in the note offered in evidence, and unless such interest is shown, they cannot recover in this action. 3d. If defendant, at the time of giving the note offered in evidence, was a married woman, the plaintiffs ought to have sued her husband with her, and unless the jury believe, from the evidence, that her husband

was dead at the time of the bringing of this suit, they must find for defendant.

All the instructions were refused ; a verdict was found for the plaintiff and judgment given thereon.

Appellant now assigns for error, among other things: 1st. That the court overruled her motion for a continuance. 2d. That the court erred in refusing the instructions prayed by her counsel. 3d. That the verdict is against the evidence and the damages excessive. 4th. That the court gave judgment upon the verdict, and such judgment is against the law and evidence.

We think the defendant's motion for a continuance was properly overruled.

The affidavit, upon which this application was based sets forth, that defendant could not safely proceed to a trial, on account of the absence of two witnesses named ; that she expected to prove by said witnesses that the claim sued on in this case was for a sum of money alleged to be due for freight upon certain goods freighted by plaintiffs for defendant ; that the witnesses were present at the time the goods were received and assisted in unpacking them and observed their condition, and that said goods were badly damaged by having become wet, and by rough and improper handling on the part of said plaintiffs and their employees, and that defendant had no other witness, etc.

We think the facts intended to be proven by the absent witnesses were not set forth with sufficient particularity ; the rule is, that the party seeking a continuance for the absence of testimony must, in his affidavit, set forth the facts to be proven with such particularity that the opposite party may, if he see fit, admit them and proceed to trial. *McBain v. Enloe*, 13 Ill. 76.

This is an alternative to which the opposite party is entitled, and he ought to have precise information as to the matters upon which he is to make his election.

Now, in the affidavit, it is not alleged to what extent the goods were injured, nor that defendants could show, by these or other witnesses, the amount of the damages occa-

sioned by the alleged negligence of the plaintiff, nor what the amount of this damage in fact was, but the only allegation is, that the goods were "badly damaged," and if the witnesses had been present, testifying to this and every other fact set forth in the affidavit as to be proven by them, their testimony, of itself, and without other facts shown, could not have either barred the action or mitigated the damages. Not only would it not have been material, but, upon motion, must have been stricken out.

It may be said that the testimony of the particular witness is none the less material to defendant's case, because not sufficient to establish it as a whole; but it was said in *Baily v. Hardy*, 12 Ill. 459, that "where testimony is important only in connection with certain facts, those facts should be set forth or referred to, so that the materiality of the evidence may be apparent to the court. The court is not to presume that a state of facts may arise which may render the testimony important."

We think this decision ought to be adhered to in our courts; the party seeking a continuance ought to make it appear affirmatively to the court not only that, upon a possible or supposable state of facts, the testimony may become important, but that, upon the facts as they are, it is and will be so.

Upon the question whether the affidavit shows diligence in the efforts made to procure the testimony of these witnesses, we are of the opinion that it does not. The pleadings in this case were brought to an issue on the 29th day of February, 1868. This application for a continuance was interposed on the 10th day of June, A. D. 1869. The affidavit shows that Welch, one of the witnesses, resided at Salt Lake City, in the the territory of Utah, and had resided there for several months then last past; that in February, previous to her making application for continuance, defendant furnished her counsel with the facts to be proven by him and his place of residence; that, as early as April, a comission issued to a commissioner in Salt Lake city to take the deposition of Welch; that said commission was indorsed

with the request that, if not called for in ten days, it might be returned to defendant's attorneys; that the deposition had not been returned to the court nor to defendant's attorneys, and that she expected to procure the attendance of Welch, or his deposition, at the next term of the court; that the other witness, Mrs. Anderson Orr, then resided at Council Bluffs, in the State of Iowa; that she had formerly resided at Central City, Colorado; that deponent went east in February preceding; that Mrs. Orr was then still a resident of Central City; that deponent had returned from her absence only a few weeks previous to making her affidavit, and had obtained no knowledge of Mrs. Orr's departure until within a few days; that, at the time of defendant's departure for the east, she had no knowledge of any intention on the part of Mrs. Orr to leave the territory, and that sufficient time had not elapsed, since hearing of her departure, to procure her deposition.

We think as to neither of these witnesses was there such a degree of diligence shown as ought to be exerted in a case so long pending and at issue as this had been.

The witness Welch had resided in Utah for several months, and, for any thing that appears, he may have resided there at the time of the commencement of this suit, and always afterward, the defendant being at the time aware of his place of residence; and if, with this cause pending and at issue, she saw fit to defer preparation until within some three months of the sitting of the court and to assume in the mean time the risk of the witnesses' removal or temporary absence, and the delays and uncertainties of communication, she ought now to endure the event with the same equanimity with which, in this game against fortune, she accepted the hazard. Nor was it diligence after this long delay to rest until June in reliance upon the one commission issued in April; after the lapse of a reasonable time for the return of the commission some effort ought to have been put forth to ascertain its whereabouts or to procure another.

As to the witness, Mrs. Orr, there is no sufficient excuse

shown, we think, for the omission to serve her with a subpoena, nor is it anywhere alleged that the defendant expected to procure her testimony at any time in the future.

Under the remaining assignments of error it is insisted by counsel that it is shown that defendant was, at some time prior to the trial, a married woman ; that, by fair inference upon the testimony, the coverture existed at the time of making the note upon which recovery was had ; that the note sued upon was not shown to have been executed in or about the sole trade or business of defendant or in relation to her separate estate ; that the statute has repealed the common law only in relation to those contracts, into which the married woman is expressly permitted to enter ; that the burden of establishing that in the execution of the note in question, the defendant was acting within the statute rested upon the plaintiff ; that this was not established and that therefore the judgment is not supported by the evidence.

We apprehend that the propositions of law maintained by counsel are supported by authority, and certainly they rest upon the soundest reasons ; but we think that, admitting the effect of the testimony to be as contended, the defendant cannot now be heard to make these objections : 1st. The plaintiff declared specially upon the writing offered in evidence and under which the recovery was had and the defendant's plea was not verified. The statute of this territory provides that no person shall be permitted to deny on trial the execution of any instrument of writing, whether sealed or not, upon which any action may have been brought, unless the person denying the same shall, if defendant, verify his plea by affidavit. R. S., ch. 70, § 14.

I understand that under this statute a defendant, sued upon a written instrument, must swear his plea, not only in cases where he proposes to deny the mere act of subscribing the instrument, but also in cases where, while the subscription in fact is admitted, it is proposed to assert that for any reason the writing was not the act of the party in such sense as to be a binding and obligatory contract ; as, for example, where the defense is that at the time of subscribing the in-

strument the defendant was drunk or insane, or *non compos*, or that he was imposed upon, and subscribed under the belief and understanding that the instrument was other and different from what it in fact was, or that the instrument was never delivered, or that for any other reason the defendant did not assent to the instrument in such sense as to execute it within the meaning of the law.

When the legislature adopt technical words in prescribing rules of practice for courts of record, their language must, I apprehend, be received in a technical sense; the word "execution," in the statute, must be understood, therefore, as meaning, not the mere subscription of the parties' name, but the subscription of the name to the instrument, with a knowledge of its contents, or with such opportunity and deliberation that the law implies knowledge, with intent to be bound thereby, and with capacity to exercise that intent; nothing less than this is, in law, an execution of an instrument in writing; and if the party sought to be charged proposes to assert that, for the absence of any of these elements, the instrument is not his act, he must verify his plea; in these positions, however, the other members of the court disagree with me.

Second: The bill of exceptions shows that, after the reception of the parol testimony recited in this opinion, the plaintiff below offered to read to the jury the promissory note, about which the witnesses had testified, and that the defendant objected thereto; but it nowhere appears what ground or reason was assigned for this objection, or that any reason whatever was assigned.

If the objection, which is now alleged against the sufficiency of the evidence, had been then stated, the plaintiff's counsel might have, perhaps, supplemented the alleged deficiencies in the proofs; opportunity would have, at least, been afforded to produce the evidence, for the absence of which error is now assigned; and if the defendant desired to insist that the proper preliminary proofs had not been made, it was her duty to have then asserted it.

When, upon trial, objection is made to the admission of

testimony, and the nature of the objection is such that, by the production of further testimony, the evidence objected to is susceptible of being made admissible, the particular ground of objection must be stated, and if it is not stated, a court of review ought to regard the evidence as properly admitted. We are all of the opinion, therefore, that the promissory note offered in evidence upon the trial was, for the reason last mentioned, properly admitted, and the defendant cannot be heard to say, in this court, that the person assuming to act as her agent was not lawfully authorized, or that it was not shown to have been executed in a case within her legal capacity, or that, for any other reason, the proofs connecting her with the instrument were insufficient.

We see no error in the assessment of damages, nor in the omission to prove the parol transfer of the note to the beneficiaries named in the declaration; it need not have been alleged; and being unnecessary to allege, is certainly not necessary to be proven. The judgment of the district court is affirmed, with costs.

Affirmed.

CONTINUANCE TO OBTAIN TESTIMONY: *Glenn v. Brush*, 3 Colo. 31. Objections to admission which may be obviated by introduction of further testimony must be distinctly presented at the time the objectionable testimony is offered (*McCrane v. Welch*, 2 Colo. 290; *Covett v. Colorado Springs Co.*, 3 Colo. 87; *Tracy v. People*, 6 Colo. 135); but where evidence is clearly incompetent a general objection will be sufficient: *Webber v. Emerson*, 3 Colo. 252.

IN ACTION FOR ANOTHER'S USE It is unnecessary to allege the use, or if alleged, to prove it: *Patton v. Coch & Ten Broeke C. M. Co.*, 3 Colo. 269; *Board of Commissioners v. Sloan*, 5 Colo. 38.

WATSON v. HAHN.

MEASURE OF DAMAGES—*on promissory note.* In action against indorser of a promissory note, judgment having been obtained against the maker the amount of the judgment, with interest, is the measure of damages unless the indorser show that the recovery was wrongful.

EVIDENCE—*by parol of contents of record.* Parol evidence is not admissible to prove the amount of a judgment or the cause of action upon which it was recovered. The record or a transcript therefrom must be produced.

WITHDRAWING DEMURRER—*what shall be regarded as.* If, upon overruling demurrer to declaration, an order is made at the instance of the plaintiff requiring the defendant to plead, although the defendant fail to object, he shall not be regarded as withdrawing his demurrer and submitting to the rule.

JUDGMENT UPON DEMURRER—*sufficiency.* Where two demurrers to the declaration were on file, and the judgment of the court refers to the said de-

murrer, without specifying which of them, it will be presumed that the court passed upon both of them.

A judgment upon demurrer that the same be overruled, although informal, will be sustained.

COMMON-LAW FORMS — *should be observed.* The common-law forms of entries cannot be abandoned without danger to the rights of parties and it is much to be regretted that clerks are not more familiar with them.

WAIVER — *of joinder in demurrer.* If a party proceed to argue a demurrer without joining in demurrer, he cannot complain of the omission.

ASSIGNOR OF PROMISSORY NOTE — *liability of.* To charge the assignor of a note suit must be instituted against the maker, at the first term of any court having jurisdiction of the amount, and prosecuted with reasonable diligence to judgment, and the property of the maker, so far as found, must be subjected to the judgment.

Under the statute of this territory the assignor of a promissory note cannot be made liable to the assignee upon notice of dishonor by the maker merely.

DILIGENCE — *in prosecuting maker of the note.* If the holder of a note obtain judgment by confession of the maker, soon after the maturity of the note, and stay execution thereof, the court will not consider whether execution was obtained as soon as it could have been obtained in the due course of law. In such case the stay of execution is made at the peril of him who grants it.

Delay of seventy days after judgment in obtaining execution is not due diligence.

DILIGENCE AGAINST MAKER — *what will discharge assignor.* Lack of diligence in prosecuting the maker of a note will not discharge the assignor, unless it has been prejudicial to him.

As a judgment is a lien upon real estate for one year after rendition, and longer, if execution is obtained within the year, execution issued seventy days after judgment may be sufficient to secure the real estate of the maker.

But execution is necessary to secure the personal property of the maker, and if there was delay in issuing execution, in order to show that such delay was not prejudicial to the assignor, it should be averred that all the personalty of the maker was ultimately secured, or that he had no such estate at the time judgment was entered.

Appeal from District Court, Gilpin County.

L. C. ROCKWELL, for appellant.

S. B. HAHN, *pro se.*

HALLETT, C. J. There are five special counts in the declaration and the common counts. A demurrer to the special counts was confessed by appellee as to the first

count, and by leave of court he amended that count and filed another special count, which I shall call the sixth. A demurrer was interposed to the first count as amended, and the sixth count, and subsequently the first demurrer, remaining undetermined as to the second, third, fourth and fifth counts, and this last demurrer pending, the court made the following order:

“At this day came the said parties by their attorneys aforesaid, and the demurrer of the said defendant to plaintiff’s declaration coming on to be heard, was argued by counsel, and the court being fully advised in the matter, and mature deliberation thereon had, is of the opinion that the said demurrer be overruled. Thereupon, on motion of plaintiff, it is ordered by the court that the defendant in this cause plead by the first day of February next.”

At the next term of the court, which occurred after the time limited in this order for pleading, no plea having been filed, appellee discontinued his action upon the common counts and took judgment *nil dicit* upon the special count, and the damages were assessed by a jury in open court. Upon the assessment of damages, appellant took a bill of exceptions which contains the testimony given upon that occasion, and upon another day of the term he moved to set aside the assessment of damages, but the court refused to do it, and he excepted.

Error has been assigned upon this refusal of the court to set aside the assessment of damages, and we think that appellant has the right to be heard in this court upon that point. *Chicago & R. I. R. Co. v. Ward*, 16 Ill. 522.

In explanation of the evidence given upon the assessment of damages, it is necessary to remark that, in the first and second counts of the declaration, appellant is charged as indorser of a promissory note, and it is averred that judgment was obtained upon the note by appellee against the maker. Upon the hearing before the jury, a witness testified that he had computed the amount due upon the judgment mentioned in the declaration and found it to be \$1,672.84, which is the amount for which the jury returned

their verdict. This was all the evidence before the jury, and as there is no other judgment mentioned in the declaration than that obtained by appellee against the maker of the note, the evidence must be taken as referring to that judgment. It is laid down in *Corgan v. Frew*, 39 Ill. 31, that, in an action against the indorser of a note, judgment having been obtained against the maker, the measure of damages is the amount of the judgment against the maker, and the accruing interest and the costs if unpaid. And this must be the correct rule, for the note being merged in the judgment, at least so far as the maker is concerned, the assignor can have no remedy over against the maker unless he be subrogated to the rights of the assignee in the judgment. Again, if the maker should reduce the recovery against him by set-off, payment or otherwise, the assignor ought to have the benefit of such reduction. As, however, the assignor is not a party to the suit between the assignee and maker, it may be difficult to say that he would at all events be bound by the recovery in that suit. But it will be sufficient for our present purpose to say that the judgment against the maker, with interest, will furnish the amount of damages unless the assignor shows that the recovery was wrongful, leaving the question of his right to contest the amount of the judgment to be determined when it is presented. But if the amount of the judgment against the maker, less the payments made upon it, is the measure of damages, it certainly cannot be established by parol testimony. The rule which requires the best evidence to be produced makes it necessary to produce the record of the judgment or a transcript from the record, not only for the purpose of showing the amount of the judgment, but also that the judgment was in fact recovered upon the promissory note, which is the foundation of the action against the assignor. We think, therefore, that there was error in the assessment of the damages, and the judgment must be reversed for that reason.

And this makes it necessary to examine the whole record, for, while it is true that, if we could maintain this judg-

ment upon any count of the declaration, we should be relieved from consideration of the other counts, yet, as we have not been able to sustain the judgment, we must look into the ruling of the court upon the demurrer, which leads to an examination of the whole declaration. A preliminary question is, however, presented as to the effect of the order upon appellant to plead, made at the time the demurrers were overruled. It is said that appellant submitted to this order or assented to it, and, in so doing, waived his demurrers to the declaration. It is well settled that, if a party plead after his demurrer is overruled, he thereby waives his demurrer, and cannot afterward rely upon it. And probably cases may be found in which it has been held that the same result is attained by a formal application on the part of the demurrant for leave to plead after his demurrer has been passed upon. But it will be observed that in this case the order to plead was made at the instance of appellee. And although appellant was present, and it does not appear that he objected to the order, we think that this is not sufficient to show an intention on his part to abandon his demurrer. To change the character of the defense and substitute an issue of fact for one of law required some act or word on the part of appellant indicative of his intention to make such change. When the order was made he could have done no more than protest against it, and record his protest in the form of a bill of exceptions. To hold that he must have done this in order to prevent the inference that he assented to the order would be to say that he must have protested against any change of the issue, in order to maintain it as it was. This would be preposterous. When a party has taken issue upon a declaration he must be allowed to maintain it until he voluntarily abandons it. Another preliminary question arises upon the form and language of the order of the court above recited. It cannot be contended that this is a formal judgment upon demurrer, and yet we think that, in support of the proceedings of a court of general jurisdiction, we must give it the effect of such a judgment. There is sufficient in the order to show that the court

passed upon a demurrer, and as it was the duty of counsel to submit all issues proper for the consideration of the court, and then ripe for hearing, we must presume that this was done. Indeed, as the order contains no reference to either demurrer specifically, we must apply it to both of them, in order to give effect to it. The common-law forms of entries cannot be abandoned without danger to the rights of parties, and it is much to be regretted that clerks of courts are not more familiar with them. It is hoped that counsel and judges of courts of original jurisdiction will make an effort to relieve us of the perplexities, often recurring, of such records as this.

Upon the point that there was no joinder in demurrer, we have only to say that appellant, having submitted the demurrers to the court, cannot now complain of the omission. *Parker v. Palmer*, 22 Ill. 489. From these questions of practice we pass to the weightier matter of the law governing appellant's liability as assignor of a promissory note. In the seventh section of the act relating to bills of exchange and promissory notes, it is provided that the assignor of a note shall be liable upon it, if the assignee, by suit against the maker, shall use diligence in collecting it, but such diligence is excused, if at the maturity of the paper it would be unavailing. This statute was borrowed from the State of Illinois, in which State it has received judicial interpretation.

In Indiana, also, the maker of a note must be prosecuted to insolvency before recourse can be had to the indorser, and there are many valuable decisions in the reports of that State upon points arising under our statute. It seems that in order to charge the assignor of a note, suit must be instituted against the maker at the first term of any court having jurisdiction of the amount and prosecuted with reasonable diligence to judgment, and the property of the maker, so far as found, must be subjected to the payment of the judgment. *Bestor v. Walker*, 4 Gil. 9; *Nixon v. Weyhrich*, 20 Ill. 600.

In this case the note became due on the 8th of March and on the 22d of that month, and before any term of court in which judgment could have been obtained, Eman-

nel, the maker of the note, confessed judgment upon it in the district court of Gilpin county, in favor of appellee. In the first count of the declaration it is alleged that, by agreement with Emanuel, execution of the judgment was staid until the first day of June, after the judgment was entered, and in both the first and second counts it appears that execution was not in fact issued until that day.

No laches can be imputed to appellee in respect to the time in which judgment was obtained, but the question arises whether there was diligence in obtaining execution of the judgment. And upon this point it can make no difference whether execution was staid by agreement with Emanuel or not. Appellee was not bound to accept the terms upon which Emanuel confessed judgment. He was at liberty to commence suit in the ordinary way, and if he prosecuted his suit diligently he could not be prejudiced by the laws delay. Nor can we enter into a calculation of chances to ascertain whether execution was obtained as soon as it might have been obtained in the ordinary course of proceeding. We have no means of determining such a question, and if we had, the statute gives no authority for doing it. The statute enjoined diligence in the prosecution of the suit, and if appellee granted a stay of execution, he did so at his peril. In *Rives v. Kumber*, 27 Ill. 291, a delay of sixty days in issuing execution upon a judgment against the maker of a note was held sufficient, if unexplained, to discharge the assignor. In *Spears v. Clark*, 7 Blackf. 283, a delay of thirty days was attended with the same result. Upon subsequent proceedings in this cause, however, it appeared that the *fi. fa.* was issued within fourteen days from the adjournment of the court in which judgment was obtained; this was regarded as sufficient diligence. *Spears v. Clark*, 3 Ind. 297. In this opinion the Indiana authorities are reviewed, and it seems that a delay of thirty days, after the adjournment of the court, in issuing execution against the maker of a note has not been sanctioned in that State. In the case at bar, as we have seen, execution was delayed from March 22d to June 1st, a period of seventy days, and this,

according to the authorities cited, is not due diligence. But lack of diligence on the part of the assignee does not discharge the assignor unless it has been prejudicial to him. The statute requires diligence for the purpose of subjecting the property of the maker to the payment of the note, and if this is accomplished the assignor cannot complain that it was not done as speedily as possible. To this effect are the cases cited, and all others that we have seen, and this is the spirit and intent of the law. As we have seen, judgment was obtained against Emanuel, the maker of the note, in due time, and from the time it was entered by a law of the territory it became a lien upon his real estate, for one year at least, and longer if execution should be issued within one year. Therefore, execution issued seventy days after the judgment was entered was as effectual to secure the real estate of Emanuel as if issued at an earlier day. Upon this point we refer to what is said *arguendo* in *Bank U. S. v. Tyler*, 4 Peters, 366.

Therefore, as to the real property of Emanuel, delay in execution could not work injury to appellant. Not so, however, as to the personal estate. To secure that an execution was necessary, and to excuse the delay in issuing it, or rather to show that such delay was not prejudicial to appellant, the declaration should show that all the personalty of Emanuel was ultimately secured, or that he had no such estate at the time judgment was obtained. In this respect the first count is defective. It is averred that Emanuel neither owned or possessed any personal property "liable to be taken in execution," but the pleader neglected to state the time to which this allegation refers. The averment, "that he obtained judgment as aforesaid against said Emanuel, at the earliest time in his power, thereby securing all the property of said Emanuel in said county," is argumentative and otherwise obnoxious to the rules of good pleading.

In the second count it is alleged "that the said Emanuel never had any goods or chattels liable to be taken in execution after the maturity of said note," and this, we think, is substantially good. As we have seen, the judgment, with

the executions issued upon it, was sufficient to subject the real property of Emanuel to the payment of the note, and if he had no personal estate the greatest diligence must have been fruitless. While, therefore, we think that the demurrer ought to have been sustained to the first count, we support the ruling of the district court as to the second, and this we infer, from the tenor of the discussion at the bar, is sufficient to determine the rights of these parties. Before passing from these counts we wish to say that, if appellant desired to object to the immaterial matter incorporated in them, there could be no objection to his doing so; but to bring the matter properly before the court he should, in framing his demurrer, have avoided the faults of his adversary.

In the third and fourth counts of the declaration appellee relied upon a promise made in consideration of forbearance to sue. We have given no attention to these counts, as they do not appear to have been relied upon. The fifth count charges liability as indorser, according to the *lex mercatoria* as it exists in some of the States, by which an indorser becomes liable upon notice of dishonor by the maker. It is hardly necessary to say that under our statute no such liability exists. The sixth count is framed upon that clause of the statute which relieves the assignee from pursuing the maker of a note, when such pursuit would be unavailing. As it conforms to the statute, we do not perceive any objection to it. Our conclusion is, that the district court erred in overruling the demurrer to the first and fifth counts, and for this and the error in assessing damages the judgment must be reversed with costs, and the cause remanded.

Reversed.

LEIS v. HODGSON.

COSTS — *not allowed when amount due has been tendered before suit.* Where the jury find that, before suit brought, the amount found to be due the plaintiff was tendered to him, he cannot recover costs.

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Error to District Court, Weld County.

Messrs. BROWNE & MECHLING, for plaintiff in error.

Mr. E. L. SMITH, for defendant in error.

Per CURIAM. This was an action in trespass for killing sheep. The trial was had by jury, who found verdict for the plaintiff for the sum of \$10, and further found, that, before the bringing of the suit, the defendant had tendered to the plaintiff the sum of \$10, in payment of the damages done by him. On this verdict the court entered judgment for the plaintiff for the sum of \$10, together with his costs, charges, etc. This judgment, so far as it relates to costs, cannot be sustained.

Section 32, Revised Statutes of Colorado, p. 511, provides: "In all cases where a tender shall be made, and full payment offered, * * and the party to whom such tender shall be made doth refuse the same, and yet, afterward, will sue for the debt or goods so tendered, he shall not recover any costs." It is claimed by the appellee, inasmuch as no motion was made for a new trial before the writ of error was sued out, this court cannot review the judgment. There is nothing in this point. The verdict was regular. A motion for a new trial precedes the entering of the judgment, and cannot well follow it. Besides, there would be nothing to require a new trial. The error is not in the trial, but in the character of the judgment. This cause is remanded, with directions to the court below to vacate so much of said judgment as assesses costs against the defendant below. It is ordered that the appellee pay the cost.

Reversed.

TIGER v. LINCOLN et al.

NEW TRIAL — *sufficiency of evidence to support finding.* In determining the relative credit to be given to the testimony of conflicting witnesses, so much consideration is due to the manner and bearing of each under exam

ination, and their apparent intelligence and candor, or prejudice, that a court of review, to which all these things are hidden, ought not lightly to reject the opinion of either court or jury, before whom the witnesses for both parties have been subjected to examination and cross-examination.

Where a witness for the plaintiff testified that the defendant purchased goods of the plaintiff, and the defendant denied that he had made such purchase, and the court found the issue for the plaintiff, such finding will not be set aside for insufficient testimony.

Where, however, the finding is unsupported as to a portion of the damages assessed, the judgment will be reversed and the cause remanded, with directions to the court below to enter judgment for the proper sum.

AGENT — *who is charged as principal must show previous authority.* In an action against T. to recover the price and value of certain goods alleged to have been purchased by him, the defendant alleged that he purchased the goods for B., and as his agent; but there was nothing to show that B. had given to T. authority to purchase such goods. *Held*, that the defense was not made out.

NONJOINDER of defendants must be pleaded in abatement. Nonjoinder of defendants is never a bar but only matter in abatement.

RELEASE OF DEFENDANT by accepting third party. In an action for the price and value of goods, the defendant alleged that he purchased the goods as agent for B., and it appeared that some time after the purchase was made plaintiffs rendered an account to B. in which he was charged with the balance of defendant's bill, for which action was brought. There being no evidence to show that plaintiffs agreed to accept B. as their debtor, or that B. agreed to pay the debt, the defendant was not thereby discharged.

Appeal from Probate Court, Arapahoe County.

At the trial Alonzo Huxley testified: That he was present at a conversation between the defendant and Mahar, at what is now the place of business of Strickler and Mahar, formerly Lincoln & Strickler. The conversation was in relation to a bill of goods. He, the defendant, admitted the buying of \$473 worth of goods on his personal account.

On cross-examination the witness stated: The defendant did not claim that he had paid any part of the money on these goods, nor that any thing had been paid on them. He claimed that he paid \$200 on account of Bigelow, or on the Bigelow account. What his statements were I do not remember; I could not swear that he did, or did not, claim that the goods were sold to Bigelow. He claimed that the amount due was the debt of Bigelow; He admitted he had

an account there; He claimed these goods were bought for Bigelow.

Re-direct: He said he had bought the goods individually; can't recollect whether he admitted that he owed the amount of the bill or not; Tiger claimed that the goods were bought for Bigelow; the exact amount I do not remember; I do not know that Tiger denied the debt at all; He admitted that he owed for the goods; He also admitted that they had not been paid for; He claimed that he bought the goods for Bigelow; I was present at but one conversation.

Con. J. Mahar testified: I have had a conversation with the defendant in reference to the account sued on in this cause; the defendant agreed to send the money back from Pueblo to pay for the goods mentioned in that account; this was at the time of the sale of the goods; he came back afterward and said he had sold out to Bigelow, and that he wished us (Lincoln & Strickler) to send our bill to Bigelow and try and get our pay for the goods from him (Bigelow). Bigelow had an account with us (Lincoln & Strickler) at the time these goods were sold. I have always understood that Bigelow and Tiger were partners. Peter Tiger came there to Lincoln & Strickler in May, 1868, and bought a bill of goods.

Witness is here shown the account, amounting to \$473.11.

I sold these goods to Peter Tiger; they were charged to his private account on the books of Lincoln & Strickler; he (Tiger) agreed to pay for them, and to send the money back from Pueblo on his trip south. At his second conversation with me, which was on his return, he told me he had sold out to Bigelow, and that Bigelow had agreed to pay for these goods, and wanted us (Lincoln & Strickler) to send the bill to Mr. Bigelow; that was on his return; he went on to make a statement when Bigelow would pay it; he stated to me in our (Strickler & Mahar's) office, at the time of the conversation testified to by the witness Huxley, which was after the commencement of this suit, that he had bought the goods, but that he had sold them to Bigelow.

and had never got any pay for them. This is the bill of goods I sold to Tiger (again referring to the above bill of goods), and they were delivered to Tiger. At the time Tiger bought the goods he wanted to get them for Bigelow, and I would not let him have them for Bigelow ; I let him have them on his own account.

On cross-examination the witness was shown two bills or accounts which he said were in the handwriting of Strickler, one of the plaintiffs, and another bill or account which he said was in the handwriting of Lincoln, another plaintiff. The witness then stated as follows : Tiger asked us to make out a bill and send to Bigelow ; this was after his return ; it must have been four weeks after the sale of the goods ; John Bigelow owes Lincoln & Strickler an account ; Tiger never paid a dollar on those goods to my knowledge.

Plaintiffs then introduced their book of accounts, showing a bill corresponding with that shown the witness Mahar, amounting to \$473.07.

The plaintiffs then rested, and the defendant then introduced the three bills or accounts identified by the witness Mahar, and which were entitled.

“Mr. JOHN BIGELOW,

“Bought of Lincoln & Strickler.”

The first contained an item as follows:

“May 27, 1868. To balance bill, P. Tiger, \$273.11.”

Alexander DeLappe testified, that he presented these accounts to John Bigelow for payment some time between Christmas, 1868, and New Year, 1869 ; I presented them on behalf of Lincoln & Strickler.

The defendant testified as follows : I bought these goods for John Bigelow ; I had a conversation with Mahar ; the plaintiffs never presented any bill to me for this balance ; I never had any conversation in 1868 with Mahar, after the time of buying the goods ; I left Denver on the 29th of May, 1868, after the purchase of these goods, and did not return to Denver until the 4th of July following, and was not in

Denver at any time between those two dates ; I never had communication of any kind with either Mahar or Strickler between those dates ; I recollect the amount of the bill of goods bought May 28, 1868, it was \$473.11 ; I took the goods away and delivered them to Bigelow ; at the time of buying the goods I paid \$200, on account of Bigelow, to Lincoln & Strickler, and Bigelow paid me a part of it back ; it was after the serving of the attachment in this cause that I had a conversation with Mahar ; Mahar asked me if I would not settle ; I am not indebted to the plaintiffs one dollar, either on this or any other bill.

Cross-examination : Bigelow had bought goods before that time ; Mahar told me, at the time I spoke to him about buying the goods, that I should wait a day or two until he could see whether Bigelow could have any more goods ; he did not tell me if I would pay for these goods he would let me have them ; he did not tell me when I came to load up these goods that he did not look to Bigelow for the pay for these goods ; he asked me if Bigelow would send the money, and I told him I thought he would ; I did not agree to send the money from Pueblo ; I was not in business of that kind ; Bigelow paid \$200 on his account, that I agreed to pay for him.

Re-direct : All the goods were delivered to Bigelow, excepting a few that I delivered to a man on the road, by Bigelow's direction ; I never agreed to pay for the goods.

Mr. S. E. BROWNE, for appellant.

Mr. L. B. FRANOE, for appellee.

WELLS, J. This was an action of assumpsit, to recover the price of goods sold and delivered by appellees to appellant.

The defendant below pleaded the general issue, and, by agreement of parties, the cause was tried by the court without jury, the issues were found for the plaintiffs, and damages were assessed at \$473.11, the full amount claimed,

and, after overruling a motion for a new trial, judgment was given upon the finding.

The defendant asserted in the court below, that, in the purchase of these goods, he acted as the agent of one Bigelow, and that the credit was extended to Bigelow, and not to defendant.

We see no error in the rulings of the court below, touching the admissibility of evidence, and the only remaining questions which can be said to be presented by the assignment of errors are, first, whether the finding of the court below is sustained by the evidence; second, whether the damages were correctly assessed.

The first question resolves itself into an inquiry as to the weight of evidence, and we are of the opinion that we ought not to reverse the finding of the probate court, unless manifestly erroneous.

In determining the relative credit to be given to the testimony of conflicting witnesses, so much consideration is due to the manner and bearing of each under examination, and their apparent intelligence and candor or prejudice, that a court of review, to which all these things are hidden, ought not lightly to reject the opinion of either court or jury, before whom the witnesses of both parties have been subjected to both examination and cross-examination. So the rule stands upon grounds of reason, and authorities in support of it are not wanting. *Webster v. Vickers*, 2 Scam. 295; *Harman v. Thornton*, id. 351.

With this rule controlling us, we cannot say that the court below erred in preferring the testimony of the witness Mahar, sworn on the part of the plaintiff, to that of the defendant who testified in his own behalf. These were the only witnesses sworn who, so far as appears, had any knowledge of the transaction at the time of its occurrence. We find no difficulty, however, in justifying the finding of the court below, even though the testimony of the defendant be accepted as a true relation of the transaction.

It is admitted by the defendant that he bought and received the goods to the amount for which the recovery was

had ; but it is claimed by his counsel that, in this purchase, he acted on behalf of Bigelow, and as his agent. Upon this point the testimony of the defendant is, and we adopt his own language, "that he bought the goods for John Bigelow, and delivered them to him."

He nowhere states that he was ever authorized by Bigelow to purchase these, or any other goods, on his account, nor whether he delivered these goods to Bigelow as belonging to him, or whether the delivery was in pursuance of a sale by himself. The law is well-settled that, where one is sought to be charged for an act done in pursuance and discharge of an alleged agency, the burden is upon him to show the fact of the agency, and that the transaction upon which the action is based was in pursuance and an ostensible discharge of that agency.

And though we should reject the testimony of Mahar, as to the subsequent declarations of the defendant, that he had sold the goods to Bigelow, and accept the fact of Bigelow's having received the goods as an acknowledgment or ratification of defendant's assumed agency, still this, according to the authorities, would not suffice to bar this action.

It must appear that there was an original appointment subsisting at the time of the transaction. *Rossiter v. Rossiter*, 8 Wend. 494.

It is said, that, by the testimony of Mahar, it appears that defendant and Bigelow were partners. Even if we accept the statement of the witness, as intended to have reference to this particular transaction, still it cannot, we think, defeat this action. Non-joinder of defendants is never a bar, but only matter in abatement.

We must then, upon this evidence, concur in the finding of the court below, that Tiger was originally liable to the plaintiffs, and, if liable originally, he of course remained so unless discharged by the subsequent act of the plaintiffs.

Upon this point it appears by the testimony of DeLappe, that between Christmas, 1868, and January, 1869, he, acting for the plaintiffs, presented to Bigelow an account, bearing

date in June previous, and in which, under date of May 27, is charged balance bill, P. Tiger, \$273.11.

It is claimed in argument, as we understand counsel, that hereby it appears that Bigelow and not Tiger was responsible for the balance ; but this item seems to us to establish the certainty of this, that is to say, that in the first instance at least credit was extended to Tiger and not to Bigelow, and the plaintiffs, by charging the amounts over to Bigelow, have not released the defendant, unless this change in the accounts was made with intent to release him and upon a consideration.

If Bigelow had agreed to pay the demand, and the plaintiffs had agreed to accept him as their debtor in lieu of the defendant, the arrangement would have been an effectual one ; but no act or declaration of a creditor, however express, ought to be accepted as a release of his debtor, or as an acceptance of one in substitution for another, unless the person to be substituted assent to the arrangement, or there be some other consideration for the release or substitution, or unless it be evidenced by writing under seal, so importing consideration. We fail to find in this record any evidence that this change in the accounts was made with intent to discharge the defendant, that Bigelow ever assented thereto, or that there was any other consideration therefor. As to the intent of plaintiffs it rather appears that this item was inserted in Bigelow's account in pursuance of defendant's request, spoken of by Mahar, and out of complacency to defendant, to relieve him of the necessity of collecting from Bigelow. If the intent had been to discharge the defendant, whether Bigelow paid the amount or not, defendant would have been credited with the amount charged to Bigelow ; but this does not appear. An account was rendered to Bigelow it is true, with this balance set down therein against him, but whether he assented or objected to this item was not shown. It rested upon the defendant below to establish affirmatively that Bigelow assented to the arrangement.

We are of opinion, therefore, that the probate court did

not err in finding this issue for the plaintiff. But in the assessment of damages we think there is error.

The bill of goods sold amounted originally to \$473.11. The defendant testifies that he paid plaintiffs at the time of the purchase \$200, which, he says, was upon Bigelow's account. In the account rendered to Bigelow, and before adverted to, plaintiffs charge Bigelow with the balance of Tiger's bill, \$273.11. It is true this charge is under date of May 27, while the transaction in question appears to have taken place on the 28th; but it does not appear that defendant ever had any other bill with plaintiffs than that for these particular goods. The bill rendered Bigelow is proven to be in the handwriting of one of the plaintiffs, and, from all the circumstances in proof, we are compelled to believe that this charge in the account rendered to Bigelow refers to the identical transaction in controversy, that the \$200 paid by Tiger, at the time of the purchase (which, it is true, he testified was paid on account of Bigelow, but which appears, nevertheless, to have been his own money and not Bigelow's, for he testifies that Bigelow repaid him part of it), was credited by plaintiffs to this account.

These deductions seem to us inevitable from the evidence contained in the record, and are fortified by the omission of the plaintiffs to explain in the court below, as they might have done by their own testimony, whatever is doubtful.

For the error in the assessment of damages, therefore, the judgment of the probate court is reversed, and the cause will be remanded to that court, with directions to enter judgment upon its finding for the sum of \$273.11.

Reversed.

HIRSCH v. FERRIS.

CONTINUANCE to obtain testimony of absent witness. Where a witness departs from the territory without the knowledge of the party desiring his testimony within a few hours after the commencement of suit, the failure to serve him with subpoena cannot be regarded as negligence.

Where process was served July 10th, and motion for continuance was made 17th August, following, and it was alleged that negotiations for settling the matter in controversy had been carried on in the interval with reasonable hope of success, the cause should have been continued to enable the defendant to take the deposition of an absent witness.

Error to Probate Court, Arapahoe County.

Mr. W. C. KINGSLEY, for plaintiff in error.

Mr. S. E. BROWNE, for defendant in error.

WELLS, J. This action was brought to the August term, 1869, of the Arapahoe probate court. Process was served on the 10th day of July. On the 17th day of August, being at the return term, the defendant, having pleaded, applied for a continuance, which application was overruled. A trial was afterward had on that same day, and judgment was given for the plaintiff.

The refusal of the application for continuance is the only matter assigned for error.

The ground of continuance set forth in the affidavit was the absence of a material witness; the facts set forth as to be proved by this witness appear to us to be material, and it seems to be admitted by counsel that they are so. The only remaining question is, whether diligence had been used to secure the attendance of the witness.

Upon this point the affidavit sets forth that the absent witness was then, and at the commencement of the suit, a resident of Cheyenne, in the territory of Wyoming; that from the time of the commencement of the suit defendant had been endeavoring to secure a settlement of the matter in controversy, and had hoped and expected to succeed in these efforts until within three secular days next preceding the making of the affidavit, when he learned for the first time, definitely, that an adjustment of the controversy was impossible; that the witness named left the territory to go to Cheyenne within a few hours after the commencement of the action and had never returned, and that he departed without defendant's knowledge, and while defendant was

endeavoring to secure a settlement with the plaintiff, and still reasonably supposed that such settlement would be effected.

We think that considering the short period which had elapsed between the commencement of the suit and the departure of the witness, and that such departure was without defendant's knowledge, the failure to serve him with subpoena cannot fairly be said to be negligence.

Nor do we think that for the omission to secure the deposition of the witness the application should have been denied.

But a little more than one month had elapsed between the service of summons and the application; it is true the deposition might, for any thing we can see, have been obtained within that time; but this would have been an exercise of the highest degree of diligence, and this at the first term, especially in a court holding its sittings upon every alternate month.

For this error the judgment of the probate court will be reversed and the cause remanded for further proceedings.

Reversed.

SHIPTON et al., Trustees, etc., v. NORRID.

REPLEVIN may be maintained by trustees of chattels. Trustees of chattels, having the legal estate therein, may maintain an action at law for any injury done to or in respect to the chattels, which are the subject of the trust.

A declaration in replevin, in which the plaintiffs describe themselves as "Trustees of the Colored Zion Baptist Church of Denver, who sue for the use and benefit of said church," is good.

Error to Probate Court, Arapahoe County.

THE plaintiffs brought replevin to recover a melodeon, describing themselves in the writ and declaration as "Trustees of the Colored Zion Baptist Church of Denver." A general demurrer to the declaration was sustained in the court below.

Messrs. BROWNE, HARRISON & PUTNAM, for plaintiffs in error.

Messrs. CHARLES & ELBERT, for defendant in error.

WELLS, J. The court erred in sustaining the demurrer to the plaintiffs' declaration. If the goods in controversy were the goods of the plaintiffs, and the defendant took them, both which facts are distinctly averred, the plaintiffs may maintain this action, whether their title is an absolute or fiduciary one, or whether, if fiduciary, their *cestui que trust* is a corporation or a mere voluntary association.

There may exist a trust in chattels as well as in real estate; and if such trust be created for the benefit of a single individual or a corporation, or an association of persons not incorporated, the trustee having the legal estate is, in either case, the proper party plaintiff to an action at law for any injury done to, or in respect to, the chattels which are the subject of the trust. And he need not, in his declaration, set forth how the trust was created or his title accrued, any more than one suing absolutely in his own right. It is sufficient to aver the fact of his property and the injury.

If, upon the trial of this cause, it should appear that the plaintiffs, notwithstanding their trusteeship, had *not* the property in the goods in controversy, then, indeed, another question will be presented; but, for the present, the property is admitted by the demurrer, and the declaration is clearly sufficient.

The judgment of the probate court is reversed, and the cause is remanded to that court for further proceedings, in conformity with this opinion.

Reversed.

HOEHNE v. RUPEAR.

PRACTICE — *judgment nil dicit cannot be taken on return day.* Judgment *nil dicit* cannot be entered on the return day of the summons, even if the defendant appear on that day and move to continue the cause.

Error to Probate Court, Las Animas County.

MR. W. F. STONE and MR. E. L. SMITH, for plaintiff in error.

MR. H. R. HUNT, for defendant in error.

WELLS, J. In this action the defendant was served with process to the August term, 1869, of the court below.

On the first day of that term he appeared and applied for a continuance upon affidavit of the absence of a material witness. The probate court declined to entertain or determine this motion, and immediately gave judgment against the defendant for want of a plea.

This was clearly erroneous. Whether the court could proceed to such judgment without disposing of the motion or not, upon which we express no opinion, we think the defendant was entitled to the whole of the first day of the term in which to plead. A judgment for default of appearance could not have been given upon that day; and we think the defendant was entitled to the same period of time, both to appear and put in his plea.

These two things he was required by the process to do upon that day, and he was entitled to the whole day to comply with the mandate of the writ.

The judgment is, therefore, reversed, and the cause remanded for further proceedings. *Reversed.*

JUDGMENT FOR DEFAULT of appearance or for want of a plea cannot be given on the first day of the return term of the process: *Hoyt v. Mueni*, 2 Colo. 117.

GOOD et al. v. MARTIN.

PRACTICE — *motion to suppress deposition too broad.* A motion to suppress a deposition founded upon objections to answers to cross-interrogatories should be denied.

PRESUMPTION *in support of record of court of general jurisdiction.* Where an attorney made oath that he had no notice of a motion for leave to amend the declaration, and there is no showing whether his clients were notified, in support of the proceedings of the court it will be presumed that notice was served upon the clients.

AMENDMENT OF DECLARATION *by increasing amount of ad damnum.* After trial and verdict in a cause, the court may, upon setting aside the verdict

and granting a new trial, allow the plaintiff to amend the declaration by increasing the amount of the *ad damnum*.

PRACTICE — *defendant's right to plead de novo after amendment.* In such case, in the absence of any showing as to the necessity for making a new defense after the amendment, the granting or refusing leave to plead anew was in the discretion of the court, of which appellants cannot complain in this court.

APPEARANCE — *effect of withdrawal upon issues.* If a defendant who has joined issue in a cause, with leave of the court, withdraw his appearance, the issue on his part falls to the ground and judgment of default should be entered against him.

PRACTICE — *default must precede final judgment.* It is irregular to proceed to final judgment against defendants served with process, without entering judgment of default.

Appeal from District Court, Arapahoe County.

ASSUMPSIT on a promissory note by Ida Martin against Parker B. Cheney, Wm. N. Shephard and Jno. Good.

Good pleaded the general issue, upon which there was a trial and verdict for plaintiff, which was set aside by the court. Afterward the court allowed the plaintiff to amend the precipe writ and narr., by increasing the amount of damages, and thereupon Good asked leave to plead to the declaration as amended, which was refused by the court.

By leave of the court, Good's attorney then withdrew his appearance, and the court proceeded to try the issue which had been joined upon Good's plea, and to assess damages against Cheney and Shephard.

Judgment of default was not entered against any of the parties.

Mr. E. L. SMITH, for appellants.

Messrs. BROWNE, HARRISON & PUTNAM, for appellee.

HALLETT, C. J. We do not think it necessary to discuss at very great length the numerous questions of practice presented in this record. The motion to suppress the deposition of Atkins was founded upon objections to some of the answers to cross-interrogatories, and was therefore too broad. While the court below might have considered the exceptions to the answers named, we do not see that

there was error in refusing to suppress the entire deposition. The amendment of the *ad damnum* in the declaration, for which leave was obtained, does not appear to have been made, and perhaps we could with propriety pass over that question. But we do not feel at liberty to do so, inasmuch as the parties have dealt with the case as if the amendment had been made, and by passing upon the question now we may facilitate the proceedings in the case, which have been greatly protracted. The power of courts to allow pleadings to be amended is pretty well established, and certainly cannot be denied at this day. Stephen's Pl. 75; Graham's Pr. 654.

It is certainly good practice to give notice of the application for leave to amend, especially when the amendment is of substance, and generally courts should require such notice to be given before the application is entertained. But we are not required to consider whether the omission to give notice in this case would have affected the order made, for it does not appear that there was any such omission. It is true that appellant's attorney makes oath that he was not notified of the intended application, but his clients may have been served with notice, and we must indulge every presumption in support of the proceedings of a court of general jurisdiction.

Authorities to support the action of the court below in allowing the *ad damnum* to be increased are not wanting. *Tomlinson v. Blacksmith*, 7 T. R. 132; *Brown et al. v. Smith et al.*, 24 Ill. 196; *Dox et al. v. Dey*, 3 Wend. 357.

In these cases the amendment was after verdict upon payment of costs and granting a new trial, and it is to be observed that these were the only conditions imposed. It does not appear, however, that the defendants demanded greater privileges than were given; and therefore, while these cases show that the court has power to allow the amendment, they are not conclusive upon the right of the defendant to plead *de novo* after the amendment. We do not doubt that in many cases a defendant may rightfully claim the privilege of pleading anew to an amended decla-

ration, and the refusal of such demand would be cause for reversal. If a new cause of action or substantive fact should be added to the declaration by amendment, the right of the defendant to meet the new case with a new defense would seem to be unquestionable. In this case, however, the amendment introduced no new fact into the declaration. The facts upon which appellant's liability was founded were set out in the declaration as originally framed, and appellee did nothing more than to increase the amount of her demand upon those facts. Appellants were as well informed of the nature of the action against them before the amendment as afterward, and it is difficult to see upon what ground the claim to change the defense, after the amendment, can rest. At all events, in the absence of any showing as to the necessity for making a new defense after the amendment, the granting or refusing leave to plead anew was in the discretion of the court below, of which appellants cannot complain in this court.

After the withdrawal of appearance by the attorney for Good, the issue made by him was tried by a jury and the damages were assessed against Cheney and Shephard, no judgment of default having been taken against any of them. In this we think there was error. Upon withdrawal of Good's appearance, the issue on his part fell to the ground, there being no one in court to maintain it, and judgment of default should have been entered against him. *Coffin v. Evansville & Crawfordsville R. R. Co.*, 7 Ind. 413.

So, also, it was irregular to proceed to final judgment against Cheney and Shephard without entering their default. *Crabtree v. Green*, 36 Ill. 278.

Through the failure to enter judgment of default against appellants, their right to plead to the action was not determined during the whole course of the proceedings, and therefore, upon the motion made by them, the judgment should have been set aside with leave to appellants to plead.

The judgment is reversed with costs, and the cause is remanded.

Reversed.

DEFAULT MUST PRECEDE FINAL JUDGMENT. — There being no appearance by one of defendants, it is error to enter final judgment against all, without first entering judgment of default against him: *Streeter v. Marshall & Mfg. Co.* 4 Colo. 540.

KLOPPER v. KELLER, Administrator.

LEGISLATIVE POWER—*authority of district courts to appoint special terms.* The statute (ch. 25, sec. 9, Revised Statutes, 267) which confers authority upon district courts to appoint special terms of such courts is valid.

UNLAWFUL DETAINER *before justice of the peace—question of title.* In an action of unlawful detainer against a tenant holding over, brought before a justice of the peace, the effect of raising the question of title is to remove the cause to another court, and not to defeat it altogether.

PLEADING AND PROOF—*in unlawful detainer.* The rule which requires that the proof shall support the allegation is as applicable to the action of unlawful detainer as to any other.

EVIDENCE—*to disprove plaintiff's case.* In an action of unlawful detainer against a tenant holding over, for the purpose of disproving the tenancy, the defendant may show that he entered as a purchaser and not as a tenant, and this whether the agreement to purchase was good or bad.

Appeal from District Court, Arapahoe County.

UNLAWFUL detainer against appellant to recover the possession of certain premises alleged to have been let to him for one month, which term had expired.

Mr. E. L. SMITH, for appellant.

Mr. L. B. FRANCE, for appellee.

HALLETT, C. J. At the threshold of this case we encounter the objection that the proceedings in the court below were *coram non judice*, having taken place at a special term. The point arises upon the validity of the statute authorizing district courts to appoint special terms of the same court, there being no question in this case as to the manner in which the power was executed. It is within our knowledge that many special terms of court have been held under this statute, and important questions have been determined in them, which, if now disturbed, will occasion much embarrassment, and we have attempted to give the subject such consideration as its importance demands.

In 1856 (11 Stat. 49), congress empowered the justices of the supreme court, in each of the territories, to appoint the times and places of holding courts in the several districts

of their territory, and, provided, that courts should be held at but one place in each district. In 1858 (11 Stat. 366), this statute was so far enlarged as to admit courts to be held at the expense of the territory in the several counties in each district. In 1861 the act organizing this territory was passed, which provided: "The said territory shall be divided into three judicial districts and a district court shall be held in each of said districts, by one of the justices of the supreme court, at such time and place as may be provided by law."

The use of the singular instead of the plural number in this clause of the act was, doubtless, through inadvertency, as, in view of the previous legislation of congress to which reference has been made, it is hardly probable that congress intended to limit the number of courts in each district to one. But this act confers upon the legislative assembly power to prescribe the times and places of holding courts, and being inconsistent with the act of 1856, renders the latter act inapplicable to this territory. The power of the legislative assembly to prescribe the times and places of holding courts is conceded, but whether that power is properly exercised in conferring upon the courts authority to appoint terms is a question upon which doubts have arisen.

In *Harriman v. The State*, 2 G. Greene, 270, this question came before the supreme court of Iowa upon a statute passed by the legislative assembly of Iowa territory, under a provision of the organic act of that territory, similar to our own. In that case the court say: "Finally it is objected that the legislature of the territory had no right, under the ninth section of the organic law, to pass an act authorizing the judges to hold such special terms of the district court, as they were by said section to be held at such times and places as might be prescribed by law. Strictly viewing this clause, it may very plausibly be assumed that the courts may be held at such times only as the appropriate law might fix upon and designate. The application of this principle might safely be admitted so far as the regular terms of the courts are concerned; and this concession would not, in the least, militate against the power of the legislature to authorize the judges

to hold special or extra terms of their courts whenever, in their opinion, occasion might require. This would be a rightful subject of legislation within the meaning of the organic law and within the province of the legislative assembly."

In the State of Illinois the constitution of 1818 provided that circuit courts should be held at the times prescribed by law, and with this provision in force the legislature authorized such courts to appoint special terms. The constitutionality of the law does not appear to have been brought in question, although the act was before the supreme court of that State upon other points. *Archer v. Ross*, 2 Scam. 303.

We find, from an examination of the reports of other States (1 Blackf. 428 ; 17 Mo. 64 ; 16 Cal. 186 ; 3 Wis. 443), that such acts are not uncommon in this country, and the constitutional power of the legislature to pass them is so generally accepted by the profession that it has not been questioned.

Therefore, upon authority, we believe that the question is at rest, and we are not disposed to seek for a new construction which may divest established rights.

A motion was made in the court below to dismiss the cause for want of jurisdiction in the justice of the peace before whom the suit was originally commenced. It is claimed that an affidavit was filed under the ninth section of the act before the justice of the peace, in which it was asserted that the title to the property described in the complaint was in dispute between the parties. Although such an affidavit was read in the district court, it does not appear that it was ever presented to the justice of the peace. And if it had been so presented, and the justice had refused to act upon it, it is difficult to see upon what ground the dismissal of the cause would result from it. The effect of raising the question of title before a justice of the peace is to remove the cause to another court, and not to defeat it altogether. It is not necessary to point out the various cases in which an action may be maintained under the statute relating to forcible entry and detainer. It is sufficient to say that this

action was founded upon section 5 of the act, which relates to cases of tenancy. It is alleged in the complaint, that the premises in controversy were let to appellant for the term of one month, which term had expired, and that appellant refused to surrender the possession upon demand made in writing therefor. This is according to section 11 of the act, which requires that the substantial facts, upon which the plaintiff relies, shall be set out in the complaint. The office of pleading is the same in this action as in every other, and the rule which requires that the proof shall coincide with the allegations is as applicable to this as to any other action. To allow a plaintiff to allege one thing and prove another would be an anomaly in the law, and most mischievous in its consequences. If then the plaintiff must prove his case, as laid in the complaint, it follows that evidence tending to disprove the facts stated in the complaint is admissible on the part of the defendant, although such evidence might also tend to prove another case upon which the plaintiff might, if he had so declared, maintain his action. Upon the trial in the court below, appellant introduced evidence to show that he went into the possession of the premises in controversy as a purchaser. This evidence the court afterward excluded from the consideration of the jury upon the ground, as stated by counsel, that the agreement to purchase was not valid under the statute of frauds. Now the question before the jury was as to the existence of the tenancy set out in the complaint, and whether appellant was holding over after the expiration of his term, and if the agreement between the parties was to purchase and not to let the premises, it can make no difference whether the agreement was void or valid. The object of showing that appellant entered under an agreement to purchase was to disprove the tenancy, and the negative effect of such evidence would be the same whether the agreement was good or bad.

We think that there was error in excluding this testimony from the consideration of the jury, for which the judgment must be reversed with costs and the cause remanded. *Reversed.*

DISTRICT COURTS — Construction of organic act: *Beery v. United States*, 2 Colo. 192.

PHELPS v. SPRUANOE.

JURISDICTION OF PROBATE COURT *to issue process to foreign county.* Under section 2 of the practice act (Rev. Stat. 500), a probate court may issue process to a foreign county.

PRACTICE — variance, how reached. A variance between the writ and declaration cannot be reached by demurrer. It is matter for plea in abatement.

PRACTICE — amended bill of particulars. If the plaintiff file a bill of particulars with his declaration, and the defendant make no objection to such bill, and the plaintiff afterward, and within ten days of the second term, file a more specific bill of particulars, the defendant cannot obtain a continuance at the second term, because of the filing of such amended bill.

VERDICT — what will be sufficient. A verdict which answers all the issues is sufficient.

BILL OF EXCEPTIONS — in trial to the court without a jury. If a cause is tried to the court without a jury, exception must be taken to the judgment of the court, if the party aggrieved wishes to have it reviewed in this court. In such case a motion for new trial is unnecessary, but the exception to the judgment of the court is indispensable, if that judgment is to be reviewed here.

Error to Probate Court, Clear Creek County.

Mr. Justice WELLS, having been of counsel, did not sit in this cause.

Mr. GEO. W. PURKINS, for plaintiff in error.

Mr. E. T. WELLS, for defendant in error.

HALLETT, C. J. The power of the probate court to issue process to a foreign county, under section two of the practice act, has been considered by us at this term in the case of *Cody v. Raynaud*, and, according to the views there expressed, the probate court had jurisdiction in this case. Variance between the writ and declaration cannot be reached by demurrer. It is matter for plea in abatement. *Duvall v. Craig*, 2 Wheat. 45.

No objection was made by plaintiff in error to the account filed with the declaration, but, at the second term of the court, he moved to continue, upon the ground that defend-

ant in error had voluntarily filed a more specific bill of particulars within ten days of the term. If a defendant is dissatisfied with the account filed with the declaration, the practice is to move the court for a rule upon the plaintiff to furnish a more specific bill, and, when the new bill comes in, if it differs materially from that first filed, the court will continue the cause upon the application of the defendant. In this case plaintiff in error, who was defendant below, did not ask for a more specific bill of particulars, and defendant in error was under no obligation to file any; therefore no question can be raised in this court in respect to it.

The general issue was pleaded, and also another plea, in which it was alleged that the promises in the declaration mentioned were made by the Phelps & Gillimore Mining Company, and not by the defendants, and that defendants were not partners or joint-contractors, etc. Issue was joined upon these pleas, and, upon trial thereof, the court found that plaintiff in error "did assume and promise, in manner and form, as the said William Spruance hath complained against him." And this, it is said, is not an answer to the issue upon the second plea; but we are of another opinion, for the second plea is, at best, only a repetition of the first. If the finding is true the plea is untrue; for, if plaintiff in error promised in manner and form as alleged in the declaration, he did promise jointly with Gillimore, and it is his promise and not the promise of the mining company. The finding certainly comprehends all that was in issue, and no more is attainable in any form of verdict.

It is also urged that excessive damages were allowed, and this would be a question of some difficulty if it were properly before us. But the question is not presented in the way provided by the law, as we shall endeavor to show. This was a trial by the court without a jury, a proceeding unknown to the common law, and, by the rules of the common law, the decision or finding of the court upon the testimony is not subject to review in another tribunal. *Campbell v. Boyreau*, 21 How. 226.

But section 22 of our practice act has wrought a change in the common law, as follows:

SEC. 22. "Exceptions taken to opinions and decisions of the district courts, upon the trial of causes, in which the parties agree that both matters of law and fact may be tried by the court, and, in appeal cases, tried by the court without the intervention of a jury, shall be deemed and held to have been properly taken and allowed; and the party excepting may assign for error, before the supreme court, any decision or opinion so excepted to, whether such exception relates to receiving improper or rejecting proper testimony, or to the final judgment of the court upon the law and evidence."

When we consider that the power to review the finding of the court below upon the testimony is derived entirely from this statute, it is not difficult to understand that an exception to the ruling of the court is necessary to give us jurisdiction. In cases of this kind the aggrieved party may except to the decision of the court, and may assign for error the decision so excepted to. But if he fails to except in this, as in every other case in which an exception is necessary, he cannot seek relief in an appellate court. And this is in perfect harmony with the practice which obtains in cases tried by jury. In such cases the party aggrieved must move for new trial, and except to the ruling of the court upon the motion. In cases tried by the court, the motion for new trial may be dispensed with, but the exception to the judgment of the court is indispensable if that judgment is to be reviewed in this court. As in such cases, the court determines both the law and the fact; if an exception were not necessary, it would be a departure from all analogous rules of practice.

There was a motion in arrest of judgment, but it presented only those questions to which we have adverted, and it is not necessary to notice it particularly. Upon this review we have not found error in the record, and the judgment is affirmed with costs.

Affirmed.

BILL OF EXCEPTIONS — TRIAL WITHOUT JURY: *Lee v. Wilcoxon*, 2 Colo. 88; *Atkinson v. Atkinson*, 2 Colo. 383; *Martin v. Cole*, 3 Colo. 115; *Martin v. Purce*, 3 Colo. 200; *Pittton v. Oen & Ten Broeke C. M. Co.* 3 Colo. 287; *Barker v. Hamilton*, 3 Colo. 292; *Law v. Brinker*, 6 Colo. 555.

DOANE et al. v. GLENN et al.

JUDGMENT — *what is final.* A judgment in favor of interpleading claimants in an attachment suit is final, and the plaintiff in attachment may prosecute a writ of error to reverse such judgment.

Error to District Court, Arapahoe County.

UPON motion to dismiss the writ of error.

MESSRS. FRANCE & ROGERS, in support of the motion.

MESSRS. CHARLES & ELBERT, *contra*.

BELFORD, J. At the December term of the Arapahoe district court, for the year 1870, the plaintiffs in error caused to be sued out of the clerk's office of said court a writ of attachment against Oliver S. Glenn and Rufus E. Talpey, which writ was duly levied on seven hundred head of cattle, alleged to be owned by the defendants in the attachment suit. At the same term of court, Lockhart T. Glenn and George O. Talpey appeared as interpleading claimants under section 21 of the attachment act, alleging that they were the owners of the property theretofore attached, and demanding restitution of the same. Issues were joined, a trial had, a verdict rendered in favor of the interpleading claimants. Motion for new trial overruled and judgment entered on the verdict. From this judgment Doane & Co. have prosecuted a writ of error, and the interpleading claimants having made a motion to dismiss the same, the only subject for present consideration is, does a writ of error lie to a judgment in favor of these claimants, or in other words, is it such a final judgment as can be brought to this court for review.

The authorities all concur in holding that, to authorize a writ of error, it is necessary that there should be a final judgment or determination upon the matter in controversy in the inferior court, and it is never employed merely to bring up interlocutory decisions or discretionary orders

made pending the litigation. Usually, this writ, being a common-law writ, is directed only to courts proceeding after the course of the common law. In the cases of *For-gay v. Conrad*, 11 How. 201, and *Beebee v. Russell*, 19 id. 283, it is said: When a decree decides the right to property and directs it to be delivered up or sold, and the complainant is entitled to have such decree carried into immediate execution, it is a final decree. The judgment below is in the following form: * * * "Therefore, all and singular, the premises being seen, and by the court here fully understood, it is considered by the court, that the property taken by virtue of the writ of attachment in this cause be delivered up to the said Lockhart T. Glenn and George O. Talpey, and that a writ of *retorno habendo* be awarded and issued therefor; and it is further considered by the court, that the said interpleading claimants do have and recover, of and from the said plaintiffs, their costs, by them in and about this said suit, in this behalf, laid out and expended, taxed at , and have execution therefor."

This, most clearly, is a complete determination of the rights of the attaching plaintiffs and interpleading claimants.

This judgment would be a bar, in behalf of the latter against any further suits instituted by the former parties. It operates as a release to the attachment lien and leaves the claimants at liberty to take the property when and whithersoever they please. It established their title to the cattle, not only against the attaching plaintiffs but against the attaching defendants, for no court would permit or suffer the defendants in the original suit to assert ownership after standing by, and without interposing any objection or supplying any evidence, allow a third party to make proof of title to the property in litigation, which would result in the ruin of the rights of the attaching plaintiffs.

The rule laid down by the supreme court of the United States is, that when a decree decides the right to property and directs it to be delivered up, it is a final decree, and

does not the judgment or decree above set forth come clearly within it?

What remains to be done by the claimants? — nothing, but await delivery. The power of the court in the premises is at an end. The issues formed by the parties have received a judicial determination, that is final, so far as the district court can make a finality, and the judgment so entered must stand as the unquestionable and unassailable evidence of the claimant's right to the property adjudicated, until reversed or set aside by a superior tribunal.

No principle can be more just than the one that asserts that all proceedings of inferior courts, which conclusively affect the rights or property of persons, ought to be subject to the revision or correction of a higher tribunal. Blackstone says: "A judgment is the sentence of the law pronounced by the court on the matter contained in the record." Did not the court pronounce the sentence of the law in the matter before it, and contained in the record made by the parties? Coke says: "A writ of error does not lie, without a judgment or an award in the nature of a judgment." Is not the order of the court below, that the attachment lien be set aside and the property delivered up to the claimants, an award in the nature of a judgment? It was final, as it respected the district court, for it did all it could do in the case.

If we are to be governed by the words which Coke lays down as a test of what is a final judgment, namely, "*ideo consideratum est*," then we must regard this as a final judgment.

Tidd, in his excellent work on Practice, volume 2, page 1134, says: "A writ of error is an original writ, and lies when a party is aggrieved by an error in the foundation, proceeding, judgment or execution of a suit in a court of record. And whenever a new jurisdiction is erected by act of parliament, and the court or judge that exercise this jurisdiction act as a court or judge of record according to the course of the common law, a writ of error lies on that judgment; but when they act in a summary way, or in a

new course different from the common law, then writ of error lies not, but a certiorari."

In Bacon's Abridgment, volume 3, page 330, the doctrine is laid down as follows: "Where the primary tribunal is a court of record, a writ of error is the proper process for the removal of the proceedings when they were according to the course of the common law in the first instance, or have assumed a common-law shape subsequently; but when they are summary, or the magistrate is not the judge of a court of record, the remedy is by certiorari." In the case of *Huse v. Grimes*, 2 N. H. 210, the court say: "A writ of error is grantable *ex debito justicie*; it is a matter of right, and lies in all cases where the court, whose proceedings are complained of, acts as a court of record according to the course of the common law."

"A certiorari is said to lie in all cases where a writ of error does not. As it respects individuals, it issues *ex mero gratia* on petition. It lies to remove indictments from inferior jurisdictions to the court of king's bench for trial; also, to reverse the doings of inferior jurisdictions, whose powers are given them by statute, whose mode of proceeding is unknown to the common law, and who render their doings effectual not by a judgment technically called, but by orders to be executed in a summary way, such as orders for laying out of highways and removal of paupers." While the right to file an interplea in the method pursued below is derived from the statute, yet the statute does not point out the mode of trial or the nature of the judgment to be rendered; these are both governed by the common law. The issues are joined, trial by jury had, verdict pronounced and judgment awarded. The court is a court of record, and its proceedings are all in accordance with the common law. Taking the distinction between a writ of error and a certiorari laid down by the New Hampshire court to be a true one, into which class of cases therein named does the one at bar necessarily fall? Here was a judgment rendered in a court of record proceeding according to the course of the common law. The judg

ment was a common-law judgment, and not an order to carry into effect certain proceedings in a summary way. This case then has all the requisites to be the foundation of a writ of error. The other points mentioned by counsel for defendants will be decided when properly brought before us.

The motion to dismiss the writ of error must be denied.

Motion denied.

CITED: *Doane v. Glenn*, 1 Colo. 503.

PEDDIE v. DONNELLY.

PLEADING — *variance may be alleged under non est factum.* In debt on a promissory note, the defendant may take advantage of a misdescription of the note under the plea of *non est factum*.

PLEADING — *variance in description of note.* In an action against two it was alleged "that the defendants made their note, the said Abram D. Bevan by the name and style of A. D. Bevan," and the note was signed by A. D. Bevan and his co-defendant. *Held*, that there was no variance, and there was no ground of demurrer to the declaration.

PLEADING — *contemporaneous agreement as defense to a note.* In an action on a promissory note if the defendant sets up a contemporaneous agreement modifying the note, he must allege in his plea that the agreement was in writing.

Error to Probate Court, Jefferson County.

THE first plea of defendant Peddie was *non est factum* verified by the oath of the defendant. In his second plea defendant Peddie alleged that the action was brought on the note described in the declaration only, and that the note was given by defendant Bevan and himself for money borrowed by Bevan to enable him to go to St. Louis, to sell mining property belonging to the plaintiff, and that it was agreed, between plaintiff, Bevan and himself, at the time the money was borrowed, that the same should be repaid out of the proceeds of the sale of the said mining property, and that said sum of money should not be repaid until Bevan sold the property, which event had not occurred.

It was not alleged that this agreement was in writing.

The promissory note given in evidence was as follows:

“BRECKENRIDGE, 1868.

“*Colorado Terry, Oct. 3.*

“Four months after date we, or either of us, promise to pay to Charles Donnelly, or order, the sum of (\$300) three hundred dollars lawful money, for value received, with interest at the rate of three per cent per month until paid.

“A. D. BEVAN. [L. S.]

“ANDREW PEDDIE.” [L. S.]

The court below gave judgment for the plaintiff.

Mr. GEORGE W. PURKINS, for plaintiff in error.

MESSRS. MILLER & MARKHAM, for defendant in error.

WELLS, J. We agree with counsel for the plaintiff in error, that the plea of *non est factum* was sufficient to give advantage of any variance between the obligation counted upon and the allegations descriptive thereof, but we are not able to agree that the alleged variance exists in this case. The count avers that “the defendants heretofore, to wit, on, etc., at, etc., the said Abram D. Bevan, by the name and style of A. D. Bevan, made their certain writing obligatory,” and out of the words “the said Abram D. Bevan, by the name and style of A. D. Bevan,” it is argued the variance arises; for it is said hereby it appears that the obligation was on its face the deed of Bevan only, whereas that offered in evidence was subscribed and sealed by both the defendants. It appears to us, however, that the words of the declaration last quoted are to be read as if written in parenthesis, importing description of the manner in which the defendant Bevan executed the writing, and not as contradicting what is also alleged, “that the defendants made their writing obligatory.”

And this disposes of the objection that the demurrer to the special plea, interposed in the court below, should have been sustained to the first count of the declaration. There

was no substantial defect in that count to which the demurrer could have been extended. The only question remaining is, as to the sufficiency of the special plea.

If this were a new question we might be inclined to doubt whether the language of the plea ought not to be construed as importing that the supplemental undertaking, upon which the defendant relies, was, as the law requires, in order that it should be effectual, in writing; for, though it appears to be well settled that a promise in writing, absolute, may not, by parol, be turned into a promise upon condition (*Hoare v. Graham*, 3 Camp. 57; *Nausen v. Walker*, 1 Stark. 361; *Free v. Hawkins*, 8 Taunt. 92; *Woodbridge v. Spooner*, 8 Barn. & Ald. 233; *Mosely v. Robinson*, 10 B. & C. 729; *Brown v. Langley*, 4 M. & Gr. 473), yet this seems to be rather a rule of evidence than of pleading, and the defendant having set forth an agreement which, if established, will bar the plaintiff of his present action, it would seem that this ought to suffice, although he has not shown by what manner of evidence he will sustain his plea.

Nevertheless, it has uniformly been held, so far as the authorities have come to our notice, that, if plaintiff count upon a writing, and the plea show an agreement contemporaneous and modifying its terms, it must show that this agreement also was in writing. *Mease, Executor, v. Mease*, 1 Cowp. 47; *Wells v. Baldwin*, 18 Johns. 46; *Miller v. Wells*, 46 Ill. 49. And, if it fail in this, plaintiff may demur generally.

The judgment of the probate court is, therefore, affirmed.

Affirmed.

NACHTRIEB v. STONER.

NEW TRIAL—*damages in trespass de bonis*. Where it appears that the defendant procured an inferior court to issue an attachment in a case not warranted by law, and to give judgment upon constructive service for a fictitious demand, and sell property of plaintiff of the value of \$800, a verdict of \$750 damages is not excessive.

POSSESSION in trespass *de bonis*. In trespass *de bonis* the plaintiff must show, that at the time of the alleged trespass he was in possession of the property, or that he had the right to the possession, and an outstanding possession in a third person, with the right to retain it until the payment of indebtedness or the happening of some other event will defeat the plaintiff's action.

POSSESSION OF PLEDGEE *extinguished by payment*. Where the plaintiff pledged property to a third party to secure certain indebtedness, due from him to such party, and the defendant, in order to levy a writ of attachment upon the property, paid to the pledgee the amount due him from the plaintiff, when such payment was made the right of possession reverted to the plaintiff, and he may maintain trespass for the property.

POSSESSION OF PLEDGEE *determined by setting up adverse title*. In such case the defendant, having set up a title inconsistent with the lien, cannot claim to have acquired the pledgee's right of possession, and hold under the lien.

TRESPASS—*justification under process of inferior court*. Whoever justifies or asserts any right under the sentence or judgment of a court of inferior jurisdiction ought to be required to show the substantial regularity of its proceedings at every step.

ATTACHMENT WRIT—*which recites no cause, is irregular*. That the defendants reside out of the county is no ground for issuing an attachment, and a writ, in which this is recited as the cause of attachment, is irregular on its face.

TRESPASS *against plaintiff in attachment—when proceedings irregular*. Where the proceeding was before a justice of the peace, the cause of attachment set out in the affidavit was insufficient, and it was stated in the writ that the defendants reside out of the county; the plaintiff who procured the writ, the justice of the peace who issued it, and the officer who executed it, are liable to the defendants in trespass.

The affidavit being defective, the rule is not affected by the power of amendment given by statute, for the court does not know that the facts exist upon which a proper affidavit may be made.

If the affidavit had been sufficient and the writ had falsely recited it, the court might incline to a different opinion.

Error to Probate Court, Lake County

THE record of the court below consisted of certified copies of the papers filed in that court, together with some informal minutes of the proceedings of the court.

The judgment was in the following form: "Therenpon, judgment is entered in favor of the plaintiff, William Stoner, and against the defendant, Charles Nachtrieb; that the said plaintiff have and recover of the said defendant the sum of

reach of their creditors." The bond was made to the constable as obligee therein. Plaintiff also gave in evidence a transcript of the docket of the justice of the peace in the case of *Nachtrieb v. Stoner and Murphy*.

In the writ of attachment the cause recited for the issuing thereof was, "that Thomas Murphy and William Stoner reside out of the county." The defendant gave in evidence that Murphy and Stoner bought a ranche of him for \$300, and that the amount was still unpaid; that he commenced suit before the justice of the peace in good faith, and that the mares were worth \$240.

The court refused to instruct the jury: "That if any person had a lien upon the property named in the plaintiff's declaration, by which any sum of money was to be paid by the plaintiff before he could reduce the same into his possession, they should find for the defendant."

Upon request of the plaintiff, the court instructed the jury: "That by his record, as appears in evidence, the magistrate had no jurisdiction which would justify the seizure of any property of William Stoner, and if the jury believed, from the evidence, that the horses in question were seized in that suit under the affidavit, writ and bond referred to, it does not amount to a justification, and the jury should find for the plaintiff." There were other instructions which it is not necessary to refer to.

Mr. M. BENEDICT, for plaintiff in error.

Messrs. HUGHES & MORRISON, for defendant in error.

WELLS, J. The record, which has been certified to us, contains many gross irregularities, and the original appears to have been made up without the slightest knowledge of what matters the record of a court ought or ought not to contain. Nevertheless, sufficient appears to show that the judgment complained of was given at a term of the probate court, convened, constituted and held in accordance with law. The objections urged on the part of the plaintiffs in error in this respect are therefore not well taken.

Neither are we disposed to interfere with the judgment in respect of the damages awarded by the jury. The plaintiff in the court below complained in effect, that the defendant had procured an inferior court to issue an attachment against the plaintiff's estate in a case where such process was unwarranted by law, and to give judgment and direct a sale of the estate upon mere constructive notice of the proceeding, he being then a resident of the territory, and entitled to actual notice by service of process; that by virtue of the sale so ordered, the defendant had possessed himself of, and converted to his own use, property of the plaintiff to the value of several hundred dollars, and that all this was done in the prosecution of a pretended claim of indebtedness which never existed. The jury have found that the facts are as asserted by the plaintiff; the evidence warrants the finding, and, as we think, makes a strong case for the award of punitive damages, and the amount allowed by the jury does not seem to us to be excessive.

The circumstance, that before the alleged trespass a portion of the property was in the possession of a third person who had a special property therein by way of lien or pledge, does not, as we think, have the effect to defeat the plaintiff's action or modify the rule of damages. True, it is, in general, that in *trespass de bonis* the plaintiff must show, that at the time of the trespass complained of he had actual possession of the goods, or had property therein, either general or at least special, with the right to the immediate possession, and an outstanding possession in a third person, with the right in such person to retain it until the discharge of an indebtedness or the happening of some other condition might, with reason, be said to disable the general owner from bringing trespass. *Gauche v. Mayer*, 27 Ill. 134; *Thorpe v. Burling*, 11 Johns. 285; *Gay v. Smith*, 38 N. H. 171.

For in such case the interest of the general owner is merely reversionary and not present, and for an injury to such interest case lies but not trespass. But, in the present case, the demand for which the goods had been held in pledge

was paid off by the plaintiff in the attachment, now plaintiff in error, before the levy, which involves the trespass complained of, and we think this, by construction of law, restored the general owner to his possession, for, though the pledgee of goods may clearly enough transfer possession thereof to another, as his servant or bailee, without waiver of his lien, and though, as we conceive, any third person may advance to the pledgee his demand, receiving possession of the goods as his security, and may lawfully retain such possession until repaid his advances, yet the authorities appear to be uniform, that if the pledgee or lienholder set up any title or claim inconsistent with or independent of the lien, this will amount to a waiver thereof. 3 Pars. on Cont. 244.

Therefore, inasmuch as the possession of the constable who levied the attachment complained of was from the beginning independent of and hostile to the lien by which the property had before been held — the very purpose for which the money was advanced to the pledgee being to enable the officer to proceed with the property in a manner inconsistent with the lien — it cannot be said that this incumbrance or special property followed the goods into the custody of the constable. On the contrary, by the payment of the amount for which the goods had before been held, the lien was dissolved and the right to the immediate possession was *eo instanti* restored to the general owner.

There remains to be considered the question to which the argument was chiefly directed, whether the plaintiff's action was rightly conceived, that is to say, whether trespass lies here or case. Upon this question we are not without authority, though it is to be regretted that the authorities are not in strict accord. It appears to be well settled, that if an inferior court assume to extend its process to a case wherein it is not warranted by law, both the magistrate and the party who instigates the unlawful proceeding are liable in trespass, and that although the cause or matter be within the jurisdiction of the court or magistrate in general, yet if there be some prerequisite prescribed by law to the exer-

cise of such jurisdiction, and the process issue without such prerequisite, all parties concerned, save the ministerial officer, where the process fails to disclose irregularity upon its face, are trespassers.

Vosburg v. Welch, 11 Johns. 175 ; *Curry v. Pringle*, id. 444 ; *Adkins v. Brewer*, 3 Cow. 206 ; *Reynolds v. Orvis*, 7 id. 271 ; *Grumon v. Raymond*, 1 Conn. 40 ; *Polk v. Slocum*, 3 Blackf. 422 ; *Barkeloo v. Randall*, 4 id. 476 ; *Davis v. Bush*, id. 330.

Some of the cases to which I have referred are directly to the point that the affidavit and bond required by statute are essential prerequisites to the issuance of the writ of attachment, and that without these no jurisdiction is acquired ; and this seems to be adjudged also in *Wight v. Warner*, 1 Doug. (Mich.) 384 ; *Mantz v. Handby*, 2 Hen. & Munf. 308 ; *Clark v. Roberts*, Breese, 285 ; *Matter of Faulkner*, 4 Hill ; *Staples v. Fairchild*, 3 Comst. 41 ; *Shirers v. Willson*, 5 Harr. & J. 130 ; and in other cases which were cited at the bar.

In some courts, indeed, it has been held, both where the question arose directly and where it arose in a collateral proceeding, that a failure to comply with the statutory prerequisites will avoid the writ and all subsequent proceedings even in a court of general jurisdiction. *Whitney v. Brunette*, 15 Wis. 68 ; *Willson v. Arnold*, 5 Mich. 98 ; *Greenvaull v. Farmers' Bank*, 2 Doug. (Mich.) 498.

I do not discover that any of these cases are upon statutes, essentially different from our own so far as concerns the requirements of the affidavit and security, or so far as relates to the effect and consequences of an omission in this respect ; and though we are not prepared to hold, with the cases last cited, that defects in the affidavit or bond given shall, in superior courts of general jurisdiction, invalidate the subsequent proceedings, yet we think this may well be asserted as the rule where the proceeding is in an inferior court, not of record (at least where the defect is a substantial one), whether the question arise directly or collaterally ; for as to these latter courts no one ought to be at liberty to

assume that their proceedings are regular either in form or substance; whoever justifies or asserts any right under the sentence or judgment of such a court ought to be required to show the substantial regularity of its proceedings at every step. There ought to be no exception to this rule save in favor of the ministerial officer who executes process regular upon its face. The cases of *Voorhies v. Bank of the United States*, 10 Pet. 449; *Cooper v. Reynolds*, 10 Wall. 320; *Ludlow v. Ramsey*, 11 id. 582, have been sometimes thought to assert the doctrine that jurisdiction may be acquired by seizure of the estate of the defendant, so as to empower the court, under whose process the seizure is made, to award sale of such estate whether the requirements of the law antecedent to obtaining the writ have been complied with or not.

But in the first of these cases the court expressly affirm the principle that "all the requisitions of the law are conditions precedent, which must be performed before the power of the court to order a sale can arise," and the title there in controversy was sustained upon the ground that the statute under which the attachment proceeding was had did not prescribe what should be received as evidence of compliance with its requirements in this respect, or direct that any record of such compliance should be preserved, and the question being, therefore, left to depend upon those general principles of law by which the validity of sales under judicial process are determined, and it appearing of record that the writ issued was that prescribed by law, or, to use the language of the opinion, "the same as prescribed by law," the court thereby acquired jurisdiction of the cause of action and the property. The record was silent as to whether the requisites of the statutes anterior to the issuing of the writ had or had not been complied with; and, as we understand the opinion, the court supply the omissions of the record in this respect by the application of the maxim *omnia rite esse acta*.

So in *Ludlow v. Ramsey* the proceeding was by bill to vacate the sale for insufficiency of the affidavit. The court

held the affidavit sufficient in substance, but referring to what had before been decided in *Cooper v. Reynolds*, and pursuing the doctrine of that case, say that the sole question is, whether the court obtained jurisdiction; that its general jurisdiction of such process is not denied; and that the writ of attachment in the particular case "appears to be in due form of law, and to have been regularly served upon the property, so that the court became fully possessed of jurisdiction in the case." So in *Cooper v. Reynolds*, MILLER, J., who delivered the opinion, says:

"It seems to us that the seizure of the property, or that which in this case is the same in effect, the levy of the writ of attachment upon it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of the plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form, under the seal of the court, and is by the proper officer levied upon property liable to attachment when such writ is returned into court, the power of the court over the *res* is established. The affidavit is the preliminary to the issuing of the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed to observe all the requisite formalities, but the writ being issued and levied, the affidavit has served its purpose, and though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon the defendant's property."

It appears to me, that while in the cases referred to the supreme court of the United States have gone much beyond the courts of most of the States in sustaining judicial proceedings of the character now under consideration, yet that they cannot, with accuracy, be said to go further than this, to wit: That defects in the affidavit or other preliminary steps shall be disregarded, if by a writ substantially perfect, and not showing upon its face any omission of the previous

requirements of the statute, the proper officer of the court has seized the estate of the defendant within the territorial jurisdiction. But I conceive it to be clearly the doctrine of these cases that there must be a perfect writ.

Under our system, it is true, a perfect writ upon a defective affidavit cannot be, for the statute requires the affidavit to be recited in the writ, but elsewhere the two may perhaps concur.

Now the present case is clearly distinguishable from the cases in the supreme court of the United States, in this: that, while in all of these the writ issued out of a court of general jurisdiction, and was fair upon its face, here the writ is out of an inferior court, and recites as the ground of its issuance that "oath has been made that the defendants reside out of this county," which was no ground in any case. The writ was, therefore, absolutely void, and would not have availed to protect even the ministerial officer who executed it.

It was argued at the bar, however, that no writ of attachment can, under our statute, be held void, whatever its defects; for, it is said, notwithstanding any deficiency therein, or in the affidavit or bond, the same may not be quashed, but, by the eighth section of the statute, shall be amended, and what is void cannot be made valid; and, therefore, it is concluded, absolute invalidity cannot be predicated of process which, by positive law, is susceptible of amendment.

This same distinction is frequently taken in the books, and seems, in some cases, to have been thought applicable to cases like the present — as in *Owens v. Starr*, 2 Lit. 230; and *Booth v. Rees*, 26 Ill. 48, in which latter case it was held that a writ of attachment, issued upon affidavit, averring the statutory causes upon information merely, should protect even the justice of the peace who issued it, and the plaintiff who procured it. But we conceive that the question, whether it may or may not be within the power of the court to allow an amendment of any particular process, is not, in all cases, decisive of the other question, whether

such process may or may not suffice to sustain a judgment given thereon. In the present case it cannot be said that the writ is amendable (and, therefore, voidable merely) in the sense in which the word is generally used in the books, for the defect here is such that there can be no amendment of the writ, without a new affidavit of facts not now appearing; and there cannot be such further affidavit unless the requisite facts exist, which does not now appear. Therefore it cannot now be known that the statutory power of amendment can ever be called into exercise, or the writ ever be amended; and we are not able to agree that one who has, to his own profit and his neighbor's injury, set in motion the process of the law "to which, by his own showing, he is not entitled, ought to be protected by that process;" because, possibly, upon a state of facts not shown, he might have obtained leave to correct his errors and perfect his writ, and so it was held in *Whitney v. Brunette*.

If the original affidavit had been sufficient, and the writ had falsely recited it, we might incline to a different opinion; but upon this record as it now stands, it does not appear that the defects in this process could have been corrected.

The judgment of the court below is affirmed, and the defendant in error will recover his costs in this court.

Affirmed.

EXEMPLARY DAMAGES, WHETHER PROPER. — In considering the question whether exemplary damages are ever proper, the principal case was cited as an instance of their allowance: *Murphy v. Hobbs*, 7 Colo. 52.

LOVELAND v. SEARS.

AMENDMENT of sheriff's return after judgment. Upon leave of court a sheriff may amend his return on a summons at a term subsequent to that at which judgment was rendered, and after the record has been removed to the supreme court.

BILL OF EXCEPTIONS — when necessary. Error cannot be assigned as to the damages awarded in the court below, unless the evidence upon which the finding was made is preserved in the record.

PLEADING — one good count will support general verdict. It cannot be objected that one count in a declaration is faulty, if there is one good count to support the finding. Rev. Stat. 500.

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PRACTICE — *referring note to clerk to compute amount due.* Where a judge of probate court acts as his own clerk, it is not necessary to refer a note on which action is brought to the clerk to compute the amount due thereon.

MISNOMER — *omission of word "junior" in record of judgment.* The word "junior" is no part of a name, and where a plaintiff in the summons and declaration affixed the letters "jr." to his name, the omission of those letters in the record of judgment is immaterial.

Error to Probate Court, Arapahoe County.

Messrs. MILLER & MARKHAM, for plaintiff in error.

Mr. E. L. SMITH, for defendant in error.

BELFORD, J. This was an action of assumpsit instituted in the probate court of Arapahoe county on the 28th day of December, 1867, on a promissory note executed by Loveland to Cook & Co., and by them duly assigned to Sears. The summons was issued on the same day, and the return of the sheriff shows that it was served on the 29th of December, 1867. At the February term, 1868, of that court, judgment was rendered by default against Loveland, for \$1,650.50. This writ of error was sued out to reverse this judgment and a supersedeas was granted. At the present term of this court the defendant in error, by his attorney, filed his affidavit and also that of Richard Sopris, the sheriff, who served the summons, showing that the date of the return of service of the summons was erroneous. On this showing he was allowed to file a supplemental record. It further appears that the defendant in error appeared before the probate court and made application to have the return amended, so as to show that service was made on the 28th of December instead of the 29th. The plaintiff in error appeared by his attorney. The notice given of the application to amend was brief, but it does not appear that further time was required by plaintiff's attorney. The court, on hearing the evidence of the sheriff, allowed the return to be amended. These facts appear in the supplemental record filed at this term. The first error assigned is that the court below permitted the amendment to be made. In the case of *Moore v. The Peo*

ple, 3 Gilm. 153, amendments of this kind are regarded as matters of course and that no resistance can be made to such application. Should the sheriff make a false return he is responsible for the consequences. *Morris v. Trustees, etc.*, 15 Ill. 269 ; 33 id. 269 ; 53 id. 323.

The next error assigned is, that the judgment is in excess of the amount of the note. There is no bill of exceptions here containing the note and we can make no computation to ascertain whether such be the fact.

It is objected that there is one bad count in the declaration and that the finding of the court was a general one. It is sufficient to say, there is one good count and that will support a general finding.

The next objection is, that the probate judge did not refer the note to the clerk to make assessment of damages. The probate judge filled both offices. If it were necessary to refer it to the clerk, in this case, it would be handing the note by Jacob Downing, judge, to Jacob Downing, clerk, a ceremony not calculated to especially advance the spirit of justice.

The next objection is, that Sears is described in the pleadings and summons as Jasper P. Sears, Jr., and that the judgment is rendered in favor of Jasper P. Sears, omitting the letters "Jr." The word "junior" is no part of a name, but is merely descriptive of the person ; and is usually adopted to designate the son, when the father bears the same christian name, as well as family name. *Padgett v. Lawrence*, 10 Paige, 170. The omission to add the word "junior" to Sears' name in the judgment can cut no figure, as the judgment recites that "said plaintiff do have," etc. This shows in whose favor the judgment was rendered.

We are unable to find any error in this record.

The judgment below is affirmed at the cost of the plaintiff in error.

Affirmed.

AMENDMENTS TO OFFICER'S RETURN IN PROCESS are in the interest of justice, and unless it be shown that the party complaining has been deceived or misled to his prejudice, great liberality in allowing them is always exercised: *McClure v. Smith*, 14 Colo. 301.

HILL v. THE PEOPLE.

INDICTMENT for deliberate and premeditated homicide. An indictment for murder in the common-law form is sufficient to support a conviction for deliberate or premeditated killing under the act of 1870. (8 Sess. 70.)

The words "malice aforethought" in the indictment are co-extensive in meaning with the words "deliberate and premeditated," and a charge that a homicide was committed with malice aforethought, comprehends a case of deliberate and premeditated killing.

CONSTRUCTION of the act of 1870 relating to homicide. The words "deliberate and premeditated" in the act of 1870, relating to homicide, refer to the intention of the accused at the time of the killing.

INTENTION is matter of fact to be proved. Under the act of 1870, the intention of the accused at the time of the killing is to be ascertained by the jury upon the evidence, and cannot be made the subject of legal presumption or inference.

INTENTION — presumption of fact. The intention of the accused may be inferred from the circumstances attending the homicide, and is therefore the subject of a presumption of fact.

Whether the intention be shown by evidence of antecedent menaces, former grudges, lying in wait, the means employed to effect the homicide or any other circumstance, the evidence is to be submitted to the jury to find the fact under the direction of the law.

A man shall be presumed to intend that which he voluntarily does, and an intention to take life is shown by the use of a deadly weapon.

So, also, if after a quarrel with deceased the prisoner went away and armed himself, and returned to the scene of the combat, intending to renew the altercation and quarrel with deceased, or to place himself in the presence of deceased with the purpose to provoke deceased to renew such quarrel and in such quarrel to make use of the pistol in repelling the assault of deceased, the intention of the prisoner to take the life of deceased is shown.

INSTRUCTION as to presumption of intent. It is the duty of the court to draw the attention of the jury to the points in the case and to presumptions of fact, which the law authorizes them to deduce from the evidence.

And in the present case, it was the duty of the court to lay before the jury the presumption of fact respecting the intention of the accused, and it was the duty of the jury to yield to its force and conclusiveness.

The jury should, however, be told that the presumption is to be drawn by them, and does not arise by implication of law.

An instruction, by which the jury were probably led to believe that they were relieved from considering the intention of the accused as a fact arising in the case, is erroneous.

This rule is not applicable to the ordinary inference of malice, which arises upon proof of killing, but to cases of deliberate or premeditated homicide, under the act of 1870.

REASONABLE DOUBT *in cases of homicide.* In a criminal cause, where the defense is based upon the facts and circumstances growing out of the charge itself, the burden of proof remains on the government throughout, to satisfy the jury of the guilt of the defendant.

In such case it is error to charge the jury that circumstances of mitigation justification or excuse, must be established by a fair preponderance of testimony, and that doubt as to whether the killing was in heat of blood or with malice, would not be sufficient to acquit of the charge of murder.

Error to District Court, Arapahoe County.

THE indictment was in the common-law form for murder.

At the trial, James Whitsell testified: That an altercation occurred between the prisoner and the deceased, Elija Williams, at a saloon in Denver, on the evening of the 15th of July, in which harsh words were used but no blows were struck; the prisoner went away and returned after an absence of half or three quarters of an hour with a pistol; that prisoner said to deceased, "you d——d black s——n of a b——ch, I am ready for you now;" that one George Lyon seized Hill, and a struggle ensued in which deceased participated, and the contending parties passed into a back room, where the shooting took place. Witness did not see the shooting; he testified that the deceased was not armed.

Thomas J. Martin gave the following account of the second altercation between prisoner and deceased. When Hill came in I heard him say to Elije, "You've called me a black s——n of a b——h," and Elije says "Yes, and what are you going to do about it;" Hill says to Williams, "If you don't take it back I'll hurt you;" Williams jumped up from his seat and started towards Hill; Hill drew a pistol from his coat pocket and says to Elije, "If you don't stay back I'll hurt you;" George Lyon caught Hill by this time and pushed him into the billiard room, drew the door to between him and Williams, and Mr. Thompson caught Williams in the opposite room. Elije pulled Thompson loose from him and jerked the door open; George Lyon says to Elije, "Why don't you go away and let him alone;" George still had Hill, holding him, and Elije still made way toward Hill, and George let go Hill and started toward bar-room to

call the proprietor of the house ; before either of 'em got back from bar-room Hill fired a shot ; in course of a minute or so after the shot was fired Williams clutched Hill, and they tussled a minute or so, and Thompson tried to part 'em ; finally, either he parted 'em or Williams let go, I ain't certain which, and walked off from him. He then sat down on the floor first, then he laid down on flat of his back ; that is, Williams ; he said in a minute or so after he laid down, " Who done it ? " and immediately died ; after they were separated, Hill immediately left the room and went out at the back door ; Hill hit Williams when he shot ; the shot hit Williams, and I believe it hit him in the point of the heart, I am not certain ; I didn't examine Williams ; he died three or five minutes after the shot ; I believe Williams wasn't hurt any other way than by the shot ; I don't know, and saw pistol which Hill had ; it was a smallish seven-shooter ; this shooting occurred in Arapahoe county, I believe, Colorado territory.

Harrison Bozier testified : That prisoner said to deceased, when he returned with the pistol : " You d — m s — n of a b — h, I am here ; " that deceased then started toward prisoner, and a struggle ensued, during which the fatal shot was fired.

George Lyon testified : That he took the prisoner into the back room and fastened the door, and that deceased broke through the door and said, " Where is the d — d nigger ; I will kill him. " Prisoner told deceased to keep away ; deceased then sprang at prisoner, and prisoner fired the shot.

Ira Thompson testified : That when prisoner returned, deceased said to him, " Hill, you back here ; " prisoner said, " I don't want you to speak to me, you called me a s — n of a b — h, didn't you ; " deceased said " Yes, what are you going to do about it ; " prisoner said deceased was a s — n of a b — h ; deceased rose from his seat, jumped on the top of the table and said, " G — d d — n you, I will kill you ; " witness said, " Williams, don't hit that man ; " deceased said, " G — d d — n the nigger, I will kill him. " Lyon then

took prisoner out and witness caught hold of deceased ; deceased broke away from him and went into back room ; a struggle followed between prisoner and deceased, during which deceased forced prisoner against the wall, and raised his hand to strike him, when the prisoner fired his pistol.

The testimony was voluminous, and it is unnecessary to insert all of it. Sufficient has been stated to show the principal points.

The charge to the jury was as follows :

If the homicide charged in the indictment has been established by the evidence to have been committed by the prisoner, the law in the first instance presumes that such killing was malicious in such sense as to hold the prisoner guilty of the crime of murder. The burden of showing circumstances of mitigation, justification or excuse is upon the prisoner, unless such circumstance sufficiently appears in the evidence on the part of the people.

If the jury find the prisoner guilty of murder, then they must also consider and find whether such murder was or was not premeditated.

If the jury believe, from the evidence, that prisoner and deceased, shortly prior to the occasion of the killing, had an altercation or controversy in which deceased used words of reproach or threats toward prisoner ; that prisoner thereupon went away from deceased and returned presently armed with a pistol, intending to renew the altercation and quarrel with deceased, or to place himself in the presence of deceased with the purpose to provoke deceased to renew such quarrel, and in such quarrel to make use of the pistol in repelling the assault of deceased in case deceased should assault him ; and that thereupon the prisoner returning with either such purposes, the altercation was renewed either by prisoner or deceased, and that an assault and struggle followed, and that the shot whereby deceased came to his end was fired by prisoner during such struggle, then the jury ought to find prisoner guilty of premeditated murder, without reference to who gave the first offense or was the aggressor in that

particular occasion, and even though they also believe from the evidence that prisoner was in danger of life at the time of the shot fired. The arming and returning in such case raises a presumption of a deliberate purpose to kill, and the law permits no man to take life even in defense of his own life in a quarrel which he himself has provoked. And if the meeting of the prisoner and deceased upon the occasion of the homicide was but casual and not premeditated by prisoner, yet if prisoner, at such meeting, before any advance by deceased toward him, or any assault offered by deceased, made show of firearms, accompanying such exhibition by words of threatening toward deceased, then the jury will be justified in regarding the prisoner as the first aggressor, and as having provoked the assault of Williams which ensued, but in such case the jury should find the prisoner guilty merely, and not guilty of murder with premeditation. But if the jury find from evidence that the meeting and altercation of prisoner and deceased, upon the occasion of the shooting, was not premeditated by defendant, as supposed by the foregoing instruction; that the defendant, before the killing, attempted in good faith to evade the assault of deceased; that, by reason of the fierceness of the assault, the prisoner, taking into account the relative strength and activity of himself and deceased, and the previous threats, if any, made by deceased, was justified in believing that he could not escape such assault, and that from such assault he was in danger of life or limb or great bodily harm, then prisoner was justified in taking the life of deceased to prevent such injury.

Prisoner was justified in believing himself unable to evade the assault of deceased, if a man of reasonable firmness placed in the same circumstances would have indulged the same belief.

It is not necessary to justify the homicide as done in self defense, that defendant should show that he was in actual danger of life or limb, or could not have escaped the assault of deceased; it is sufficient if, under all the circumstances

then existing, a man of reasonable prudence and firmness would so have believed.

After the jury had retired they were recalled, and an instruction not here recited was withdrawn from the consideration of the jury by the court. The court then proceeded to instruct the jury further, as follows :

That the law, in the first instance, presumes every accused person innocent of the crime charged, but if the crime charged be murder, and if the killing be proven, then a presumption arises that said killing was malicious. The law, however, makes no presumption from the fact of the killing, that such killing was deliberate, but requires the deliberation of the accused to be proven beyond a reasonable doubt before he can be found guilty of premeditated murder. But the presumption of malice which arises from the fact of the killing, devolves upon the accused the burden of showing to the satisfaction of the trial jury all circumstances of mitigation, excuse or justification, unless such circumstances be shown in the prosecution, and unless upon consideration of all the evidence, both on the part of the people and the prisoner, it appears by a fair preponderance of proof that the killing was done in lawful self-defense upon apparent necessity in a quarrel not provoked by accused ; they ought not to acquit, nor ought they to find guilty of manslaughter and not guilty of murder, unless by a like preponderance of proof it appears that the killing was done in the sudden heat of passion and not of malice aforethought.

It will not suffice to acquit the defendant, that the jury are in doubt whether the killing was or was not done in self-defense, or was or was not done in a quarrel unprovoked by accused. Nor will it suffice to reduce the killing to manslaughter, that the jury are in doubt whether such killing was of malice aforethought or in the sudden heat of passion and without malice.

The distinction between murder and manslaughter is as follows : *Murder* is an unlawful killing with malice aforethought, express or implied. *Express malice* is a deliberate intention to take life, and may be inferred from external

circumstances, or the conduct, actions and words of the party accused, at or about the time of the homicide, the weapon used, and the manner of the killing. *Implied malice* is that malice which is inferred by the law from the fact of homicide, where no considerable provocation appears, or the circumstances of the killing show an abandoned and malignant heart. *Manslaughter* is an unlawful killing without malice, express or implied, and without any mixture of deliberation whatever. To reduce a homicide from murder to manslaughter, it must be shown by the person accused thereof (unless shown by the prosecution) to have been upon a sudden heat of passion, and upon a provocation apparently sufficient to make the passion irresistible, or it must be shown to have been done involuntarily in the commission of a lawful act, without due caution and circumspection.

The court further instructs, that the instruction that the jury "ought or ought not," upon a supposed state of facts, to find, for or against the accused, imports that the state of facts, supposed by the instruction, does or does not warrant the finding, which the jury are thereby told they ought or ought not to make, and that a finding in violation of such instruction will be deemed in law erroneous.

A "presumption" is an inference or conclusion from certain premises; presumptions are either conclusive or disputable; conclusive presumptions cannot be overcome by evidence; disputable presumptions may. The presumption of innocence in criminal cases is a disputable presumption, so, also, is the presumption of malice, which the law raises from the fact of a homicide proven. This latter presumption, as before stated, can only be overcome by a fair preponderance of testimony.

The jury found the defendant guilty of premeditated murder.

Section 36 of the criminal code, referred to in the opinion of the court, is as follows:

"The killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the

homicide, will devolve on the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide."

Section 1, of the act of 1870, is as follows: "That section 20 of said chapter 22 of the Revised Statutes of Colorado territory shall be hereafter construed so that the death penalty for the crime of murder shall not be ordered to be inflicted by the courts of the territory, unless the jury trying the case shall, in their verdict of guilty, also indicate that the killing was deliberate or premeditated, or was done in the perpetration, or attempt to perpetrate, some felony."

Messrs. BROWN & PUTNAM, for plaintiff in error.

Mr. M. A. ROGERS, district attorney.

Mr. Justice WELLS dissented from so much of the opinion as relates to the effect to be given to section 36 of the Criminal Code.

HALLETT, C. J. The act of 1870, which provides that the crime of murder shall not be capitally punished, unless the jury trying the case shall indicate in their verdict that the killing was deliberate or premeditated or done in the perpetration or attempt to perpetrate a felony, is peculiar in form, but in many respects substantially the same as the law of several States upon the same subject.

As early as 1794, in Pennsylvania, it was enacted that:

"All murder which shall be perpetrated by means of poison or lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree."

In substance, if not in form, this statute has been adopted in other States, and its meaning and effect are now pretty well understood. Our legislature, with less method, perhaps, but with quite as much certainty, has raised a punitive distinction between murder committed with deliberation or premeditation, or in the perpetration or attempt to perpetrate a felony, and other murders, and this distinction, so far as relates to deliberate or premeditated killing, is substantially the same as that which, by the Pennsylvania act, separates the first and second degrees of murder. In the Pennsylvania act, and in our own, certain distinctions are mentioned for the purpose of limiting the death penalty to cases falling within them, but nothing is added to or taken from the common-law definition of murder. And this brings into view the first question presented in this record, which is the sufficiency of an indictment in the common-law form to support a conviction for premeditated murder. It is conceded that the crime of which plaintiff in error has been convicted must be set out in the indictment, and if the words, "malice aforethought" are not co-extensive in meaning with "deliberation and premeditation" this has not been done. If these words had not acquired a technical meaning in the law, probably no doubt would exist upon this point. We would then accept them in their primary sense, which is rather more comprehensive than "deliberation and premeditation," inasmuch as the latter words do not necessarily imply wickedness of purpose or evil design. Said Lord Coke (3 Inst. 51): "Malice prepensed is when one compasseth to kill, wound or beat another, and doth it *sedato animo*. This is said in law to be malice aforethought, *prepensed, malitia precogitata*."

The meaning of these words has been greatly amplified since the days of Coke, for, in the *Webster case*, 5 Cush. 304, it was said to include "not only anger, hatred and revenge, but every other unlawful and unjustifiable motive." But it is no objection to say that the words are more comprehensive than the words of the statute, if they are of equivalent meaning, because the whole must include all of

its parts. Before the statute of 1870, it was never doubted that a formed design and deliberate purpose to kill was provable under the averment of malice aforethought, and there is nothing in the statute to change the rule on this subject. In the *Webster case*, 5 Cush. 316, it was said that malice aforethought does not imply deliberation or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent.

They do not *necessarily* imply deliberation or premeditation, because they have acquired a technical meaning in the law far beyond their primary and popular sense, and may be, and often are, taken to mean something other than premeditation and deliberation. The mother who exposed her child in the garden, and the workman who cast timber into the crowded street, are instances given in the books of criminal carelessness which the law denominates malice aforethought; but a homicide effected in either of these ways would not be regarded as deliberate or premeditated. Therefore the words of the statute, although not co-extensive in meaning with the words of the indictment, are, nevertheless, synonymous with them, and there can be no reason for using the former rather than the latter. Whart. Crim. L., § 1115.

The doctrine is not to be extended, however, beyond the reason which supports it, and, therefore, if the fact to be proved is not set out in the indictment no evidence can be received concerning it. We doubt the soundness of those decisions in which it is held that proof of a homicide committed in the perpetration, or in the attempt to perpetrate a felony, may be made under the ordinary common-law indictment, for these facts are not averred in such an indictment. 2 Bishop's Crim. Proc., § 562, *et seq.*

Passing from the indictment, which we accept as sufficient, no argument will be required to show that the words "deliberate and premeditated" refer to the specific intent with which the act is done. They are used to denote the action of the mind, and involve the idea of thought and reflection.

A deliberate or premeditated act is one which is done upon a formed design, and with a direct purpose to accomplish it.

The act and intention must coincide, but, as to this coincidence, it was held in Pennsylvania to be sufficient that the accused intended to take life, although the act fell upon one not within the intention. *Hopkins v. Com.*, 50 Penn. 10. Mr. Wharton says (Whart. C. L., § 1084):

“The distinctive peculiarity attached by the statutes to murder in the first degree, however, is that it must necessarily be accompanied with a premeditated intention to take life. The ‘killing’ must be ‘*premeditated*.’ Whenever, then, in cases of deliberate homicide, there is a specific intention to take life, the offense, if consummated, is murder in the first degree; if there is *not* a specific intention to take life, it is murder in the second degree.”

Accepting this distinction, not as establishing degrees, but as one which regulates the punishment under our statute, we will inquire in what manner the intention to take life is to be ascertained. And here it will be observed that the act of 1870, in terms, refers this question to the jury, the language of the act being that the jury shall indicate in their verdict that the killing was deliberate or premeditated. Juries act upon evidence, and hence we may conclude that the intention is matter of fact to be found by the jury upon the evidence. In support of this view, I find it laid down in *Roberts v. The People*, 19 Mich. 414, as a general rule, to which there are few if any exceptions, “that when a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found by the jury as matter of fact before a conviction can be had.”

This is the rule in the States where degrees in the crime of murder are recognized, and deliberate and premeditated homicide is assigned to the first. *People v. Potter*, 5 Mich. 1; *Whitford v. Com.*, 6 Randolph, 722; *Bivins v. State*, 6 Eng. 455; *State v. Gillick*, 7 Iowa, 287; *State v. Dowd*, 19 Conn. 387; *People v. Sanchez*, 24 Cal. 17.

At common law, and under our statute, the presumption of malice arises upon proof of the killing, but the statute of 1870 distinguishes the cases characterized by deliberation and premeditation from others, and declares that the jury shall indicate the existence of such distinguishing characteristics. Of the correctness of the general proposition, that the intention with which the killing is done is matter for the consideration of the jury, there appears to be no doubt, and it would seem that this can never be made the subject of legal inference or presumption; and yet in some of the cases homicide, by means of a deadly weapon, appears to have been regarded as an exception to the rule, and Mr. Greenleaf states that the intent to murder is conclusively inferred from the deliberate use of such weapon. 1 Greenl. Ev., § 18.

A man shall be presumed to intend that which he voluntarily does, and where the act is necessarily destructive of life, it would be absurd to say that the actor did not intend to produce death. So, if a person deliberately use a deadly weapon in a manner likely to produce harm, upon every principle by which we may judge of the motives of men, we must say that he intends to destroy life. But we determine this psychological fact upon our experience of the operations of the mind; and, therefore, I think this is a natural presumption as distinguished from a legal presumption. It is an inference, approved by reason of such an infallible nature that the law recognizes and enforces it. Of natural presumptions Mr. Starkie says (3 Stark. Ev. 1245): "Many presumptions of this class are recognized by the law, and, therefore, in one sense, may be termed legal presumptions, which still, unless some degree of technical force and weight be given them beyond their mere natural operation, are properly to be ranked in this class. Recent possession of stolen goods, on a trial for larceny, is recognized by the law as affording a presumption of guilt; and, therefore, in one sense, is a presumption of law; but it is still, in effect, a mere natural presumption, for, although the circumstance may weigh

greatly with a jury, it is to operate solely by its own natural force, for a jury are not to convict on this or any other charge unless they be actually convinced in their consciences of the truth of the fact."

So, also, in Best on Presumptions, 45, mention is made of presumptions of fact recognized by law, first among which are those where the inference is one which common sense would have made for itself. I think that we may regard the presumption arising from the use of a deadly weapon, as of this class, so strong that it has often been mistaken for a presumption of law. "We find the same presumption spoken of by judges, sometimes as a presumption of law, sometimes as a presumption of fact; sometimes as a presumption which juries should be advised to make, sometimes as one which it was obligatory on them to make," etc. Best on Presumptions, 44.

The statute has not declared that homicide, effected by means of a deadly weapon, shall be punished with death, but deliberate or premeditated homicide is so punishable; therefore, the ultimate point which the evidence must extend to and establish, is not the use of a deadly weapon, but the deliberation or premeditation with which the fatal act is done, and whether the intention is shown by evidence of antecedent menaces, former grudges, lying in wait, the means employed to effect the homicide, or any other circumstances which may give assurance of it, I think that it is to be submitted to the jury to find the fact under the direction of the law.

How far the law will go in supporting, before the jury, a presumption of fact which it recognizes and enforces, is a question of some difficulty. The rule is given in Best on Presumptions, 48, as follows: "The terms in which presumptions of fact and mixed presumptions should be brought under the consideration of juries, by the presiding judge, depend on their weight, either natural or technical; when the presumption is one which the policy of law and ends of justice require to be made, such as the existence of moduses and other incorporeal rights, from unin-

interrupted usage, the jury should be told that they *ought* to make the presumption, unless some evidence be given to the contrary; it should not be put to them as a matter for their discretion, and the same rule seems to apply where the presumption is one of much natural weight and frequent occurrence; as where larceny is inferred from the recent possession of stolen property, etc. In the case of presumptions of a less stringent nature, however, such a direction would be improper; and, perhaps, the best general rule is, that the jury should be advised or *recommended* to make the presumption."

To advise or recommend a jury to make a presumption, must, in many cases, be very nearly akin to an expression of opinion upon the weight of evidence, which, according to the construction placed upon our statute governing charges to juries, is prohibited by it.

The doctrine of presumption grew up under the common law which enjoined upon courts the duty of analyzing the evidence, and commenting upon the bearings, tendency and force of the particular facts, and the comparative weight and force of conflicting evidence. 1 Stark. Ev. 73.

The object of the statute in providing that courts should charge juries as to the law of the case only was to preserve the distinction between the functions of each, which, however commendable in itself, must not be carried so far as to defeat the administration of the law.

It is still the duty, as it always has been the practice, of our courts, to draw the attention of the jury to the points arising in the case, and to the presumptions of fact, which the law authorizes them to deduce from the evidence. To guide the deliberations of a jury to a correct conclusion, without assuming their functions, is a delicate and arduous duty, which must be faithfully and intelligently performed by the courts in all cases.

A portion of the charge to the jury in this case was the following:

"If the jury believe, from the evidence, that prisoner and deceased, shortly prior to the occasion of the killing, had

an altercation or controversy in which deceased used words of reproach or threats toward prisoner, that prisoner thereupon went away from deceased and returned, presently, armed with a pistol, intending to renew the altercation and quarrel with deceased, or to place himself in the presence of deceased with the purpose to provoke deceased to renew such quarrel, and, in such quarrel, to make use of the pistol in repelling the assault of deceased in case deceased should assault him; and thereupon, the prisoner returning with either such purposes, the altercation was renewed either by prisoner or deceased, and that an assault and struggle followed, and that the shot, whereby deceased came to his end, was fired by prisoner during such struggle, then the jury ought to find prisoner guilty of premeditated murder, without reference to who gave the first offense or was the aggressor on that particular occasion, and even though they also believe, from the evidence, that prisoner was in danger of life at the time of the shot fired. The arming and returning, in such case, raises a presumption of a deliberate purpose to kill, and the law permits no man to take life even in defense of his own life in a quarrel which he himself has provoked."

It will be observed that the intention of the accused to take life is not mentioned in this part of the charge as a fact essential to guilt, except as a presumption arising out of the circumstances that the accused armed himself and returned to the scene of the tragedy after the first interview. Elsewhere the jury were told that they were to find premeditation; but as this fact is, in this portion of the charge, distinctly predicated upon the arming and returning, it is not probable that the jury accepted the former as a modification of this statement. In the circumstances named by the court, and in the character of the weapon used, there was plenary proof of the intention of the accused to take life, but, as I have attempted to show, this was for the consideration of the jury. It was the duty of the court to lay before the jury the presumption of fact as to the intention of the accused arising upon these circumstances, and it was

the duty of the jury to yield to its force and conclusiveness. I think that the manner in which this duty was performed by the court is open to the objection, that the jury probably understood that they were relieved from the consideration of the intention of the accused as a fact in the case. It cannot be objected that the premeditation is made the subject of inference and presumption, because, usually, this fact cannot be proved in any other way. 2 Stark. Ev. 739.

But they should have been told that this presumption was to be drawn by them, and did not arise by implication of law. *Graves v. The State*, 12 Wis. 593; *Methard v. The State*, 19 Ohio, 367.

I do not refer to the ordinary inference of malice, which, by the common law and our statute, arises upon proof of the killing, but to the premeditation and deliberation mentioned in the act of 1870, which by that act are directly submitted to the decision of the jury. In all cases of intentional homicide malice is implied, and so it must have been here if the jury could find nothing to mitigate the offense. But premeditation and deliberation is the subject of proof of which the government assumes the burden, and of this I think the jury were not sufficiently informed.

Another part of the charge presents a question which has been the subject of much learned discussion in the courts of this country, and appears to be still unsettled, although I think the weight of authority is opposed to the views of the district court. The court charged that circumstances of mitigation, justification or excuse must be established by a fair preponderance of testimony, and that doubt as to whether the killing was in heat of blood or with malice, would not be sufficient to acquit of the charge of murder.

The doctrine of reasonable doubt was, however, applied to the crime of which the accused was convicted, and if the case were not to be tried anew, it might not be necessary to notice that portion of the charge which relates to the evidence required of the accused. The charge is grounded upon section 36 of the Criminal Code, which, after proof of the killing by the government, in terms, casts upon the

accused the burden of proving circumstances of mitigation, justification or excuse, unless such circumstances appear in the evidence against him. The law of homicide, as found in the Criminal Code, was evidently drawn from the common law, and probably this section was intended to preserve the common-law rule respecting malice in cases of homicide. I think that the language accords with that used by the common-law writers upon the same subject, sufficiently to warrant this inference. At all events it is noticeable that, by the statute as well as by the common law, if the circumstances of mitigation, justification or excuse are apparent in the testimony of the government, the accused is entitled to the benefit of the presumption of innocence, which demands that his guilt shall be made to appear beyond a reasonable doubt. But it is said that, if these circumstances do not so appear, he must establish them by testimony outweighing that of the government. Now, the circumstances attending an act give character to it, inasmuch as they evince the intention of the actor at the time of the fact. Section 2, Criminal Code. Usually, the proof of the killing will disclose the circumstances attending it, and the character of the crime is demonstrated by the same evidence which establishes it. But if the government is able to make proof of the homicide, without more, and the accused is therefore compelled to give evidence of the attending circumstances, it seems to me that he ought not to be placed under greater hardship or subjected to a more rigorous rule than would have been applied, if the government had frankly presented the whole case to the jury.

The argument in the *York case*, 9 Met. 93, which is difficult to answer or to accept, proceeds no further than the case of homicide, without further proof on the part of the government, and it appears to me that there are unanswerable objections to the doctrine thus limited. It often happens, as in this case, that several witnesses of a criminal act give different accounts of it and some of the testimony is more favorable to the accused than the remainder.

The government usually selects the testimony which

tends most strongly to conviction, while the accused relies upon that which is most favorable to himself. Shall it be said that in such case the testimony for the defense must outweigh the testimony of the prosecution?

The testimony of the accused may be supplemented by that of the government, or it may be sufficient to balance the opposing testimony; but if it is sufficient to raise a reasonable doubt of the guilt of the defendant in the minds of the jury, the presumption of innocence will operate in his favor. "However the rule may be in cases where the defendant sets up, in answer to a criminal charge, some separate, distinct and independent fact or series of facts, not immediately connected with, and growing out of, the transaction on which the criminal charge is founded, there can be no doubt that, in a case like the present, the burden of proof remains on the government throughout to satisfy the jury of the guilt of the defendant. It appears by the evidence, as stated in the bill of exceptions, that the justification upon which the defendant relied was disclosed partly by the testimony introduced by the government and in part by evidence offered by the defendant, and that it related to and grew out of the transaction or *res gesta*, which constituted the alleged criminal act." *McKee v. Com.*, 1 Ben. L. C.C. 297, and note; *State v. McClure*, 5 Nev. 132; *State v. Bartlett*, 43 N. H. 224; *State v. Flye*, 26 Me. 316.

If we except the statute in its common-law relations where the presumption of malice always encountered the presumption of innocence we shall not be able to approve the charge of the court below. Where the defense is based upon the facts and circumstances growing out of the charge itself, we cannot indulge the presumption of innocence and, at the same time, require the accused to establish those facts and circumstances by preponderance of testimony, because less evidence may be sufficient to engender a reasonable doubt of guilt.

In a case of less consequence we should hesitate to reverse a judgment for misdirection to the jury alone, but we cannot assume the grave responsibility of determining the

correctness of the verdict upon the evidence in a capital case. The judgment is, therefore, reversed and the cause remanded with directions to the district court to award a new trial.

Reversed.

HOMICIDE, "deliberate and premeditated." See *Redus v. People*, 10 Colo. 212; *Kent v. People*, 8 Colo. 574; *Morganhaus v. People*, 3 Colo. 374. Burden of proof: *Babcock v. People*, 11 Colo. 552. Province of jury: *Kent v. People*, 8 Colo. 582.

DOANE et al. v. GLENN et al.

PRACTICE—amending record after judgment—upon whom to serve notice.

Where an order allowing a bill of exceptions to be filed in vacation was omitted from the record, notice of an application to amend the record in that particular may be served upon the attorneys who appeared for the opposing party at the trial of the cause.

AMENDMENT OF RECORD at a subsequent term. Where an order allowing a bill of exceptions to be filed in vacation was omitted from the record by mistake of the clerk, the court may, at a subsequent term, allow the record to be amended by inserting such order *nunc pro tunc*.

Error to District Court, Arapahoe County.

UPON motion to strike the bill of exceptions from the record.

Messrs. FRANCE & ROGERS, in support of the motion.

Messrs. CHARLES & ELBERT, *contra*.

BELFORD, J. The defendants in error move to strike from the record the bill of exceptions, and rest the motion on two grounds.

It appears that at the June term of the district court the judgment in this case was entered up. The plaintiffs in error were allowed thirty days to prepare a record and file bond, and sixty days to settle their bill of exceptions. By the inadvertence of the clerk the order made by the judge in reference to filing the bill of exceptions was omitted from the record. This order was made at the last hour of the last session of the term, and the omission was not discovered until some weeks after. At the ensuing term of the court the plaintiffs in error, having given notice to the at-

torneys of the defendants, made their application to the court to have this omission supplied. This application was founded upon affidavit of Doane's attorneys, which set up the facts that the order had been made by the judge and omitted from the record by the clerk. The judge, acting on his own recollection of what had occurred, together with what appeared from the affidavits, allowed the omission to be supplied.

It is claimed by defendant's counsel that the notice above referred to was insufficient because the same was served on the attorneys and not on the parties. That final judgment having been entered at the July term, their connection with the case by operation of law had ceased, and that the amendment of the record must be regarded as having been made without notice, and therefore not valid or binding.

We find ourselves unable to sanction this claim. It is a noticeable fact that the same counsel who appeared for the defendants below appear for them here. There seems to be no breach in the line or continuity of employment.

While it is generally true that the power of the attorney, under his general warrant, expires when judgment is rendered, yet it is equally true that the power of the attorney will be retained even after the entry of final judgment on the record, and beyond the purpose of merely superintending the execution of the same. If a writ of error be brought against his client, it has long been the practice to require that he should be served with notice. 2 Sel. Pr. 365. So the entering of final judgment by the defendant's attorney may be irregular. What objection is there in such case to serving him with notice of a motion to set it aside, and to call upon him to defend and make it good? It is his business at least to see that a regular judgment in favor of his client should be perfected and sustained when the court has awarded in his favor. Having conducted the suit, he is best able to resist all attacks upon the judgment. Indeed, his own regularity is generally drawn in question by the proceeding. For a similar reason he is the proper person to be served with notice when the judgment or any

other proceeding in which he has participated is sought to be set aside or questioned on the ground of merits, as is done in this case. We think that the case of *Lusk v. Hastings*, 1 Hill, 656, is decisive of this point; and if it were not we would still be induced to hold that the duty of an attorney does not cease to his client so long as the judgment obtained by him is menaced by further judicial action.

It is next objected that the court could not, at a subsequent term, amend its records.

In *Alhers v. Whitney*, 1 Story, 310, Mr. Justice STORY says: "It is plain that at the common law no judgment was amendable after the term at which it was entered; and amendments could be made in the process, pleadings and proceedings only while the cause stood in paper, and before judgment. The authority to amend then, even in England, in cases of this sort, is dependent upon, and limited by, statute. Mr. Tidd has laid this down as the clear doctrine of the courts in all cases of ordinary suits in English courts of practice. Judgments and records are there never allowed to be amended except, in the first place, where the case is within the reach of some statute, or, in the next place, when there is something to amend by; that is, when there is some memorial, paper or other minute of the transactions in the case from which what actually took place in the prior proceedings can be clearly ascertained and known." Tidd, 713, 714.

We acknowledge the force of this doctrine, and question the right of allowing a judge to alter a judgment after the close of the term, when there is nothing to amend by; and he assumes to do it on the ground that the judgment, as entered, does not express the intention of his mind at the time it was entered. To tolerate a practice of this kind might give a license to the judge to carry the records of his court, and the ultimate rights of parties, about the country in his head. Yet, notwithstanding what has been said above, the doctrine in this country, in reference to amendments of records, may be said to have crystalized into the

following legal propositions, namely: That any error or defect in a record which occurs through the act or omission of the clerk of the court in entering, or failing to enter, of record its judgments or proceedings, and is not an error in the express judgment pronounced by the court in the exercise of its judicial discretion, is a mere *clerical error* and amendable, no matter in how important a part of the record it may be; and when the error or defect is in respect to the entry of some judgment, order, decree or proceeding to which one of the parties in the cause was of right entitled, as a matter of course, according to law and established practice of the court, it will sometimes be presumed to have occurred through the misprison of the clerk, and will always be amendable if, from other parts of the record, or from other convincing and satisfactory proofs, it can be clearly ascertained what judgment, order or decree the party was entitled to; nor is it necessary, so far as clerical errors go, that the amendment should be made during the term at which judgment is rendered. In the case of *Shaw v. Benkard* it was held, that, when an entry of default was not made, it is amendable in the court below, and, on appeal, the amendment will be presumed to have been made. 10 Ind. 227. So in *Burrow v. Blair*, 12 Ind. 371, a clerical error, whereby a judgment for foreclosure and the order of sale, and the execution covered land at the time not included in the mortgage, was allowed to be amended.

In the case of *Limerick petitioners*, 18 Mann. R., the court say: "When a defect in a record is occasioned by an omission of the court to render the proper judgment, or to come to a conclusion upon the whole matter embraced in the cause, such defect, arising out of an incorrect or a want of judicial action, cannot be amended after the term has closed and the cause is no longer *sub judice*. But, if the court have performed its whole duty correctly, and the recording officer has erred in making up a proper or full record, the court may, in its discretion, cause the record at any time to be amended or corrected so as to have it declare the whole truth. Each court must necessarily be the

judge of what it has decided and adjudged ; and, when it orders an amendment of the record, the presumption of other courts must necessarily be that it does not undertake to order its clerk to record what it never had decided."

In the case of *Slicer v. The Bank of Pittsburgh*, 16 How. 579, it was objected that the judgment was not entered upon the minutes kept by the clerk. The court say: "But the court had the power to make the amendment, which they did make, and which removed the objection, by entering the judgment *nunc pro tunc*. This was a duty discharged by the court in the exercise of a discretion which no court can revise."

In the case of *Latshaw v. Steinman*, 11 Serg. & Rawle, 356, it was held that the court below might, in their discretion, amend a judgment by default, and that the appellate court would not inquire whether they had exercised their discretionary power judiciously."

In the case of *Stickdale v. Johnson*, 14 Iowa, 179, a motion was made in December, 1861, to strike the bill of exceptions from the record. The motion was sustained because it appeared affirmatively that the same had been signed and filed in vacation, without the consent of the appellee. At the April term of the district court, A. D. 1862, the appellant moved the court to supply an omission in the final record of said cause, so that it might be made to conform to the order of the court, made at the September term, 1861, in this, to wit: "That by consent of parties the bill of exceptions was ordered to be prepared and signed in vacation." This motion was supported by affidavits; counter affidavits were filed by the attorneys on the other side, denying, in very positive terms, that they ever assented to any such arrangement, referring to some circumstances in confirmation of their statement. The motion was overruled and an appeal taken.

The supreme court say: "The facts about which there is conflicting evidence transpired before, and in the presence of, the judge below. He is supposed to have some knowledge and recollection of the facts himself. They relate to a

supposed omission in his records, which are exclusively under his own control and keeping. It would be manifestly improper, under the circumstances and the showing made, for us to overrule his decision.”

Here the court treats the subject as a matter of discretion resting with the court below, and not to be interfered with by the appellate tribunal.

In *Hudgkins v. Kemp*, 18 How. 530, it appears that TANEY, C. J., in vacation, ordered the clerk to enter up an appeal as of the term. An appeal had been prayed and allowed, but the clerk had failed to enter the order. When it came to the supreme court for review it was not regarded as error.

The case of *Malbeson Adams v. Grant's admr.*, 2 How. 279, is a strong case. There the declaration was in two counts, one as administrator, and one in the plaintiff's own right — general verdict and judgment arrested, but no *venire de novo* awarded, or judgment *non obstante veredicto*. At the second term, subsequent, and one year afterward, a motion was made to vacate the order arresting the judgment. It was sustained. And on affidavits showing what evidence had been given on the trial, the verdict was amended so as to apply it to the first count. Judgment was given on the first count, and a *nolle prosequi* entered as to the other. *Held*, on error, that there is no time absolutely fixed within which such an amendment as the one in question must be made; all that is required is that it should be within reasonable time, and when no such change of circumstances shall have intervened as may render it inconvenient or inexpedient.

That such an amendment, though usually made by reference to the judge's notes, may be had upon any other evidence equally clear and satisfactory (see the cases there cited).

Many other authorities might be cited, showing that amendments of this character are matters of discretion, but we deem it unnecessary. We see no error in the action of the court below. The motion to strike the bill of exceptions from the record must be overruled.

Motion denied.

AMENDMENT OF RECORD AT SUBSEQUENT TERM. — When a mistake was clearly made in preparing the bill of exceptions, if the evidence of the fact is still in existence, the court may allow the bill to be amended in accordance with the facts: *Byers v. Martin*, 2 Colo. 603. Thus, if the clerk, by mistake, omit an order allowing the bill to be filed in vacation, the court may allow the record to be amended *nunc pro tunc*: *Wolfe v. Lebanon Mfg. Co.*, 3 Colo. 297. Reversed, 21 Wall.

HOLLADAY v. DAILEY.

DOWER — *right of* — *not known*. In this territory a wife has no dower in the real estate of her husband. 1 Sess. 863.

MARRIED WOMEN — *power to contract*. By the act of 1861, to protect the rights of married women (1 Sess. 152), a wife may make contracts respecting her separate business and estate; beyond these limits her contracts are governed by the common law and are therefore void. She cannot warrant her husband's title to realty, or covenant for his act or default in any respect whatever.

POWER OF ATTORNEY *to convey husband's lands executed by wife*. Therefore, where husband and wife joined in a power of attorney, the attorney could do no act under the power which should in any way charge the wife's estate or bind her or those in privity with her.

DEED BY HUSBAND, *without wife, under power from both*. A deed conveying the husband's land, executed in the name of the husband only, by an attorney in fact, under a power proceeding from the husband and wife, is as effectual as if the wife had joined therein.

POWER OF ATTORNEY — *conditions imposed on attorney*. In an authority to convey lands, the principal may impose frivolous and impertinent conditions upon his attorney, and, if the conditions are merely indifferent, and not *malum prohibitum* or *malum in se*, his will shall be observed.

POWER OF ATTORNEY — *condition against public policy*. It is against public policy that land records should be incumbered by invalid conveyances purporting to be executed by persons incapable in law, and so holding out empty promises.

A power of attorney, executed by husband and wife, which confers authority to convey lands of the husband, in so far as it requires that the conveyance shall be made in the name of the wife, imposes a condition which the law will not suffer the attorney to perform.

POWER OF ATTORNEY — *illegal or void condition*. An illegal or void condition inserted in a warrant of attorney may be disregarded by the attorney.

POWER FROM HUSBAND AND WIFE *to sell husband's estate — how executed*. A power proceeding from husband and wife, as to the estate of the husband, is well executed in his name alone.

DEED valid without acknowledgment. A conveyance is valid between the parties thereto and those having notice thereof though not acknowledged.

In ejectment by a grantor against one who claims title under his grantee, if the execution of the deed is admitted, no question can be raised respecting the certificate of acknowledgment.

DEED — *what is sufficient signing by attorney in fact*. Where the christian name of an attorney in fact is inserted in the power of attorney and in the deed, a signature to the deed, in which the initial letter of such christian name is used, is sufficient.

Error to District Court, Arapahoe County.

THE action was ejectment, and the cause was heard upon an agreed statement of facts, as follows: 1st. That the lots mentioned in the declaration in this suit are within, and a part of, the land entered by James Hall, probate judge, etc., under an act of congress, entitled "An act for the relief of the citizens of Denver, in the territory of Colorado," approved May 28, 1864. 2d. That said land so entered was duly patented by the United States to the said James Hall, probate judge, etc., by letters patent, bearing date July 1, A. D. 1868. 3d. That, on the 11th day of August, A. D. 1865, the said James Hall, probate judge, etc., duly conveyed the said lots to the plaintiff, Ben Holladay. 4th. That the defendant, Anthony Dailey, was in the possession of the said lots at the time of the commencement of this suit. 5th. That, on the 27th day of September, A. D. 1866, Bela M. Hughes, acting as attorney in fact, for and in the name of the plaintiff, Ben Holladay, made, executed and delivered a conveyance of said lots (with others) to Richard E. Whitsitt, for a valuable consideration paid to said Hughes. 6th. That, in the execution of such last-named conveyance as attorney in fact for the plaintiff, the said Bela M. Hughes acted under and by virtue of a certain letter or power of attorney from Ben Holladay and N. A. Holladay, his wife, of the date of February 13, 1866. 7th. That, under and through said last-mentioned deed, the defendant, or those under whom he claimed to hold said lots, derive title thereto. 8th. That the genuineness of the signatures to the said power of attorney, and the said last-mentioned deed, as well as the signing of the same respectively, is hereby admitted. 9th. That the only question in dispute between the parties hereto is, the legal sufficiency of the said power of attorney from Ben Holladay and wife to Bela M. Hughes, and the deed thereunder, made from Holladay by Hughes, his attorney in fact, to Richard E. Whitsitt, to pass the legal title of the said plaintiff, Holladay, in and to said lots, to the said Whitsitt. 10th. That

the exhibits hereto annexed, marked "A" and "B" respectively, are copies of the power of attorney and of the deed last above referred to, together with the certificate of acknowledgment thereunto attached, and said copies shall stand in this stipulation for the original. 11th. The matter in controversy in suit is submitted to the court, without the intervention of the jury, either party having the privilege of submitting such a statement of points and brief of authorities as he sees fit, first furnishing the opposite party with a copy thereof. 12th. If the court be of the opinion that the deed and power of attorney herewith exhibited are sufficient to convey the legal title of Holladay to said lots to Whitsitt, then judgment is to be given for the defendant; if the court be of the opinion they are insufficient to convey said title, then judgment is to be given for the plaintiff.

The substantial parts of the power of attorney referred to are as follows:

"Know all men by these presents that we, Ben Holladay and N. A. Holladay, his wife, of the State of New York, for and in consideration of the sum of one dollar to us in hand paid, as well as other considerations us thereunto moving, have this day constituted and appointed Bela M. Hughes, of the State of Kansas, our true and lawful agent and attorney in fact for us, and in our names to sell and convey to any purchaser or purchasers for such price or prices as to him may seem best, all or any lots of ground in Denver city, Colorado, in the county of Arapahoe, in said territory, the title to which is now vested in said Ben. Holladay. * * * and the said Ben Holladay and N. A. Holladay, his wife, do hereby authorize said Hughes to proceed to sell said property on such terms as he may consider best for their interest; this power to sell said property and real estate, or any part of it, to continue until the whole of the said property or real estate is sold by their said attorney and agent, and shall extend also fully to all out lots or parcels of ground in and around the said Denver city, and it is provided that, in case of the death of either of the

said parties making this power of attorney, no further power shall be necessary to our said attorney in fact and agent, to enable him to complete conveyances for property then sold, or to proceed to sell the same or any part thereof thereafter, but he shall proceed, notwithstanding, to sell and convey said property until the same is all disposed of by him, * * * hereby ratifying and confirming all that the said Hughes may do and perform in the premises under this power of attorney to him given."

The first clause of the deed to Whitsitt was as follows: This indenture, made this 27th day of September, in the year of our Lord, eighteen hundred and sixty-six, between Ben Holladay, of the city and State of New York, by Bela M. Hughes, his duly authorized attorney in fact, party of the first part, and Richard E. Whitsitt, of the city of Denver, party of the second part, witnesseth, etc., etc. The deed was signed, "Ben Holladay, by his attorney in fact, B. M. Hughes." The certificate of acknowledgment attached to the deed was as follows: "On this twenty-ninth day of September, in the year of our Lord, one thousand eight hundred and sixty-six, before me, a notary public, in and for the county aforesaid, personally came Ben Holladay, by Bela M. Hughes, his attorney in fact, personally known to me to be the same person described in and who executed the within conveyance, and acknowledged that he freely and voluntarily executed the same as the attorney of Ben Holladay, and as the free and voluntary act and deed of the said Ben Holladay therein described."

The objections to the deed from Holladay to Whitsitt were as follows:

First. The attorney in fact deviated from his warrant of authority in making the deed in controversy; and, thereby, made a deed that was entirely unauthorized.

Second. Said deed was not acknowledged in accordance with the laws then in force in Colorado.

Third. Said deed was not subscribed by the attorney in fact, as the laws of Colorado then required.

The district court gave judgment for defendant.

HALLETT, C. J., took no part in the decision.

Mr. ALFRED SAYRE, for plaintiff in error.

Mr. B. M. HUGHES and Messrs. CHARLES & ELBERT, for defendant in error.

WELLS, J. I will consider first the question, whether the letter of attorney under which Hughes acted, or assumed to act, on the conveyance to Whitsitt, imposed as one of the conditions to the exercise of his authority, that the conveyances made in pursuance thereof should be in the names of Holladay and his wife.

This is purely a question of interpretation, and the intent of the instrument is to be derived solely from the words used therein, read in the light which the situation of the parties, so far as this appears, affords.

It is perfectly clear, as we think, that, if the attorney had united Mrs. Holladay with her husband, as grantor, on the conveyance which he assumed to execute, it could have effected no purpose, for, though the wife united in the letter of attorney, she had no dower in the lands, as it would seem was supposed; it has not been shown that she had any other estate vested or contingent upon which her conveyance could operate, and we will not presume such estate in the absence of proof thereof; neither could she have bound herself by any covenant in the conveyance, for, under the statute, as it then stood, the power of the wife to contract extended only to the sale and conveyance of her separate estate, real and personal, and to the carrying on and contracting about any trade or business conducted upon her separate account. Acts 1861, p. 152, §§ 2, 3, 10. All the contracts of a *feme covert* beyond these limits were still, as they were at common law, absolutely void. The statute did not authorize the wife to warrant her husband's title to realty or to covenant for his act or default in any respect whatever; and, in this case, the wife having no estate in the realty, which she could convey, and having no power to engage in regard to her husband's estate, it is clear that

she could not authorize another to so convey or engage for her, and the letter of attorney was, therefore, as to her, absolutely void. It was as if her name had not been inserted in it, or subscribed to it, the attorney could do no act thereunder which should in any way charge her estate, or bind her, or those in privity with her.

The conveyance which the attorney did make was quite as effectual to this, as if her name had been inserted therein, and by him, or by herself, indeed, subscribed thereto.

Nevertheless, if the husband, by the letter of attorney, has required that all conveyances thereunder shall be in the joint names of himself and the wife, then, howsoever empty and profitless the form, the attorney was not on this account merely' at liberty to disregard it. The principal, in an authority to convey lands, may, I suppose, lawfully require that the conveyance shall be upon parchment or attested by certain witnesses, or shall be by deed indented, and not otherwise, or he may impose any other frivolous and impertinent condition which caprice may suggest; and the mere vanity and ineptitude of the condition will not avoid it; for, though the law requires it not, yet the owner of the lands may; and if the condition be merely indifferent, and not either *malum prohibitum* nor *malum in se*, his will shall be observed.

But here, as I think, the condition which it is said was imposed upon the exercise of the agent's authority was not only vain, but illegal; for it is manifestly against public policy, that our land records should be incumbered by invalid conveyances, purporting to be executed by persons incapable in law, and so holding out empty promises. If such conveyances be tolerated — if one may do by another what he may not do in his own person — if the husband may, by way of condition or in any other way, authorize the attorney whom he alone has constituted to subscribe the wife's name to a deed by which she cannot be bound, inserting therein covenants and recitals which assume or purport to be hers, it may probably happen that ignorant and incautious persons will be led to purchase the estate on the faith

of the wife's supposed ability and liability to respond in damages in case of the failure of title, or on the faith of some imagined estoppel. If one may, in this manner, assume to have authorized his wife's name to be subscribed to a conveyance or covenant, I do not see why he may not exercise the same liberty with that of his neighbor. Certainly, the recognition of such a power or right will serve no good purpose, and it may breed uncertainty in titles and unprofitable litigation.

I am therefore of opinion that the construction for which the counsel for plaintiff in error has so ingeniously contended will render the letter of attorney nugatory, for, by this construction, it imposes a condition precedent, which the law will not suffer the attorney to perform, and it is said that if one grant an estate upon condition precedent which it is unlawful to perform, here, both the estate and the condition are void, for an estate can neither commence nor increase upon an unlawful condition (Shepherd's Touchstone, 132), and so I conceive is the law where a power is sought to be created upon like condition. Though, possibly, it may better be likened to a bond with condition repugnant to mere positive law, in which case it is said the condition only is void, and the bond shall stand single (2 Bl. Com. 300), but I think not.

Therefore, to effectuate the manifest purpose of the principal — namely, to convert these lands, which were at a distance from his place of residence, and so beyond his personal supervision and control, into money — and in order that the letter of attorney may not utterly fail of effect, I think we are authorized to read it as if the name of the wife were not contained therein (as in effect it is not) and as if the authority had been in terms “for me and in my name to convey,” etc.

And this, though it may seem to do violence to the text of the instrument, is warranted by authority; for it is said that: “If divers join in a deed and some are able, and some are not able, this shall be said to be his deed alone that is able” (Shepherd's Touchstone, 81), that is to say, the

words of grant, confirmation and the like, which are written in the plural shall be read in the singular, for if taken in the plural, there are none to whom they can be ascribed.

As to the other questions which have been argued, we think that the conveyance of the attorney, under which the defendant derives title, was well enough executed, and that whether it was acknowledged in conformity with the statute or not is a matter of indifference, for the acknowledgment is but a means of proving the execution and authenticating the record, when the instrument shall be thereafter recorded; and the statute which requires it being in the affirmative, and without any negative implication to exclude the common law, the conveyance will be valid, as between the parties thereto and those having notice thereof, even though not acknowledged at all. The judgment of the district court is therefore affirmed. *Affirmed.*

CONVEYANCE by husband and wife. See *Craig v. Chandler*, 1 Colo. 319.
POWER ATTORNEY — HUSBAND AND WIFE: *Holladay v. Dalley*, 19 Wall. 606, affirming the judgment below.

MURPHY v. CUNNINGHAM.

PRACTICE — *bill of exceptions, when it should be signed.* A bill of exceptions must be signed during the term at which the judgment or opinion excepted to is given, unless a day in vacation is allowed therefor by order of the court.

PRACTICE — *objection waived by joining in error.* But if a defendant join in error, he thereby waives the objection that the bill of exceptions was filed in vacation without an order of court, and all matters appearing in the transcript, which are esteemed in law to form part of the record, will be considered by the court.

NEW TRIAL — *presumption in favor of finding.** Where an issue of fact is submitted to the judge at *nisi prius*, he performs the functions of both court and jury, and the same presumption must be indulged to sustain his finding as would be made in favor of the verdict of a jury.

NEW TRIAL — *sufficiency of evidence to support verdict.* Where the evidence is conflicting, and the question is upon the credibility of the witnesses, a new trial will not be granted.

COSTS ON APPEAL FROM JUSTICE OF THE PEACE — *power to apportion discretionary.* The power conferred by section 16, chapter 19, Revised Statutes, 156, to apportion costs on appeal from justice of the peace, is to be exercised in the discretion of the district court, and error cannot be assigned upon the ruling of the district court in relation thereto.

Appeal from District Court, Jefferson County.

THE action was brought before a justice of the peace, and thence appealed to the district court. At the trial in the district court, the plaintiff testified: That in the month of December, 1870, he worked for the defendant five and one-half days in a drift, at taking out coal, and that the same was worth four dollars per day; that, before commencing said work, he agreed with defendant to take out and deliver, at the month of said drift, the coal, and was to have two dollars per ton for what he took out and so delivered; that he did not know how much coal he did take out, but took out several loads; that he bought of the defendant two pick-eyes, worth seventy-five cents each, and a piece of steel of about eight pounds weight, and had the use of defendants' mule three days, at one dollar per day, in taking out coal, and had not paid defendant for same or either, and defendant was entitled to credit for same; that he did not know what the steel was worth; that he worked for defendant ten and one-half days at quarrying and removing rock, which work was worth per day three and one-half dollars; that before beginning said rock work, he agreed with defendant to make an excavation in a bank, thirty-three feet in length, three feet in width, and, on an average, about eleven feet high, the same being almost nothing in height where he was to commence digging in the bank, and about twenty feet at the back part of said excavation; that he agreed to make said excavation for the sum of fifty dollars, to commence work thereon immediately; no time agreed for the payment therefor; that he worked at said excavation ten and a half days; that the charge made in his account on file for ten and a half days' work was for work done at said excavation; that he commenced and did said work immediately after making said contract, which was in November, A. D. 1870; that witness considered that he had completed the said excavation according to contract; that he measured the said excavation by stepping off lengthwise, and the width thereof by a scraper which scraper he measured with his hands; that, while

plaintiff was still engaged at the work on said excavation, the defendant appeared and claimed that it was not yet completed, according to the contract, and desired the plaintiff to do certain things in order to the completion of the same, which the plaintiff refused to do and therefore quit work on said excavation.

Michael Hollorum testified : That he worked upon said excavation for the plaintiff, and helped measure the same by stepping the length thereof, and by measuring the width thereof with a scraper, previously measured with his hands, and the same measured about thirty-three feet in length, and about three feet in width.

The defendant testified : That the plaintiff had agreed to take out what coal he took from drift for two dollars per ton ; that the plaintiff took out in all only two tons of coal and no more ; that plaintiff had the use of defendant's mule in taking out said coal three days, worth one dollar per day for the use of said mule, the plaintiff, by agreement, was to allow the defendant ; that defendant let plaintiff have two pick-eyes, for which, by agreement, the plaintiff was to allow defendant one dollar and fifty cents ; that plaintiff got a piece of steel of defendant worth two and a half or three dollars, for which plaintiff was to allow defendant what the said steel was worth ; that defendant had never at any time employed the plaintiff to work for him by the day, and the plaintiff had never worked by the day for him at any kind of work ; that the work done by plaintiff at quarrying and removing rock, was performed under contract ; that the contract was as made by plaintiff and defendant ; that the plaintiff was to make for the sum of fifty dollars, to be paid when the work was completed, a certain excavation, thirty-three feet long, two and a half feet wide, and, on the average, eleven feet high ; that the excavation was to be made into a bank, and the way they came to call it eleven feet high, was, that they first measured the bank to ascertain the quantity of dirt and rock to be moved, and the same being about nothing in height when it began, and about twenty feet high at the back part, they called it

eleven feet high on an average ; that the plaintiff did not complete said work according to contract, and that it had afterward cost defendant thirty-seven and one-half dollars in cash for hired help to finish said excavation, as the plaintiff had agreed to make it ; that the plaintiff did not do more than one-half the work necessary to complete said excavation, and voluntarily abandoned the same without finishing it.

John Armor testified : That plaintiff told him he was to have \$50 for making the excavation ; plaintiff also told him that the excavation was to be three feet wide and thirty-three feet long, and that the same would average about eleven feet high ; witness saw the excavation after it had been abandoned by plaintiff, and that fully one-half or more of the work necessary to be done to complete the excavation according to contract, as witness learned from plaintiff, was left undone.

The court gave judgment for the plaintiff and against the defendant for \$25 damages, and for costs of suit.

The plaintiff had judgment before the justice of the peace for \$42 damages, and for costs, and it was assigned for error in this court that the district court erred in rendering judgment against appellant for all of the costs of the suit. It was also assigned for error that the finding of the district court was against the evidence.

Mr. A. H. DE FRANOE, for appellant.

Mr. GEORGE W. PURKINS, for appellee.

WELLS, J. By the record which has been certified to us in this case, it appears that the bill of exceptions taken by the plaintiff in error was not filed until the lapse of nearly sixty days after the adjournment of the term at which the judgment complained of was given, and the record fails to show that time was given to present such bill of exceptions.

According to all the authorities, and, indeed, by the letter of the statute, the bill of exceptions must be signed during the term at which the judgment or opinion excepted to is

given, unless a day in vacation is allowed therefor by order of the court. Rev. Stat., ch. 70, § 21.

And, according to some cases, if the record fails to show such order, and that the bill of exceptions was filed within the time limited, it cannot be considered in the appellate court, even though, as it would seem, the objection is not suggested by counsel. *Moffit v. Pollard*, 19 Ind. 178; *Cable v. Smoyer*, id. 202; *Pick v. Vankirk*, 15 id. 159; *Hance v. Miller*, 21 Ill. 637.

We think, however, that the verbal agreement of the parties or of counsel may supply the absence of such order of court, and the defendant in error having joined in error and assented to the submission of the cause upon written argument, we will construe this as implying a stipulation that all matters appearing in the transcript and which are esteemed in law to form a part of the record are properly certified to us.

But accepting the bill of exceptions which is set out in the record as properly before us, we are not able to see that any error was committed in the court below.

The only question in issue between the parties was, whether the plaintiff had fully performed the contract for grading and excavation which constituted the principal item of his account, and upon this question, we must presume, unless the contrary clearly appears, that the court below found correctly.

Where an issue of fact is submitted to the determination of the judge at *nisi prius* he performs the functions of both court and jury; he is the exclusive judge of the credibility of witnesses, and in the court of review the same presumption must be indulged to sustain his finding, as would be made in favor of the verdict of a jury, if the issue had been submitted to a jury.

We must, therefore, presume that his honor, who presided below, regarded the witnesses who were sworn on the part of the defendant below (or some of them) as unworthy of credit; and we, who have not heard the witnesses, and can-

not draw conclusions from their manner and bearing in giving testimony, cannot say that he has erred.

The finding of the court below, therefore, cannot be said to be erroneous; and if there is any error apparent in the amount allowed to plaintiff below for his damages, it is not an error of which his adversary can be heard to complain.

Neither can it be assigned for error that the court below omitted to apportion the costs, for this is a matter purely in the discretion of the court.

Let the judgment of the Jefferson district court be affirmed, with costs. *Affirmed.*

BILL OF EXCEPTIONS, SIGNING AND FILING: *Packard v. Spellings*, 3 Colo. 113; *Eldred v. Malloy*, 2 Colo. 21; *Robinson v. Austin*, 3 Colo. 375.

FINDINGS PRESUMED CORRECT: *Kinney v. Wood*, 10 Colo. 372.

VERDICT, SUFFICIENCY OF EVIDENCE TO SUPPORT: *Matthews v. Glines*, 1 Colo. 474; *Barker v. Hawley*, 4 Colo. 37, 34L.

MATTHEWS et al. v. GLINES et al.

NEW TRIAL — *sufficiency of evidence to support verdict.* Where the evidence is conflicting, and the question is upon the credibility of the witnesses, a new trial will not be granted.

Error to Probate Court, Arapahoe County.

ASSUMPSIT for work, labor and services rendered.

At the trial, the plaintiff, E. A. Reser, testified that plaintiffs were real estate agents, and that Glines, one of the defendants, applied to him to sell a brick house and lots, on which the same was located, at the price of \$7,000; that there was nothing said as to the commission to be charged for making such sale; that the customary charge was five per cent up to \$3,000, and three per cent on all sums above \$3,000; that he had several conversations with one B about the property, and that he advised B to purchase it, and that B did purchase it.

E. G. Matthews, one of the plaintiffs, testified that he had several conversations with B about the property; that, upon one occasion, B told witness that defendants had reduced the price to \$6,500, and that B said that he would take the property at that price. Witness subsequently told defendant Glines that B would take the property at the price

named; that Glines then said he could not have it at that price. Glines came to plaintiffs' office a few minutes afterward and told plaintiffs to make the sale at \$6,500. Witness did not remember that he said any thing further to B. Witness testified that the customary rate for selling city property was five per cent on the first \$3,000, three per cent over \$3,000 up to \$8,000, and two per cent on all over \$8,000. Dr. J. F. Bancroft testified: That he had several conversations with plaintiffs, and with one Hyatt Hussey, about the property, and that he negotiated the purchase of the property with Hussey. Plaintiffs also proved a conveyance, made by defendants, to George A. Jarvis, for the property in question, which conveyance was so made by direction of Dr. Bancroft.

George Glines, one of the defendants, testified that he never had any conversation with Matthews in regard to the property; that Matthews said to him at one time, that he was a member of the firm of Matthews & Reser, and that he had been trying to sell the property in question to Dr. B.; that witness subsequently called at Matthews & Reser's office, and told them if Dr. B. came there, to tell him the property was not for sale, and that he could not have it. Witness further testified, that Reser once asked him if he had sold the Tom Smith property; he said Dr. B. had been bothering them about it a good deal; he said, What do you ask for it! I told him we asked \$7,000; he said, I don't think he will give that; I said, all right, he can't have it for any less. Witness afterward asked Reser who authorized him to sell the property; he said Mr. Hussey; witness said that was all right; any thing Mr. Hussey does is all right; after the property was sold, Reser came into witness' office and said, ain't you going to allow us some commissions on that sale up there? Witness said, what sale? he said, the Tom Smith property. Witness told him, I did not authorize you to sell that property; Reser said Mr. Hussey did; witness said, all right, go to Hussey and collect commissions of him; witness told him that he, witness, did not owe him any thing; witness further testi-

fied that he never employed the plaintiffs to sell the property.

Hyatt Hussey testified as follows: I was the party that sold the property described in the deed; Mr. Reser came to me one day and said he had sold the property, along about the middle of March, and told me the property was sold; I asked him who gave him the property for sale; he told me Mr. Glines; I then asked him the terms of sale; he told me the property was sold for \$7,000 to Dr. Bancroft, and that Dr. B. would come to the office and let me know to whom to draw the deed; about an hour afterward, Dr. B. came to the office and positively refused to take the property at \$7,000, but offered \$6,800, which I declined; we had conversation on the subject two or three times a week, and some three weeks after that the sale was finally made.

The court found for the defendants.

Messrs. BROWN & PUTNAM, for plaintiffs in error.

Mr. M. BENEDICT and Mr. JOHN F. BOSTWICK, for defendants in error.

Per CURIAM. This case must be governed by the principle of *Murphy v. Cunningham*, ante 467.

The only error complained of is, that the judgment should have been for the plaintiffs and not for the defendants, as by the record appears.

The evidence was conflicting, and whether judgment should have gone for the plaintiffs, or against them, depends upon whether credit was due to the witnesses called for them, or to those who were called for their adversary. The judge who presided below, and before whom the issue was tried without a jury, gave credit to the latter, and it does not lie with us to review his action in this regard.

The judgment is affirmed, with costs.

Affirmed.

VERDICT — CONFLICT OF EVIDENCE. — Where the verdict is not manifestly against the weight of evidence, and the evidence is conflicting, the verdict will not be disturbed: *Barker v. Hawley*, 4 Colo. 327, 341; *Denver F. B. Co. v. Platt*, 11 Colo. 519.

CENTRAL CITY WATER COMPANY v. KIMBER et al.

PRACTICE — *what must be expressed in a special case.* Where parties waive process and pleading, and come before the court upon an agreed case, the nature of the relief sought must be expressed in the agreement.

JURISDICTION — *upon a special case or statement of facts.* In such case the court acquires jurisdiction of the parties and of the subject-matter, by force of the agreement, and if nothing is expressed as to the judgment or decree to be rendered upon the facts stated, the court is not empowered to do any thing whatever in the premises.

Appeal from District Court, Gilpin County.

THERE was neither process nor pleading in the court below; the parties filed a paper as follows :

This agreement, made and entered into this 15th day of October, A. D. 1871, by and between the Central City Water Company and E. L. Salisbury, Job V. Kimber, Erasmus Garrott, Lawrence Miley, Robert W. Mead, — Borham, William Fuller, Henry W. Lake, mill owners on North Clear creek,

Witnesseth : That, whereas, there is a dispute pending between said company and said mill owners, as to the right of said company to take and divert the waters of Peck gulch, and to run the same into Central City for public and private use, to wit : for fire purposes and use in houses and mills ; and, whereas, it is desirable that said dispute be speedily, and once for always, settled by legal adjudication without reference to technicalities, etc. Now, therefore, in consideration of the premises, it is hereby agreed :

1. That the said water company is duly incorporated under chapter 18, Revised Statutes of Colorado, and under all the several sections of said chapter relating to ditches and flumes, subject to all liabilities, and entitled to all benefits given by said chapter and said sections.

2. That the said company propose to take water out of Peck gulch, a tributary of North Clear creek, at a point about one hundred rods above its mouth, and convey water to Central by route designated ; and that such water is

thus diverted from North Clear creek, and does not reach it again, if at all, till at a point below a majority of the mills on North Clear creek.

3. That the mills owned by said mill owners are all situate on North Clear creek, at distances varying from two to four miles below the mouth of Peck gulch, and have been run and used by the present owners and grantors for periods of from two to ten years, and are both water and steam; and that a certain amount of water is needed for each mill, both for the batteries and for steam purposes, all of which, as well as for water power, when used, has heretofore been taken from said North Clear creek.

4. It is also admitted and agreed, that, in a dry season of the year, the water is insufficient to use as an economic water power without the aid of steam, but is, most of the time, sufficient to supply the batteries and water for steam purposes.

5. It is also agreed and admitted, there is at least one stream running into said Clear creek below the mouth of Peck, and above all, or nearly all, of the mills.

6. It is further agreed, that this case shall be submitted to the district court of Gilpin county, at November session, upon the facts above set forth, and the evidence to be taken and presented as hereinafter mentioned; and that the matter in dispute shall be submitted to said court at all events and without any delay or postponement, and that the decision of said court as to the right of said water company to take the water from said Peck gulch shall be final, except in case either party may wish to appeal, in which case such appeal may be taken to the supreme court, and this agreement and the evidence taken shall, together with the record, be taken as the record in this case, and such appeal shall be heard upon such record at the next session of the supreme court, and neither party shall be allowed to postpone the hearing thereof for any cause whatever.

It is further agreed, that, upon final decision of this cause, either by the district court or by the supreme court, both parties shall submit and make no attempt to deprive

the other of any right adjudged to belong to them or it, or to interfere with the waters of Peck gulch so as to diminish the flow legally going to the other, except upon agreement duly made.

It is further agreed, that no process need be issued herein ; that upon filing of this agreement with the clerk of the district court at its next session, all parties hereto shall be in said court, and subject to its jurisdiction, and that the costs in this case shall be paid, one-half by said company, and one-half by the mill owners.

It is also agreed, that each party shall choose a competent engineer, who shall choose a third, who shall make an accurate measurement of the water running in Peck gulch, both at its mouth, and at a point directly above the point from which the company propose to take the water out, and also the amount of increase of water by reason of the bed rock ditch, dug by said company. Also the amount of water running in North Clear creek, immediately above the mouth of Peck gulch, the amount running in said creek, immediately above Missouri gulch, and the amount running in said creek, at a point near the mill known as the Mammoth Company's mill, as well as the amount running in Missouri gulch, and report the same, under oath, to the court, at said November session, and lastly, all other testimony desired by either party may be taken in writing before the clerk of said court, on three days' notice, in writing, upon either Hugh Butler, Esq., or G. B. Reed, Esq., for the mill owners, or upon Willard or H. M. Teller, on part of the company ; such testimony to be taken in time, so as to not delay, in any manner, the hearing of said cause, and that no attempt shall be made by said company to take the water of said Peck gulch until a final decision has been had in the district or supreme court, except upon postponement of said hearing and decision by the said mill owners.

In witness whereof the parties have hereunto set their hands.

Edw. L. Salisbury, Job V. Kimber, L. C. Miley, Robert W. Mead, Kimber, and Fullerton, H. W. Lake.

The court found for the plaintiffs, Kimber et al., and that the said defendant had not the right to take and divert the water of Peck gulch in said county, and to run the same into Central City in said county, for defendant's private purposes, to wit, for fire purposes, and for use in houses and mills.

Judgment was given against the defendant for costs.

Messrs. JOHNSON & TELLER, for appellant.

Mr. G. B. REID, for appellee.

HALLETT, C. J. These parties appeared in the court below, with a statement of facts signed by appellees only, from which it appears that they desired an adjudication of some kind as to the right of appellant to divert the waters of Peck gulch from their natural channel. It does not appear that the waters of Peck gulch have been diverted, but it is stated that appellant proposes to do so, and the only paragraph in the agreed statement which conveys any information as to the nature of the relief sought is that in which it is agreed that the decision of the court as to the right of appellant to divert the waters of Peck gulch shall be final. Usually a special case or statement of facts is made in a cause pending, where the nature of the relief sought is sufficiently indicated by the form of action. But if parties waive process and pleading, and come before the court upon a naked statement of facts, there is nothing in the record to show what relief is desired unless it is expressed in the agreement itself. The court acquires jurisdiction of the parties and of the subject-matter in such case by force of the agreement, and if nothing is expressed as to the judgment or decree, to be rendered upon the facts stated, the court is not empowered to do any thing whatever in the premises. Courts are established to administer the law in cases of specific injury, and to render judgments and decrees is the essential power conferred upon them. All judicial proceedings are instituted and maintained for the purpose of obtaining specific relief, and this does not

appear to have been directed to that end. If parties may go before a court with a naked statement of facts, and demand information as to their rights, without more, our courts will become schools of instruction, with little time to attend to their proper and legitimate duties. The question propounded in this record is interesting and probably important, but we must decline to answer it. When it becomes necessary to determine the rights of these parties, for the purpose of affording relief to either of them, we will cheerfully perform that duty, but we cannot engage in an idle discussion which would be without any definite result or legal character. The court below was authorized by the agreement of the parties to divide the costs of the proceeding between them, and this was not done, but all the costs were adjudged against appellant. As the matter of costs only was within the jurisdiction of the court, we do not think it necessary to remand the cause for the purpose of securing a correct judgment upon that point, and therefore the judgment will be reversed.

Reversed.

GILPIN v. WATTS.

SPECIFIC PERFORMANCE — *title to land.* A vendor who seeks specific performance of a contract for a sale of land must, in his bill of complaint, set forth his readiness and ability to make a good title to the land.

SPECIFIC PERFORMANCE — *decree should extend to the whole contract.* Upon bill by vendor against vendee to enforce specific performance of contract for sale of land, the defendant cannot be required to pay the purchase-money, or, in default thereof, to surrender the contract to be canceled, except upon the condition that the complainant convey the land to him.

POSSESSION OF LAND *obtained under contract of purchase.* Where a vendee of land has obtained possession from the vendor under a contract of purchase, if he refuses to pay the purchase-money, and accept the vendor's title, he must surrender the possession. And this, although the vendor has not a good title.

PRACTICE — *how possession may be recovered.* And the vendor may recover possession of the land in a suit to enforce specific performance of the contract.

PLEADING — *prayer for possession need not be special.* In such case the complainant may have relief under the general prayer.

Appeal from District Court, Arapahoe County.

THE complainant alleged in his bill, that, on the 17th of February, 1862, he entered into a contract with William Gilpin, defendant, for the sale of certain land granted to the heirs of Luis Maria Baca, by the act of congress entitled "An act to confirm certain private land claims in the territory of New Mexico," approved June 21, 1860 (12 Stat. at Large, 72). That, by the terms of said contract, he sold to the defendant one of the grants or claims of land mentioned in said act of congress, which was estimated to contain one hundred thousand acres of land, for the sum of thirty cents per acre, payable in five equal annual installments, commencing two years after the date of sale; the purchase-money to bear interest at five per cent per annum from the date of sale, payable semi-annually, the first payment of interest to be made with the first installment of purchase-money. That defendant was to locate the tract of land, and complainant was to convey the same to him in fee simple when the same should be located, paid for and surveyed. That, at defendant's request, the float or grant was located on a tract of land then in the territory of New Mexico, but now in the county of Saguache, in the territory of Colorado, which tract was described in the bill, and it was alleged that it amounted to 99,289 $\frac{22}{100}$ acres. Complainant further alleged that he had obtained a conveyance in fee simple from the heirs of Baca to the said tract of land, a copy of which was attached to the bill as an exhibit.

This conveyance, as appeared from the copy attached to the bill, contained the names of about sixty-five grantors, of whom some had executed it, and others had not. A person had subscribed his name to the conveyance as attorney in fact for the heirs of various parties, but the names of such heirs were not subscribed. There were other objections to the conveyance, which it is not necessary to mention. Complainant further alleged that he had tendered to defendant a deed for the land, and that the purchase-money had not, nor had any part thereof, been paid to him, and that such

purchase-money was still due and unpaid. It was further alleged that, at the time of the contract, the defendant entered into possession of the land, and had retained the possession thereof. The defendant demurred to the bill for want of equity, and because the complainant did not show in his bill, title in fee simple to the land. The demurrer was overruled, and the defendant stood by it. Upon the coming in of the master's report, the defendant excepted thereto, which exceptions were overruled, and the court decreed that there was due the complainant on the contract the sum of \$42,267.68, and that the defendant pay the same to complainant within sixty days, and in default of such payment, that the defendant be forever barred and foreclosed of all equity of redemption, etc., and that the defendant surrender the said contract to be canceled, etc.

Messrs. MILLER & MARKHAM, and Messrs. CHARLES & ELBERT, for appellant.

Mr. JOHN S. WATTS, *pro se*.

Mr. S. E. BROWNE and Mr. ALFRED SAYRE, of counsel for appellee.

WELLS, J. Three questions, arising upon this record, appear to us entitled to consideration. First. Does the complainant's bill make a case for the interposition of equity to compel specific performance? Second. Assuming the bill to have sufficiently stated a case for specific performance, is the decree which was given below the proper decree upon such case? Third. Was there error in overruling the defendant's demurrer to the complainant's bill?

The resolution of the first of these questions depends upon whether the exhibits attached to the bill, and which are therein prayed to be taken as a part thereof, shall be considered as a part of the bill in such sense that, upon demurrer, the court may look into the exhibits and receive what appears therein to falsify the complainant's express allegations. The complainant contracted to give a perfect

title, and specific performance cannot be decreed at his suit unless he be prepared to furnish such perfect title ; and his readiness and ability to do this ought, we think, to be affirmatively set forth in the bill, for so are the precedents; though it is held that, if he show himself able to make a good title at the time of final decree, this will satisfy the averment.

Now, if we are to consider the exhibits as a part of the bill, in the sense in which counsel have assumed that they are, it may well be doubted whether complainant has such a title as he has contracted to convey. But whether the exhibits are a part of the bill in this sense, and so are brought into view upon demurrer, is a question upon which we are not agreed.

But, however the first question may be resolved, we are all of opinion that the second must be answered in the negative, for, assuming that the complainant's bill sufficiently makes out his equity to have the contract which is set up specifically performed, yet the court below has decreed that the defendant below, by a day limited, make payment of the purchase-money, or, in default of such payment, surrender the contract to be canceled ; and there is no requirement upon the complainant to make the conveyance which was the consideration of the defendant's promise to pay. That is to say, the defendant is required to perform on his part, and complainant is at liberty to perform, or omit to perform, at his own option.

It is true that the bill contains an offer to produce, subject to the order of the court, the conveyance which, it is averred, complainant had before tendered to the defendant; but there is nothing to show that such conveyance was, in fact, ever brought into court or delivered to any officer of court ; and the original cause being determined by the final decree, it appears to us doubtful whether the defendant has any remedy to compel its production. The decree ought to be a final determination of the whole controversy, so far as the case made warrants. The purchaser ought not to be required to pay the purchase-money, and then resort to his

motion or bill of review, or other process, if there be any effectual to this end, to secure a conveyance.

As to the third question: The argument of counsel for the plaintiff in error upon this point rests upon two assumptions, namely: 1. That the conveyance of Baca's heirs, alleged to have been executed to the complainant, is to be taken as a part of the bill or demurrer; and, 2. That unless complainant's bill shows a case for specific performance, which is the relief specially prayed, he can have no relief whatever. To the first of these, as before said, we are not prepared to assent, and the latter we conceive to be opposed to both reason and authority. For though, when it is doubtful to what relief in particular the complainant, upon the state of facts, is entitled, the bill ought technically to be framed with a double aspect, or with a prayer for alternative relief, yet nothing is better settled than that when specific relief in one form only is prayed, and this relief cannot be granted, the court may, nevertheless, when the bill contains the general prayer, grant any relief consistent with the facts stated, unless in the particular case this course would operate to surprise the defendant.

Now in this case the bill alleges and the demurrer admits that the defendant has enjoyed the lands which are the subject of the controversy, his possession being derived from the complainant, since the year 1863; and granting, for the argument sake, that the complainant is not able to make out such a title as the defendant contracted for, nevertheless the defendant, if he will not accept such title as the complainant tenders, ought certainly not to retain this possession. He cannot have both the lands and the money which he has agreed to pay for the lands. *Smith v. Lloyd*, 1 Madd. 56; *Clark v. Willson*, 15 Vesey, 317; *Tindall v. Cobham*, 6 M. & K. 385.

It appears by the English cases, which I have cited, that where there is a controversy as to the title tendered, and the purchaser has already been let into possession, the court will, on mere motion, require him to either bring the purchase-money into court or yield up the possession. I do

not see that it is said that the bill must, on its face, show a case for specific performance in order to entitle the vendor to his motion, nor upon principle ought this to be required; for when the vendor's bill does aver his ability to make title, his right to the provisional alternative relief, by motion, as practiced in the English courts, rests not at all upon this averment, but upon the principle that he ought not to be deprived of the lands, nor kept out of possession thereof without compensation, even though his title be defective. To have afforded such relief would certainly, therefore, have been consistent with the case made by the bill, whether the title there set up be a perfect title, or otherwise. Neither could it have occasioned surprise or prejudice to the defendant, for it would have been the same relief which the bill prays specifically, though in less degree.

We are of opinion, therefore, that no error was committed in overruling the demurrer to complainant's bill.

For the error in the final decree, however, that decree will be reversed, and the cause is now remanded to the district court for further proceedings according to equity.

Reversed.

ANDERSON et al. v. SLOAN, Administrator.

PRACTICE—*affidavit denying execution of instrument sued on.* An affidavit accompanying a plea of *non est factum* must follow the plea so far as to deny the execution of the instrument sued on.

Where it is alleged in a declaration on an appeal bond, that defendants executed the bond by the name and style of T. G. Anderson, Edwin Scudder and A. C. Hunt, an affidavit in which it is averred that the defendants did not make their said supposed writing obligatory, signed Thomas G. Anderson, Edwin Scudder and A. C. Hunt, is not sufficient to deny the execution of the instrument.

PLEADING—*nil debet in debt on a specialty.* In an action on an appeal bond the plea of *nil debet* is bad.

SURETY IN APPEAL BOND *cannot require obligee to proceed against his principal.* In an action on an appeal bond, a plea by a surety in the bond that execution has not been sued out on the judgment from which the appeal was taken is bad.

PLEADING in debt on appeal bond. In an action on an appeal bond by an administrator of the obligee, a plea interposed by a surety in the bond to the effect that, if the plaintiff, as administrator, etc., has been damnified, it is because of the wrong and default of his intestate, is bad.

WAIVER OF DEMURRER by going to trial. If, after filing a demurrer to the declaration, a defendant proceeds to trial on the merits, he thereby waives his demurrer, and cannot object in this court that the issue thereon remains undetermined.

WAIVER OF ISSUE OF FACT by going to trial. And in such case the defendant cannot object that there was no issue of fact. If he appear at the trial and proceed as upon issue joined, he must abide the result.

RECORD of defendants' appearance at trial. Where the record recites that the defendants appeared at the trial, the presumption is that all were present who had been served with process.

PLEADING denying execution of instrument must be verified. If a plea denying the execution of the instrument sued on is put in without oath, the execution of the instrument need not be proved.

JUDGMENT in action of debt — form. In an action of debt, a judgment in the form used in actions of assumpsit is erroneous.

PRACTICE — where error in form of judgment. But if no error appears prior to the verdict, the cause will be remanded, with leave to plaintiff to move the court below for the proper judgment.

Appeal from District Court, Arapahoe County.

Mr. H. R. HUNT and Mr. ALFRED SAYRE, for appellants.

Messrs. CHARLES & ELBERT, for appellee.

BELFORD, J. This was an action on an appeal bond, instituted in the Arapahoe district court by the appellee against the appellants. The declaration charges that the defendants below, Thomas G. Anderson, Edwin Scudder and A. C. Hunt, under the name and style of T. G. Anderson, Edwin Scudder and A. C. Hunt, executed their certain writing obligatory, sealed with their seals, etc., and conditioned as follows: The condition of this obligation is such, that, whereas, the said John G. Sloan, etc., did, on the 26th day of April, 1868, in the district court, etc., recover a judgment against the above bounden Thomas G. Anderson, for the sum of \$1,200, etc., from which said judgment the said Thomas G. Anderson, did, etc., sue out of the supreme court, etc., a writ of error, removing said cause from the district to

the supreme court, and which writ of error was to operate as a supersedeas. Now, if the above bounden Thomas G. Anderson shall duly prosecute his said writ of error, and shall pay said judgment, costs, interest and damages in case said judgment shall be affirmed, then the above obligation to be void, otherwise to remain in full force and effect. It is further averred, that the judgment was duly affirmed by the supreme court, and that Anderson has failed and refused to pay said judgment and costs, or any part thereof, according to the letter and effect of the said writing obligatory, whereby, etc., an action has accrued, etc.

To this declaration, Hunt filed several pleas. 1st. *Non est factum*. 2d. Amounting to *nil debet*. 3d. That he had signed the bond as surety, and that no execution had been issued on the original judgment by Sloan against Anderson. 4th. That if the plaintiff or his intestate has been damnified, it is owing to their own laches, etc.

Anderson filed a general demurrer, and also assigned special causes — which demurrer remained undisposed of at the time of the trial.

As to Scudder, the record shows the following plea: "And the said defendants, Edwin Scudder and Thomas G. Anderson, comes and defends the wrong and injury, when, etc., and says that the said writing obligatory in said declaration mentioned is not his deed, and of this he puts himself on the country, etc., (signed) Edwin Scudder, by Alfred and Daniel Sayre, his attorneys."

The plaintiff filed a demurrer to the second, third and fourth pleas interposed by Hunt, and also a motion to strike out the verification to the plea of *non est factum*. The demurrer and motion were sustained by the court, and this action of the court constitutes one of the errors assigned.

The verification to the plea of *non est factum* was in the following form:

The said defendant, A. C. Hunt, by way of verification to the plea by him above pleaded, being duly sworn, upon oath says: "That he and the said defendants, Thomas G. Anderson and Edwin Scudder, at the time when, etc., in

the said declaration mentioned, or at any other time, did not make their said supposed writing obligatory, signed Thomas G. Anderson, Edwin Scudder and A. C. Hunt. (Signed) A. C. Hunt, sworn and subscribed," etc.

It is evident that this verification is evasive and in no manner responsive to the allegation of the declaration. It was not charged that the writing obligatory sued on was signed Thomas G. Anderson, Edwin Scudder and A. C. Hunt. The person making this affidavit could readily swear to the statements therein contained, and when the oath was so taken, the execution of the bond set out in the declaration would remain undenied. It is equally clear that the affiant did not intend to deny the execution of the bond as charged.

The court committed no error in striking this verification from the files. *King v. Haines*, 23 Ill. 341.

As to the plea of *nil debet* it is clearly bad ; no principle of law being better settled than that this is an improper plea to an action of debt upon a specialty or deed where it is the foundation of an action. *Sneed v. Wister*, 8 Wheat. 694 ; 11 Blatchford, 162.

The third and fourth pleas are no better. The condition of the bond is, that if the judgment be affirmed, the parties executing the obligation shall pay the judgment, damages and costs. It was not necessary that an execution should be sued out on the judgment before a right of action would accrue on the bond. As between the obligors and obligees, all the obligors are principal debtors, though, as between each other, they may have the rights and remedies resulting from the relation of principal and surety. As long as the obligee does no act varying the terms of the original contract, he has the same claim upon the sureties that he has upon the principal for the payment of the bond.

It is objected in the argument, though not specially assigned as error, that the trial below was wrong, Anderson's demurrer remaining undisposed of. We are aware that in *Gray v. Cooper*, 5 Ind. 506, and *Waldo v. Richter*, 17 id. 634, it has been held error to proceed to trial of issues of fact before the jury, where issues of law remain undis-

posed of ; but we are not at liberty to follow these cases, even if we concurred in the reasons assigned in their support.

In the case of *Evans v. Gee*, 11 Pet. 85, this precise point was involved, and the court held that the irregularity was waived by the defendant going to trial upon the merits, and that he could not avail himself of it in the appellate court. Regarding the plea, above alluded to, as the individual plea of Scudder, the record shows that the "defendants" submitted to trial on the merits, and that the defendants made their motion for a new trial, and the judgment was rendered against the "defendants."

In the case of *Kirby v. Holmes*, 6 Ind. 33, it is held, that if a judgment be rendered in form against the defendants, it will be presumed to be against all of them.

The record shows that the defendants were all personally served with process, and that they appeared to the action by their attorneys, and when they submitted to a trial on the merits, we cannot do otherwise than presume that it amounted to a waiver of the demurrer on the part of Anderson.

Of course the presumption spoken of by the supreme court of Indiana would not obtain when there was no service of process or personal appearance. It must be understood as applying to cases where the word "defendants" may embrace, and should be understood to embrace, all the defendants who, as the record showed, might and should be embraced in the judgment. *Clagget v. Blanchard*, 8 Dana, 43; *Violet v. Waters*, 1 J. J. Marsh. 303.

It may be claimed, however, that, although the demurrer was waived, still there was no issue as to Anderson, and hence a mistrial. We cannot allow the defendant, after permitting the cause to proceed as though issue had been joined, to take advantage of that fact in this court.

It is claimed by the appellants that the court erred in allowing the bond to go in evidence ; that there was a variance between that offered and the one declared upon. We think not. The bond was set out in the declaration *in hac verba*. The obligation offered corresponded with that set

out. There was no sworn plea denying the execution of the bond, and it was not necessary to furnish any proof of its execution. *Non est factum* was the general issue at common law in actions on bonds, and its office was to put in issue the execution of the deed sued on. It was not necessary that the plea should be verified. In this territory the term *non est factum* is and has been applied to all pleas, answers and replies that deny the execution of a written instrument constituting the foundation of the previous pleading answered by such denial; but such pleading has not been regarded as having the effect to put in issue the execution of any written instrument, but only its existence, unless the pleading was verified by oath.

We are clearly of the opinion that no error was committed by the court below in allowing the bond to be read in evidence. The other assignments of error are, in our judgment, equally untenable.

The judgment, however, will have to be reversed, it being entered in assumpsit instead of debt. But as a careful examination has failed to show any error previous to the finding of the verdict, and inasmuch as it is sufficient to sustain a judgment, we deem it unnecessary to award a *venire facias de novo*, but we reverse the judgment and remand the cause, with leave to plaintiff to move the court below for a judgment on the verdict. And the court below is directed to enter the proper judgment. *Reversed.*

DEMURRER — WAIVER BY GOING TO TRIAL. — A demurrer is waived by going to trial on the merits, leaving the issues raised by the demurrer undetermined, and the party cannot afterwards complain that they were not determined: *Danielson v. Gude*, 11 Colo. 94.

ANDRE v. JONES.

APPEAL — how prayed for. If several defendants pray an appeal jointly, and the appeal bond is executed by one only, and recite an appeal by one, it is irregular, and the appeal will be dismissed.

APPEAL BOND — when amendable. In such case the appeal bond is not amendable.

Appeal from District Court, Clear Creek County.

JONES recovered judgment against Andre and Haskins; both defendants appealed, and day was given to perfect the

appeal, by bond, with security. Within the time limited Andre filed his bond, with surety, but his co-defendant did not join therein, and the condition of the bond recited an appeal by Andre only.

Mr. H. M. TELLER, for appellee, moved to dismiss the appeal for the imperfections of the bond.

Mr. W. R. GORSLINE, for appellant, asked leave to amend the bond.

BELFORD, J., was of opinion that leave to amend ought to be allowed.

Per CURIAM. The motion to dismiss must be allowed; the appeal was granted upon certain conditions, which have not been complied with. Haskins has evidently abandoned his appeal. The defendants might have prayed joint and several appeals, but they both united in the only appeal which was prayed, and a joint appeal of two cannot be prosecuted by one only. *Watson v. Thrall*, 3 Gilm. 69; *Johnson v. Barber*, 4 id. 1. *Motion allowed.*

JOINT APPEAL — ALL MUST PROSECUTE. — A joint appeal prayed by all of the defendants, and allowed on condition of filing a joint bond, must be prosecuted by all, and if prosecuted by part only will be dismissed: *Fuller v. Swan River Placer Co.* 5 Colo. 123, 124; and the statute of 1879, authorizing one of several defendants to remove a case to this court by appeal, and permitting him in such case to use the names of all, if deemed necessary, will not affect the rule that a joint appeal must be prosecuted by all: *Diamond T. G. & S. M. Co. v. Faulkner*, 14 Colo. 439, 440.

CLEMENTS v. HAHN.

PRACTICE IN SUPREME COURT — *certiorari for lost records.* Certiorari will not be issued to bring up matter, not of record, in the court below.

Where a bill of exceptions has been lost from the files of the court below, certiorari cannot be issued to bring up the record of such bill until the loss has been supplied.

Error to District Court, Gilpin County.

PLAINTIFF in error suggested diminution of the record on the affidavit of Charles C. Post, Esq., who appeared for the defendant in the court below, now plaintiff in error, and who deposed to facts tending to show that a bill of the exceptions reserved by the defendant upon the trial in the

court below had been prepared by him and allowed, and signed by the chief justice who presided at that trial, and had been afterward filed in the office of the clerk of the district court. The affidavit further set forth that deponent had diligently searched the office of said clerk and procured the clerk to make search among all the papers in his office and in all places where it might be, and that said bill of exceptions could not be found.

Per CURIAM. Certiorari cannot go upon this showing. The affidavit relied upon shows that the bill of exceptions no longer remains in the court below, and the clerk of that court cannot certify what is not. It may be that, upon proper showing, the district court will, in the exercise of its discretion, allow this bill of exceptions to be supplied by copy. If that should be done, you may then renew your suggestion.

Motion denied.

PAUL v. LUTTRELL.

PRACTICE — *proceedings when judgment is reversed and cause is remanded.*

When the judgment of a district court is reversed in this court, and the cause is remanded for a new trial, the jurisdiction of the district court is restored, and the parties are bound to attend and proceed to trial whenever required by that court.

In such case it is not essential that the plaintiff should proceed at the first term after the judgment is reversed.

Nor that he should file the precept or mandate of this court before proceeding in the district court.

Nor that he should give notice to his adversary of his intention to docket the cause in the district court.

Upon motion for supersedeas.

LUTTRELL brought replevin against Paul in the Jefferson district court, and upon the writ of replevin the property was taken by the sheriff and delivered to him. At the last term of this court a judgment theretofore given in the

district court was reversed, and the cause was remanded for a new trial.

At the October term, 1871, of the district court, a jury was called, and upon their verdict judgment was given for the plaintiff Luttrell, that he have the property, and damages for the detention thereof were adjudged to him, and a *retorno habendo* was awarded.

Upon this trial, as appeared by the record, no one appeared for the defendant; it further appeared, that no transcript of the order of this court, whereby the cause was remanded, was at any time filed in the district court.

Paul now moved for a supersedeas, assigning for error, among other things:

1. That after reversal in the supreme court of the former judgment, the district court proceeded to a new trial of the issues, and gave judgment thereon, although no precept or mandate had been issued out of the supreme court directing the said district court to proceed further.

2. That, after judgment of reversal in the supreme court of the former judgment given in the district court, the cause was not docketed in the district court until the second term succeeding, and then without notice to the defendant.

3. That, by the judgment of the district court, the defendant was required to return to the plaintiff the goods and chattels which were already in plaintiff's possession.

Per CURIAM. Your motion must be denied. When the former judgment of the district court was reversed, the defendant still remained in court, and was bound to attend and proceed to trial whenever required by the district court. He was not entitled to notice from the plaintiff of his purpose to docket the cause or proceed to trial.

That the plaintiff failed to have the cause docketed, or to file the mandate of this court in the court below at the first term after judgment of reversal, is nothing; the cause was, nevertheless, pending there, and if the defendant desired any step taken at that time he might have procured the mandate himself, or he might have proceeded as the plain-

tiff did, finally, without the mandate. The jurisdiction of the district court over the cause was restored as soon as judgment was given in this court. The mandate was but evidence of that jurisdiction; and, though there are prudential reasons, perhaps, why transcript of the final orders of this court, where causes are remanded, should be filed in the court below before either party is allowed to proceed, yet it is not error to proceed without it, for the question is altogether one of jurisdiction, and if the transcript should be filed at any time hereafter, as it may be, it will afford conclusive evidence that, at the time when the district court gave the judgment now complained of, it had jurisdiction to do so.

The award of the writ of *retorno* appears to us to be irregular, and if the plaintiff in error proceeds with his writ of error he may probably have that order vacated, but, in the mean time, the defendant in error must be at liberty to take execution for his damages.

Motion denied.

SHALLCROSS v. KRETSCHEMER.

ERROR assigned as to matters not of record. Error cannot be assigned upon the ruling of the court, in allowing a promissory note to be read in evidence, unless the note has been preserved in the record.

DAMAGES allowed where writ has been prosecuted for delay. It appearing that the writ of error was prosecuted for delay, twenty per cent of the amount of the judgment below was awarded to the defendant in error.

Error to Probate Court, Arapahoe County.

Messrs. BROWNE & PUTNAM, for plaintiff in error.

Mr. JOHN MECHLING, for defendant in error.

Per CURIAM. A brief filed on behalf of plaintiff in error contains the statement that a promissory note was improperly received in evidence in the court below; but the

note is not preserved in the record, and we cannot act upon the statement of counsel, unsupported by the record. The writ of error appears to have been prosecuted for delay, and we, therefore, affirm the judgment of the court below, with costs, and assess twenty per cent of the judgment below against the plaintiff in error as damages.

Reversed.

WATSON v. HAHN.

CONSIDERATION — *equitable right will support express promise.* If the remedy, by second indorsee of a promissory note against first indorser, is in equity alone, this equitable right is sufficient to support an express promise upon which he may recover at law.

PLEADING AND EVIDENCE — *common counts.* In an action by the second indorsee of a promissory note against the first indorser, the plaintiff may recover upon evidence of an express promise under the common counts.

PRESUMPTION *in favor of judgment below.* Where the bill of exceptions does not contain all of the evidence given on the trial in the court below, the court will presume that the finding of the district court is correct.

PRACTICE — *objection to testimony must be specific.* Upon a general objection in the court below, to copies of papers offered in evidence, it cannot be alleged in this court that there was not sufficient evidence of the loss of the original papers to warrant the use of copies; that objection should have been made in the district court.

Error to District Court, Gilpin County.

Mr. L. C. ROCKWELL, for appellant.

Mr. S. B. HAHN, *pro se.*

HALLETT, C. J. Assumpsit by second indorsee against first indorser of a promissory note; and demurrer to special counts in the declaration overruled; plea of general issue to the common counts, and trial to the court and judgment for the plaintiff.

Upon the question raised by the demurrer, the supreme court held, under a Virginia statute in some respects similar to ours, that an indorsee of a promissory note could not sue

a remote indorser at law (*Mandeville v. Riddle*, 1 Cranch, 290), and that the remedy was by bill in equity. *Riddle v. Mandeville*, 5 Cranch, 322. In Illinois, whence our statute was obtained, the rule is otherwise. *Clifford v. Keating*, 3 Scam. 250.

However this may be, defendant in error proved an express promise to pay, and upon this he may recover under the common counts. According to the case in 5 Cranch, defendant in error was entitled to recover in equity if the law is as claimed by plaintiff, and this equitable right will support the express promise upon which an action at law may certainly be maintained. 1 Pars. on Cont. 444. Therefore it is not necessary to inquire whether the demurrer was properly overruled, and we express no opinion on the point. Again, it does not appear that the bill of exceptions contains all of the evidence given on the trial in the court below, and we will presume that the finding of the court is correct. *Ballance v. Leonard*, 37 Ill. 43.

Copies of certain papers were received on the trial, to which plaintiff in error objected generally, but this objection cannot be renewed here. If there was not sufficient evidence of the loss of the original papers to warrant the use of copies, that objection should have been made in the court below. As to the depositions, some of the testimony was irrelevant, but we cannot reverse the judgment for that reason. The testimony is abundantly sufficient to support the judgment of the court, and that which is irrelevant and immaterial could not have had any influence in determining the issue.

The judgment of the district court is affirmed, with costs.

Affirmed.

DOANE et al. v. GLENN et al.

EVIDENCE OF DECLARATIONS *of parties in charge of property to show possession*

On the trial of an issue as to ownership of property, between interpleading claimants and plaintiffs in attachment, the declarations of the claimants

and others who were present with the property, made to the officer at the time the writ was levied, are admissible to show who were in possession of the property.

EVIDENCE as to who was in charge of property admissible. The officer having testified that the claimants were with the property attached at the time the levy was made, his testimony upon that point was admissible, and a motion to exclude all of his testimony from the jury, was properly overruled.

MISNOMER — as to middle name. The law knows but one christian name, and the omission or incorrect insertion of a middle name or initial letter is immaterial.

PRACTICE — when formal objections to deposition must be made. Formal objections to a deposition must be made before trial, and the objection that the official character of a notary public, by whom the deposition was taken, is not authenticated, is of this nature.

DEPOSITION — witness must be sworn in the cause. A deposition taken in an attachment suit, upon notice that the deposition would be read upon the trial of the cause, and the witness being sworn to testify in that cause, is not admissible upon the trial of an issue between interpleading claimants of the property attached and the plaintiffs in the attachment.

PRESUMPTION OF OWNERSHIP arising from possession of personal property. Upon issue joined between interpleading claimants and plaintiffs in attachment, where there is evidence to show that the claimants were in possession of the property at the time the writ was levied, the jury was properly instructed, that, if the property was found in possession of the claimants at the time of the levy, from such possession the law raises a presumption that the claimants were then the owners of such property.

JUDGMENT on issue found for interpleading claimants. It is irregular to enter judgment in favor of the interpleading claimants for the possession of the property attached, but where all the property attached is embraced in the claimant's pleading, the irregularity is not sufficient to reverse judgment.

EVIDENCE OF OWNERSHIP of property attached — sheriff's return. Where the sheriff returns to a writ of attachment that the defendants are not found in his county, and does not state in whose possession he found the property attached, such return does not make out a *prima facie* case of ownership of the property in the attachment defendants.

Error to District Court, Arapahoe County.

THE sheriff's return to the writ of attachment was as follows: "I have duly executed this writ by levying on seven hundred and fifty-five head of Texas cattle, branded seventy-one. Six horses or two mares and four geldings, one saddle, one bridle, one heavy wagon, one sorrel mare branded $\frac{3}{8}$, connected on right shoulder, one sorrel mare branded OX on left hip, M S on shoulder, one sorrel horse branded LL on shoulder, one bay horse branded H on

shoulder, one black poney branded HS on shoulder, one black poney branded B on shoulder, as I am therein commanded, and have the said property now in my possession. The within-named Oliver S. Glenn and Rufus E. Talpey are not found in my county."

The claimants described the property in their plea as follows: "Seven hundred and fifty-five head of Texas cattle branded "71," one sorrel mare branded $\frac{Z}{O}$, connected on right shoulder, one sorrel mare branded OX on left hip, one sorrel horse branded LL on shoulder, one bay horse branded H on shoulder, one black poney branded HS on shoulder, one black poney branded B on shoulder, one saddle, one bridle, one heavy wagon."

The judgment of the court was as follows: "It is considered by the court that the property taken by virtue of the writ of attachment in this cause be delivered up to the said Lockhart T. Glenn and George O. Talpey, and that a writ of *retorno habendo* be awarded and issued therefor."

In addition there was judgment for costs.

The evidence is sufficiently stated in the opinion of the court.

The first instruction to the jury is given in the opinion of the court; the second and third instructions were as follows:

If the interpleading claimants purchased the stock which is in controversy with the funds of the defendants, or held the same for the use of the defendants, then such purchase and holding was a fraud upon the creditors of the defendants, and the property in question was subject to the levy of the plaintiff's writ of attachment.

Such fraud as supposed in the last instruction is not to be presumed or inferred without proofs, and it is for the jury to say, upon all of the facts and circumstances in proof, whether the possession of the interpleading claimants was an honest one or merely colorable and fraudulent.

Messrs. CHARLES & ELBERT, for plaintiffs in error.

Messrs. FRANCE & ROGERS, for defendants in error.

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BELFORD, J. Plaintiffs in error commenced suit by attachment in the district court of the county of Weld, on the 22d day of September, 1870, against Oliver S. Glenn and Rufus E. Talpey, for the sum of \$7,000. A writ of attachment was issued, directed to the sheriff of said county, which was, on the 23d day of September, 1870, levied on the following described property, to wit: seven hundred and fifty-five head of Texas cattle, six horses, one saddle and bridle, and one heavy wagon. At the following December term of the district court defendants in error filed in said suit their plea, claiming that they were the absolute owners of, and entitled to, the immediate possession of the property above set forth. To this plea a replication was filed by the attachment plaintiffs, denying that the property levied on by the writ of attachment, and described in said plea, was the property of said interpleaders, or that they were entitled to the possession of the same. Issue being joined, by stipulation of the parties, the cause was brought to Arapahoe county for trial. The jury returned a verdict for the defendants in error, on which judgment was rendered for return of the property attached. On the trial below, the interpleading claimants, to support the issue on their side, introduced as a witness one Thomas E. Benson, who testified that, as deputy sheriff, he had levied the writ of attachment; "that at the time of the levy he found the property in the possession of George Glenn and Dr. Talpey. These young men were in possession of the cattle. They had some herders with them. One colored person driving a team, and one other man on horseback. Did not know that they, the interpleaders, were in possession more than the other men who were there, except from what they told him. Saw them there with the cattle, so were the other men as much as they." The plaintiffs moved to exclude this testimony, on the ground that Benson's knowledge of the possession was derived from the declarations of the claimants and, therefore, hearsay and inadmissible. This motion was denied by the court, and this constitutes the first assignment of error, which we will notice. The

declarations made by the claimants to Benson do not appear in the record, and hence, we are unable to judge of their character and force.

It is a settled rule, that the best evidence that the nature of the case will admit of must be adduced unless some obstacle lies in the way which legally authorizes a resort to inferior evidence. The highest degree of certainty of which the mind is capable, with respect to the existence of a particular fact, consists in a knowledge of the fact, derived from actual perception of the fact by the senses. It is seldom, however, that a jury can act upon knowledge of this description; it rarely happens that a fact which can be decided by mere inspection is submitted to the consideration of the jury. The second degree of evidence in the scale of certainty consists of information derived from the relation and information of those who have had the means of obtaining actual knowledge of the fact, from actual perception of the same by the senses; and upon knowledge thus derived juries must in general act. The jury must be informed of the facts by those who are eye and ear witnesses of them. The third degree of evidence in the scale of certainty consists of information derived, not immediately from one who has had actual knowledge of the fact by the perception of his senses, but from one who knows it only by its having been asserted by some other person; this is generally hearsay evidence. And, although there is a rule which excludes hearsay evidence, yet there are numerous exceptions to it, which courts are bound to recognize and enforce, and among the exceptions thus recognized is, that when a declaration is in itself a fact, and is part of the *res gesta*, the objection to hearsay evidence ceases.

The distinction between a mere recital, which is not evidence, and a declaration which is to be considered as a fact in the transaction, and therefore evidence, frequently occasions much discussion. The rule is this: if the declaration has a tendency to illustrate the question, and any importance can be attached to it as a circumstance, which is part of the transaction itself, and deriving a degree of credit from

its connection with the circumstances, independently of any credit to be attached to the speaker, then it is admissible. The objection of hearsay evidence can never operate to the exclusion of any statement of a fact which the law regards as a proper and safe medium for conveying the truth to a jury ; for, in such case the evidence is admissible, because it is in itself and in connection with the circumstances deserving of credit, and it is no more hearsay evidence than the fact itself. Such evidence does not rest upon the credit due to the person who makes the statement, but it is, in general, good, although the person who made it would not, in ordinary cases, be believed upon oath. It is admitted as a part of the transaction, on the presumption that it is calculated to elucidate the facts with which it is connected, and it is evidence, although the party who made it is himself a competent witness. *Ingram v. Plasket*, 3 Blackf. 454. In treating of this subject CLIFFORD, J. (*Insurance Co. v. Mosley*, 8 Wal. 412), says: "Undoubtedly whenever evidence of an act done by a party is admissible, the declarations he made at the time the act was done are also admissible, if they were of a character to elucidate and unfold the act, because they derive a degree of credit from the act itself and do not rest entirely upon a statement not made under oath. But such declarations cannot properly be received as evidence, unless the principal act which they accompany and to which they relate is itself material to the issue to be submitted to the jury, nor unless the declarations were made at the time the principal act was done," etc. The record shows that, at the time of the levy of the writ of attachment, these claimants were with the cattle. This is a distinct fact in itself and a fact which was ascertained by Benson by actual perception, a fact which he could and did testify to, so that we find something to which the declarations can attach, and from which they derive a legal support. The latter would be clearly inadmissible were they disconnected from the act of levy. If made at any other time they could not be received, and their admissibility is only secured by

reason of their forming a part of the transaction, of the levy, or what occurred at that time.

In *Nilson v. Iverson*, 19 Ala. 95, the declaration of a party, while in the possession of a slave, "that she was his negro and that he intended to keep her," was held admissible as part of the *res gestæ* to prove the character of his possession. And in *Nilson v. Iverson*, 17 Ala. 216, the court holds that the declarations of a party in possession are admissible as a part of the *res gestæ* to prove the character of his possession, as that he claims the property as his own, or holds it in subordination to the claims of another. 1 Halstead's Ev. 424, 426.

The material issue to be tried in this case was, the possession and ownership of the property at the date of the levy. The return of the sheriff to the writ shows that the attachment defendants, Oliver S. Glenn and Rufus E. Talpey, were not found in his county at the time the property was attached, and on the trial of the interplea the sheriff testifies that the claimants were with the herd. This certainly was evidence of possession. It might be slight, but still it is entitled to some regard, and especially so when nothing appears to show that the elder Glenn or Talpey had ever been in possession of the cattle. It is true that there were two other parties with the interpleaders at that time, a colored man driving a team, and a man on horseback. And it is claimed that this is evidence of a joint possession. It is sufficient argument on this point to say that these parties nowhere appeared as claimants, nor are they known in any way as interested in this suit, or as parties to this record. Benson says he found the property in the possession of George Glenn and Dr. Talpey. There is an evident confusion of names here, and no effort seems to have been made by the attorneys in the court below to explain this. But it appears from the evidence that, in using these names, the witness intended and designed to designate Lockhart T. Glenn and George O. Talpey, for he says: "these young men, the interpleading claimants, were in possession of the property," etc.

The younger Glenn and Talpey were both present in court, and, from a careful reading of the testimony, there can be no doubt that Benson referred to them when he used the words "George Glenn and Dr. Talpey." Independent of any declarations made by these parties, it would have been error for the court to strike out the evidence of Benson, for the reason that his knowledge of the claimants' possession may have been founded quite as much on the fact that they were with the cattle, and driving them as from their declarations. At least, in establishing the fact of possession, the circumstance that these claimants were with the cattle was proper to be given in evidence, and this circumstance is detailed by Benson.

The next error assigned is the refusal of the court to allow plaintiffs to read in evidence the deposition of James W. Hanna. Several objections were made by the defendants, which we will notice in the following order :

1. The commission is to take the deposition of James H. Hanna, and the deposition taken is that of James W. Hanna.

2. That there is no authentication of the character of the notary public.

3. That the deposition is taken in the original cause, and not in the interpleading suit, and does not permit interrogatories to be propounded in behalf of the claimants.

4. That the parties plaintiffs in this suit were different from those named in the commission.

These objections were all made for the first time on the trial.

There is nothing in the first objection. In legal contemplation, the middle letter constitutes no part of one's name. The law knows but one Christian name, and the omission or incorrect insertion of a middle name or initial is immaterial in pleading; so also in a commission to take depositions. *Franklin v. Tallmadge*, 3 Johns. 84; *Roosevelt v. Gardiner*, 2 Cow. 463; *Milk v. Christie*, 1 Hill, 102; *Ginnis v. Martin*, 10 Iowa, 347.

The second objection was not well taken. Generally

speaking, a party cannot be allowed to lull his adversary into security by his silence till the trial commences, and then spring an objection on him which, if sustained, may deprive him of the proof of material facts, which he might have established in a more formal and regular mode, had the objection been made and sustained at an earlier period. 1 Gilm. 425. When formal objections are not made prior to the commencement of the trial, they cannot be heard afterward. The party seeking to use the deposition would be justified in believing that these objections had been waived. To hold any other doctrine on this subject would work most serious mischief. In many instances it would operate to prevent a party from availing himself of the attendance of witnesses, by whom the same matters contained in deposition might be proved.

The third objection is of a more serious and substantial character. The notice was served on the defendants in the attachment suit as well as on the claimants, and contained the statement that the deposition was to be used in evidence on the trial of the above entitled cause, now pending, etc., and that they were at liberty to file cross-interrogatories and join in the commission.

Without deciding whether the notice was sufficient to bind the claimants, we find, from an examination of the notary's certificate to the deposition, that Hanna was sworn as a witness in the case of *Doane et al. v. Oliver S. Glenn and Rufus E. Talpey*. It does not appear that he was sworn as a witness in the cause of *Glenn and Talpey, interpleaders, v. Doane et al.* To have made this deposition available on the trial of the interplea the witness should have been sworn in that suit. The parties were different, and to have admitted the deposition under these circumstances would have been to give the plaintiffs in error the benefit of his testimony, without the sanctity of an oath. We are of the opinion that the court committed no error in excluding the deposition.

The court gave to the jury the following instruction, which is assigned for error:

“The burden of showing that they are the owners of the property in question, and were such owners at the time of the levy of the attachment is upon the interpleading claimants. But, if, at the time of the levy of the writ of attachment in this case, the property was found in the possession of the interpleading claimants, then, from such possession, the law raises a presumption that the interpleading claimants were then the owners of such property, and unless it has been shown to the satisfaction of the jury that such possession of the interpleading claimants (if they were so in possession) was colorable or fraudulent, and a possession for the use of the defendants in this suit, the interpleading claimants may recover.”

The plaintiffs in error claim that the law raises no presumption of ownership from the possession of personal property. Matthews, in his work on Presumptive Evidence, page 30, says: “As to personal property of a movable nature, the general rule is, that possession constitutes the criterion of title, and for this reason, that no other means exist by which a knowledge of the fact to whom it belongs can be attained. Hence, a vendor of personal chattels is never expected to show the origin of his right.”

Presumptions, or, as they are sometimes called, “intentments of the law,” are inferences or positions established for the most part by the common and occasionally by the statute law, and are obligatory alike on judges and juries. They differ from presumptions of fact, or mixed presumptions, in two important respects. In the latter a discretion more or less extensive, as to drawing the inference, is vested in the tribunal, while in the former the law peremptorily requires a certain inference to be made whenever the facts appear, which it assumes as the basis of that inference. In the second place presumptions of law are, in reality, rules of law, and a part of the law itself, and the court may draw the inference whenever the requisite facts are developed in the pleading, while all other presumptions, however obvious, being only inferences of fact, cannot be made without the intervention of the jury. There is a class of presump-

tions which the law, out of regard for public policy, recognizes and enforces. In such cases it gives an artificial effect to the facts which give rise to the presumption, beyond their natural tendency to produce belief. For instance, when one sets fire to a house the presumption is that he intended injury to its owner. If, then, a legal presumption is one that the law peremptorily requires to be drawn from certain ascertained facts, and which is incumbent alike on courts and juries to make, then clearly the possession of personal property does not create such a presumption. It is purely an inference of fact to be dealt with by the jury, and not one of law to be applied by the court, and falls strictly within Mr. Starkie's definition of natural presumptions, or presumptions of mere fact. It depends wholly upon its own natural force and efficacy in generating conviction in the mind, as derived from those connections which are pointed out by experience, and is altogether independent of all artificial legal relations. It is a fact to be weighed by the jury, when they have found it, as a circumstance, tending to establish in their minds the main fact in issue, to wit: whether the possessor is the real owner.

The inaccuracy of calling it a legal presumption finds sanction in the language of many courts and writers upon the subject of evidence. 12 Wis. 594.

It is said that presumptions of this kind may be properly termed legal presumptions, because they have been so frequently drawn under the sanction of legal tribunals that they are to be viewed as presumptions authorized by law. We cannot, therefore, say that in this cause the naming it a legal presumption in the instruction to the jury was error. The jury were told that the burden of proving ownership was upon the claimants, and they were further told, that while the law did raise a presumption of ownership from possession, yet if that possession was colorable, or for the use of the attachment defendants, then they could not recover. Even if the instructions were erroneous we would not feel at liberty to reverse the case on that ground. The plaintiffs in error had every opportunity to make good their

claim, if they had any. Their examination of witnesses was long and ingenious, and yet they failed to bring before the jury any evidence calculated to satisfy them that the elder Glenn and Talpey were the owners of the property. There are many suspicious circumstances connected with the purchase of the cattle and the conduct of the parties, and these were all brought to the attention of the jury, and after weighing them they returned their verdict for the claimants.

Whatever may be our opinion of the merits of the controversy, we cannot usurp the function of the jury and disregard a verdict that has evidence to support it. The issue below was a clear and distinct one. Was the property levied upon the property of the interpleaders? That issue was fully tried and the court left the jury free to pass upon it, and they resolved it against the plaintiffs in error. The court, in the second instruction given to the jury, told them that if the interpleading claimants purchased the stock in controversy with the funds of the defendants, or held the same for the use of the defendants, then such purchase and holding was a fraud upon the creditors of the defendants, and that the property in question was subject to the levy of the plaintiffs' writ of attachment. Under this instruction, the jury had the right, and doubtless did consider fully, not only the evidence of Blackington, but all the circumstances which were brought out on the trial, and which indicated the character of the transactions had by the younger and elder Glenn and Talpey in reference to the cattle.

Objection is also made to the form of the judgment rendered in this cause. We are of the opinion that the judgment in the present form is irregular. It would be better, in entering judgment in cases of this kind, to have it show that the property described in the plea is the property adjudged to be restored, instead of the property levied upon by the writ of attachment. We do not, however, conceive that an irregularity of this kind is in any way prejudicial to the plaintiffs in error.

There is one other point made by the plaintiffs in error which we think it proper to allude to. It is claimed that

the return, made by the officer on the writ of attachment, was *prima facie* evidence that this property belonged to Oliver S. Glenn and Rufus E. Talpey, as against the interpleading claimants, and would have been sufficient to support the issue on behalf of the plaintiffs, without any further evidence, until rebutted. It is quite true that such returns are commonly evidence of more or less force, according to circumstances, and, particularly, with respect to parties against or for whom they are sought to be used. A familiar illustration is, when a person other than the defendant in execution sues or is sued for property levied on under it, in which case the return usually states the property to belong to the judgment debtor, but the real owner is always permitted to contradict such statement. 2 Philips' Ev. 368, 369 (margin).

The sheriff, in making his return, does not state to whom this property belongs, nor in whose possession it was found. It further appears that, at the time of the levy of the writ, Oliver S. Glenn and Rufus E. Talpey were not found in Weld county. It seems to me that it would be doing violence to every principle of law, to hold that such a return furnishes *prima facie* evidence of ownership in the elder Glenn and Talpey against the interpleaders.

In accordance with the view we have taken of this case, the judgment of the court below must be affirmed. *Affirmed.*

DEPOSITIONS, FORMAL OBJECTIONS TO. — The supreme court of the United States reversed the judgment in the principal case for error of the court in excluding the depositions offered by plaintiff: *Doane v. Glenn*, 21 Wall. 33.

SOPRIS v. WEBSTER.

NEW TRIAL — *verdict not supported by evidence.* If, in an action of replevin no evidence of the value of the property, or of the value of its use, is given, no more than nominal damages can be allowed for the detention thereof.

Appeal from District Court, Arapahoe County.

Mr. L. B. FANCE, for appellant.

Mr. S. E. BROWNE, for appellee.

WELLS, J. The judgment in this case is clearly erroneous. The jury awarded the plaintiff \$50 as his damages for the wrongful detention of the property in controversy, while there is no evidence in the record of its value or of the value of its use during the detention. There was, therefore, no data upon which damages could be assessed, and only nominal damages should have been allowed.

For this error the judgment is reversed, with costs, and the cause remanded to the district court, with directions to that court to award a new trial. *Reversed.*

REPLEVIN — EVIDENCE OF VALUE. — If in an action of replevin, no evidence of the value of the property, or of the value of its use, is given, no more than nominal damages can be allowed for its detention. This was the common-law rule, and the same rule obtains under the code: *Tucker v. Parks*, 7 Colo. 65, 66.

THE PEOPLE v. MYERS.

JURISDICTION OF SUPREME COURT in criminal cases. This court can entertain jurisdiction of causes only in the methods prescribed by law, and cannot give judgment in a criminal cause certified into this court from a district court, without writ of error.

PRACTICE — removal of records into supreme court. This court will not take cognizance of questions arising in a criminal cause, which are brought into this court from a district court by agreement of parties.

THE prisoner having been found guilty upon an indictment for murder, at the January term, 1872, of the Arapahoe district court, moved for a new trial. Judgment upon this motion was reserved until the next succeeding term of the court, and upon motion of the prisoner's counsel, the district attorney consenting, certain questions arising upon this motion were directed to be argued in the supreme court at this term.

HARRISON & POWERS for the prisoner now moved upon certified copy of the order of the district court, that the question therein reserved be set down for argument at a future day in this term.

PER CURIAM. We cannot hear the counsel as to these questions. There is no warrant for the course which was pursued

here. We can entertain jurisdiction of causes only in the methods prescribed by law. We can give no judgment here which shall bind the prisoner or any one else. Though we should be of opinion that a new trial ought to be granted, the district court may refuse it, and if we should be of the contrary opinion, and the district court should thereupon deny the prisoner's motion, he may, nevertheless, bring his writ of error, and we must hear counsel again.

The practice of the English courts is of no weight upon this question, because the relation which the English courts at *nisi prius* have to the court *in banc* is essentially different from that of our district courts to this court. When the district court shall have given final judgment upon this indictment, the prisoner may, if he will, apply for his writ of error.

Motion denied.

CREIGHTON v. KERR et al.

APPEARANCE — *effect of withdrawing.* If a defendant enter an appearance in a cause, in which he has not been served with process, and afterward withdraw his appearance, "without prejudice to the plaintiffs," the plaintiffs are in the same position, as if such appearance had not been withdrawn or in any manner qualified.

The appearance, to all intents and purposes, still stood as a waiver of process, and sufficiently supported the judgment *nil dicit* which was afterward given.

APPEARANCE — *effect of in proceeding in rem.* If, in a suit in attachment, in which service of process has not been made, the defendant enter his appearance, the character of the proceeding is changed from an action *in rem* to an action *in personam*.

ATTACHMENT — *if defendant appear, plaintiff not limited to amount specified in affidavit.* If, in such action, the defendant withdraw his appearance, "without prejudice to the plaintiffs," the plaintiffs are not limited to the amount or causes of action specified in the affidavit in attachment, but may take judgment upon the declaration for an amount not exceeding the damages laid therein.

Error to District Court, Arapahoe County.

SUIT commenced by attachment to the June term, 1870; amount specified in the affidavit \$5,563.50. Cause of action

in the affidavit, for telegraph poles and labor and material furnished by the plaintiffs to defendant. The declaration contained the common counts for work and labor, for telegraph poles, goods, wares and merchandise, for money paid, laid out and expended, and a count upon an account stated; the damages were laid at \$8,000.

At the October term, 1870, the defendant appeared by Charles & Elbert, his attorneys, and submitted to a rule to plead within ten days. Afterward, and before the expiration of the ten days, an order was entered of record in the cause, as follows:

“Now on this day came Messrs. Charles & Elbert, and withdrew their appearance as attorneys for the said defendant, without prejudice to the plaintiffs.”

Afterward, and at the same term, the plaintiffs obtained judgment against the defendant for \$8,000 and costs.

Messrs. BELDEN & POWERS and Messrs. CHARLES & ELBERT, for plaintiff in error.

Messrs. SAYRE & WRIGHT, for defendant in error.

WELLS, J. It appears to us that the withdrawal of the appearance which was entered on the part of the plaintiff in error in the court below, whether it be regarded as the act of the attorneys merely or as the act of the defendant himself, left the plaintiffs below in precisely the same position as if it had not been withdrawn or in any manner qualified. If we are to give any effect to the words of the record of this proceeding, they impart a stipulation by the defendant, or at least a condition imposed by the court, that the plaintiffs shall not lose any advantage which, by reason of the appearance, they had gained. The appearance, to all intents and purposes, still stood as a waiver of process, and sufficiently supported the judgment *nil dicit*, which was afterward given.

And this, we think, also disposes of the second question which is presented by counsel, for, if we consider the appearance which was interposed on behalf of the defend-

ant, as still so far subsisting as to waive the necessity of process; if the plaintiffs, notwithstanding the withdrawal of the defendant's attorneys, still maintained their advantage in this respect, it follows that there was still an appearance subsisting on behalf of defendant for all purposes where such appearance could afford the plaintiff any advantage.

Therefore, the attachment which, in the first instance, was but a proceeding *in rem*, and which, by the defendant's appearance, had assumed the character of an action *in personam*, still remained of the same character after the appearance was withdrawn, and the plaintiffs were still entitled to have judgment for whatever damages they might establish under their declaration within the limit of the *ad damnum* laid therein, whether the causes of action counted upon were the same as those mentioned in the affidavit or different. The position of the plaintiffs was the same as if the defendant had plead to the action and the issue had been tried by a jury; and, in such cases, it has uniformly, we believe, been held that the plaintiff's recovery is not limited to the amount or causes of action specified in the affidavit.

We see no error in the record. The judgment of the court below is, therefore, affirmed. *Affirmed.*

APPEARANCE, WITHDRAWAL OF. — The United States supreme court affirmed the decision in *Creighton v. Kerr*, 20 Wall. 80. General voluntary appearance waives all objections to the summons and return, and the filing of a demurrer or answer is such an appearance: *Union Pac. Ry. Co. v. De Busk*, 12 Colo. 206

CONSOLIDATED GREGORY COMPANY v. RABER.

AGENT OF MINING COMPANY — extent of authority. An agent of a mining company may employ laborers in the business of the company, but he cannot pledge the faith of the company to persons not so employed.

If an agent of a mining company employ a person to take care of a team which does not belong to the company, used by such agent while attending to the business of the company, and also while attending to the business of other parties for whom the agent is acting, such employment is beyond the scope of the agent's authority and the company is not liable for the wages of the person so employed.

NEW TRIAL — *evidence to support verdict.* In an action against a mining company by an employee, to recover for services rendered, a declaration by an agent of the company that the plaintiff should lose nothing by the company, and another declaration by a director of the company to the same effect, are to be regarded as admissions of the company and are sufficient to support the verdict.

PRACTICE — *objection to testimony must be specific.* Upon a general objection to the declarations of an agent, made in the court below, the party cannot object in this court that the agent had no authority to bind his principal.

PRACTICE — *where judgment has been taken for a greater sum than the ad damnum.* If judgment is obtained for an amount exceeding the damages laid in the declaration, the plaintiff in the judgment may remit the excess and take judgment in this court for the amount claimed in his declaration.

COSTS — *when plaintiff below has taken judgment for too large an amount.* In such case appellant will be allowed costs in this court.

Appeal from District Court, Gilpin County.

At the trial, M. B. Hays testified: "That he, as agent of defendant, employed the plaintiff in spring, 1867, at \$60 per month, and that plaintiff worked for defendant about a year; that the work of plaintiff was to take care of the team of James E. Lyon & Co., and to saw wood for the house and office, and there was due defendant on the 15th of January, 1868, the sum of \$490; that he, the witness, was the agent for defendant, and for James E. Lyon & Co.; that the team was used by him in the business of defendant, and also while attending to the business of other companies."

Mrs. N. Buckman testified: That she had a conversation with Richman, agent of defendant, in 1868, in which she said to Richman, "I hope my brother will not lose anything by the Consolidated Gregory Company," and he said, "He shall not." Witness was then asked about a conversation with Frank Parmelee. The defendant admitted that Parmelee was, at the time of the conversation, a director of the company. Witness then stated that she had a conversation with Parmelee in 1868, about the claim of plaintiff against defendant, and Parmelee said that plaintiff was a good boy, and should lose nothing by defendant.

The defendant objected generally to the evidence of Mrs. Buckman, but did not state the ground of objection. The

verdict was for \$628.83, and the damages were laid in the declaration at \$490. Appellee filed in this court a remittitur, by which he proposed to remit to the appellant the amount by which the verdict exceeds the *ad damnum* in the declaration.

Messrs. JOHNSON & TELLER, for appellant.

Mr. L. C. ROCKWELL, for appellee.

HALLETT, C. J. The business of the Gregory Company is mining, milling and melting ores. Raber was employed by the agent of the company to take care of a team, the property of Lyon & Co., which the agent says was used for the company. Lyon & Co. made no charge for the use of the team, and before Raber was employed the company had paid for its keep. I cannot perceive that these facts create any obligation on the part of the company to pay for Raber's services. If Lyon & Co. furnished the team without charge, this is no evidence to show a contract with the groom. It is true that the agent of the company states that he employed Raber for the company, but this was evidently beyond his authority. He could employ laborers in the business of the company, but he could not pledge the faith of the company to persons not so employed.

But the declarations of Richman, who was the successor of Hayes in the agency, and of Parmelee, who was a director of the company, must be regarded as an admission by the company of the indebtedness to Raber, and, therefore, a ratification of Hayes' act in employing him. The account was entered in the books of the company, and Richman objected to it when he took charge of the company's affairs. It is not shown that any other demand in favor of Raber stood upon the company's books, and it is fair to presume that both Richman and Parmelee referred to this demand in their answers to Mrs. Buckman's inquiries. Therefore it cannot be said that the verdict is not supported by the evidence, and, although the right of the plaintiff below is not very clear, we do not see that the court erred in refusing a

new trial. A general objection in the court below to the declarations of Richman and Parmelee cannot be made the basis of a specific objection in this court. If Richman and Parmelee had no authority to bind the company; the attention of the court below should have been drawn to the fact, for possibly the plaintiff would have furnished evidence of their authority if it had been questioned. The amount recovered exceeds the amount shown to be due, but appellee has remitted the excess, a practice sanctioned by high authority. *Bank of Kentucky v. Ashley*, 2 Pet. 327.

The *remittitur* will be received, reducing the judgment to \$490, for which execution may issue from this court, and the appellant will be allowed costs in this court. *Affirmed*.

JUDGMENT — REMISSION OF EXCESS. — Where judgment is obtained for an amount exceeding the damages laid in the declaration, the plaintiff may remit the excess, and take judgment in the appellate court for the amount claimed in his declaration: *Winn v. Colorado Springs Co.* 3 Colo. 161.

GROUND OF OBJECTION TO EVIDENCE must be stated specifically at the trial or it cannot be raised afterward: *Cowell v. Colorado Springs Co.* 3 Colo. 161.

DOUGHERTY v. THE PEOPLE.

PRACTICE in cases of criminal abortion. *What is for the consideration of the jury.* Upon indictment, under section 42, Criminal Code (Rev. Stat. 202), for administering a noxious or destructive substance or liquid to a woman pregnant with child, with intent to produce miscarriage, whether the substance or liquid is noxious or destructive is a question of fact for the jury.

INDICTMENT for criminal abortion — description of drug. In such case it is not necessary to set out in the indictment the kind of drug or liquid administered.

EVIDENCE as to drug or liquid administered. And if the drug or liquid administered is described in the indictment, it is not necessary that the proof should correspond with the allegation.

EVIDENCE as to effect of the potion. Nor is it necessary that miscarriage should be produced. If the noxious substance or liquid is administered with intent to produce miscarriage, the crime is complete.

EVIDENCE as to power of potion to produce intended result. Nor is it necessary that the noxious substance or liquid administered should be poisonous, — the term is commonly understood, or that it should be capable of producing miscarriage.

If the substance administered is unwholesome, and may probably occasion injury or derangement of the system to a woman pregnant with child, it is noxious within the meaning of the statute.

PRACTICE — changing form of instruction. The refusal to give a proper instruction cannot be assigned for error, when the court gives other

instructions embracing the correct principle embraced in the instruction asked.

EVIDENCE OF CONFESSION—*whether sufficient to establish guilt.* Upon indictment for administering drugs to a woman pregnant with child, with intent to produce miscarriage, confessions of the prisoner to the effect that he gave certain drugs to the woman named in the indictment, and that the effect of such drugs was to make the woman sick, may be sufficient to establish guilt, there being other evidence to prove the fact of pregnancy, and it appearing that about the time of the alleged offense the prisoner inquired of a physician, and of other persons, to ascertain what kind of drug would produce miscarriage.

Error to District Court, Arapahoe County.

MR. L. C. ROCKWELL and Mr. G. W. MILLER, for plaintiff in error.

MR. M. A. ROGERS, district attorney, first judicial district, and Mr. CLINTON REED, district attorney, second judicial district, for the people.

BELFORD, J. The indictment in this case contains three counts. The first alleges that the defendant, on the 10th day of September, 1870, at the county of Clear creek, unlawfully, willfully and feloniously, did administer to, and cause to be taken by, one Maria Casey, she, the said Maria, being then and there pregnant with child, a large quantity of a certain noxious and destructive substance called boneset, with intent thereby, then and there, to procure a miscarriage of the said Maria, etc.

The second alleges that the defendant, unlawfully, willfully and feloniously, did cause to be taken by one Maria Casey, she, the said Maria, being then and there pregnant with child, a certain noxious substance called boneset, and other noxious and destructive substances, administered to the said Maria by the said Daniel Dougherty, etc.

The third count differs in no important particular from the first. In the court below the prisoner's attorney moved to quash the indictment, on the ground that boneset was not a destructive or noxious substance within the contemplation of the statute. This motion was overruled, and this

ruling of the court is assigned for error. We are unanimously of the opinion that the character and capabilities of any drug, specified in an indictment as having been used in the production, or attempted production, of a crime, are questions of fact to be determined by the jury upon the evidence before them. To hold otherwise, would be to require that the presiding judge, in all trials involving charges of poisoning, should be an expert in the science of toxicology, or thoroughly familiar with the active and inert properties of all drugs, herbs or minerals, which are, or might be, used in the perpetration of a crime.

This, indeed, might be regarded as a very onerous requirement, and yet, if of easy fulfillment, would certainly be open to the objection that the judge would thereby become master both of the law and the fact. Independent of this, however, we are of the opinion that an indictment which follows the language of the statute is sufficient.

In the case of *Curtis v. The State*, 2 Ind. 618, the court say, that it is not necessary to name the kind of drug, and if it is named, the proof need not correspond. See, also, *Vawter v. The State*, 7 Blackf. 592; and *Crichton v. The People*, 6 Park. Cr. 369. In the case of *Rex v. Philips*, 3 Camp. 73, the defendant was charged with administering to a pregnant woman a decoction of a certain shrub called savin. On the trial the prisoner's counsel objected, that, unless the shrub shown in the evidence was savin, there was no evidence that the mixture was "noxious and destructive." LAWRENCE, J., said: "In an indictment on this clause of the statute, it was improper to introduce these words; and although they are introduced, there is no necessity to prove them. It is immaterial whether the shrub was savin or not." We think there was no error in the overruling of the motion to quash.

The section of the statute on which this indictment is founded reads as follows: "Every person who shall willfully and maliciously administer, or cause to be administered to or taken by any person, any poison or other noxious or destructive substance or liquid, with intention

to cause the death of such person, and being thereof duly convicted, shall be punished by confinement in the penitentiary for a term not less than one year and not more than ten ; and every person who shall administer or cause to be administered or taken any such poison, substance or liquid, or who shall use or cause to be used any instrument, of whatever kind, with intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years in the penitentiary, and fined in a sum not exceeding one thousand dollars. And if any woman, by reason of such treatment, shall die, the person or persons administering, or causing to be administered, such poison, substance or liquid, or using or causing to be used any instrument aforesaid, shall be deemed guilty of manslaughter," etc. Crim. Code, § 42. From an examination of this section, it will be observed that the first clause applies to cases of poisoning as popularly understood ; that is, to cases when a person, desirous of destroying the life of another, willfully and maliciously administers the poison or other destructive substance, against the consent of the person taking the same. For instance, when a servant girl, designing and intending to take life, should place arsenic in coffee ; and the words "malicious" and "willful" applies to poisonings of this kind, and not to cases of abortion. The next clause applies purely to cases of the nature of the one undergoing investigation.

The acts sought to be prohibited and the crime sought to be punished, are the using of noxious substances, or instruments with intent to produce miscarriage. It is not necessary that the miscarriage should take place — that is, that the administering of the drugs or the use of the instrument should be followed by the expulsion of the foetus. That is not necessary to constitute the crime. It is the *administering* the noxious substance or the use of the instrument with intent to produce miscarriage that makes up the crime — and as to the intent, it may be remarked that it is a well-settled rule of law that a sane man, a voluntary agent, act-

ing upon motives, must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts. If, therefore, one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is, that he intended so to destroy such life. So, if the direct tendency of the willful act is to do another some great bodily harm, and death in fact follows as a natural and probable consequence of the act, it is to be presumed that he intended such consequences, and he must stand legally responsible for them. So when a physician inserts into the womb of a woman pregnant with child, instruments calculated to produce irritation and serious derangement of the female economy, and abortion follows, the intention to produce that result is a necessary conclusion from the act. So where drugs regarded as abortives are administered to a pregnant woman whose general health is good and requires no medicine, and said drugs so administered are calculated to produce serious disturbance in her system, and miscarriage is thereby superinduced, it may be presumed that the drugs so applied were designed and intended to produce that result. The intention may be rightly inferred from the character of the means employed. We have said thus much as preparatory to the consideration of the instructions given by the court below to the jury, and which are assigned for error. Over the prisoner's objection, the court gave the following instructions: "If the jury believe from the evidence that the prisoner administered or caused to be taken by Maria Casey, named in the indictment, any noxious or destructive substance or liquid with intent to procure a miscarriage of said Maria Casey, then the jury should find the said defendant guilty. It must appear, however, in order to such conviction, not only that the prisoner gave such drug, or substance, or liquid, but that it was actually taken into the person of said Maria Casey. It will suffice, however, that prisoner procured and gave the drug or substance to said Maria with the intent named, and that she afterward took and swallowed such drug or substance, or some portion

of it. And it is not necessary in order to be noxious and destructive, within the meaning of the statute, that such drug should be poisonous, as the term is commonly understood, or should be capable of actually producing the miscarriage. It will be sufficient if, upon the consideration of all the testimony, it shall appear to the jury that such drug, so administered (if any), is unwholesome and might probably occasion injury or derangement of the system to a woman pregnant with child."

In determining the correctness of this instruction it must be borne in mind that the act of miscarriage is not necessary to the gist or completeness of the crime. The crime sought to be punished is the administering of a poison, or noxious or destructive substance or liquid, with the *intent* to produce miscarriage. A person indicted under a statute for administering a drug, or doing some other like act, with intent to procure an abortion, may be convicted, not alone, when the proofs show an unsuccessful attempt, but equally when they show an attempt successful; that is, show an abortion actually committed. 2 Bishop's Crim. L., § 10. What then is a poisonous, noxious and destructive substance in the contemplation of this act? A poison is commonly defined to be a substance which, when administered in *small quantity*, is capable of acting deleteriously on the body; and, in popular language, it is confined to substances which destroy life in small doses. It is obvious, says a learned writer, that the above definition is too restricted for the purposes of medical jurisprudence. It would, if admitted, exclude a large class of substances, the poisonous properties of which cannot be disputed, as for example the salts of copper, tin, zinc, lead and antimony, which, generally speaking, act only as poisons when administered in large doses. A person may die either from a large dose given at one, or from a number of small doses given at such intervals that the system cannot recover from the effects of the one, before another is administered. Some substances, such as nitre, have not been known to act as poisons, except when taken in large doses, while arsenic acts as a poison when

taken in small quantities. But, in a medico-legal view, whether a person die from the effects of half an ounce of nitre, or two grains of arsenic, the responsibility of a person who criminally administers the substance is the same. Each substance must be regarded as a poison, differing from the other only in its degree of activity, and, perhaps, in its mode of operation. The result is the same; death is caused by the substance taken, and the quantity required to destroy life or produce any other hurtful result, cannot, therefore, be made a ground for distinguishing a poisonous from a non-poisonous substance. It cannot be doubted that the definition of poison, above given, sprung out of a desire to get rid of the difficulty that would necessarily be encountered in separating a class of poisons from bodies which are generally reputed inert, and which, under certain conditions, are capable of producing the most serious mischiefs.

Medical practitioners would hardly be ready to admit that common salt, an article of constant domestic use, can be so administered as to become as deleterious and destructive to the functions of life as strychnia. An instance of common salt having caused death occurred in 1839. A young lady swallowed a certain quantity for the purpose of destroying worms. It was considered to be a harmless substance according to common notion, but in the course of a few hours some alarming symptoms made their appearance, and medical assistance was sent for. She was found to be in a state of general paralysis, and although the stomach pump and other antidotal means were speedily employed, she died in the course of a few hours. This case is deserving of notice from the evidence which it furnishes of the fallacy of the popular doctrine, that what is taken so freely in small quantities with benefit may be taken with equal impunity in large doses. It is of little moment therefore, in medicine or law, whether one grain of one substance or one ounce of another substance be taken, provided the fatal effects be traceable to the action of the particular substance in the body. This is the point to which a medical jurist must direct his attention. It is therefore necessary

to look to the noxious effects produced by particular substances on the system, and the adequacy of these substances to cause death under symptoms of poisoning, rather than to the mere quantities in which they may be taken. The question of what is a noxious or destructive substance most generally arises on charges of attempted abortion. In the case of White, tried in England in 1857, it was proved that the prisoner had administered to the prosecutrix a large dose of a substance, popularly known under the name of *hiera-picra*. This is a compound of aloes and canella bark. It was admitted to be a proper medicine in small doses, but capable of acting with injurious effects on pregnant females when given in large doses. The prisoner was convicted. In 1842, in England, two men were indicted for causing the death of another by the administration of a destructive substance. On the day laid in the indictment the deceased had drank several pints of beer which it was afterward proved had been drugged with epsom salts. He was seized with violent purging, and died within forty-eight hours. On an examination of the body the lining membrane of the alimentary canal was found inflamed, and there was no doubt that death was owing to the irritant effects of the salt. One of the prisoners was convicted. The quantity of the substance taken in this case could not be ascertained, but there is reason to suppose the dose was large.

Wharton, in his work on Medical Jurisprudence, book 2, section 236, says: "Most authors assert that there are no specific medicinal substances by which abortion can be produced. The only drug which has any claim to be considered as specific in its action upon the uterus is the ergot of rye; *savin* and oil of tansy are more frequently used than ergot. They have both, unfortunately, a popular reputation as agents for producing abortion. Their action as abortives is solely due to their poisonous properties, since, when given in proper medicinal doses, they are generally aromatic and stimulant. In fact tansy is in common use as an agreeable bitter for promoting appetite. We think, however, that the administration of either of these drugs to pregnant women,

should always be looked upon with suspicion, for we cannot imagine any condition which at this time would require or justify their use." In section 39, he says: "Powerful purgative medicines, such as aloes, julap, croton oil and elaterium given repeatedly, or in doses capable of setting up violent action of the lower bowels, may produce abortion by a secondary action upon the uterus. The same may be said of cantharides and turpentine. All of these drugs are capable of producing a great degree of active congestion and inflammation in the *pelvic viscera*, and, hence, the uterus is not always exempt from their action. It is certain that, in the greater number of cases, when abortives are criminally employed, the life of the mother is more readily sacrificed than that of her offspring."

As the greater number of substances known under the name of medicines may act like poisons, according to the dose or circumstances under which they are administered, and no precise boundary can be laid down, it would seem that the proof of the crime of poisoning should rest upon the *intention* with which the substance is administered and on the effects produced, or on satisfactory evidence that it is capable either of destroying life or causing injury to health. And in deciding this question, we think it would be doing violence to the wisdom of the legislature to hold, that, when they enacted this section, they intended to limit its operation to such substances as in popular conception were regarded as absolutely poisonous. It is clear and unmistakable that the object had in view, in the enactment of the first clause, was the protection of the person from injury; from stealthy and wicked assaults made by the designing criminal on the life of his intended victim, through the administration of drugs hurtful and ruinous to health and life.

And it is equally clear that, in the enactment of the second clause, they intended specially to protect the mother and her unborn child from operations calculated and directed to the destruction of the one and the inevitable injury of the other. And the spirit and letter of the law are violated

and set at defiance, when a miscarriage is sought to be produced, either by the application or administration of drugs, which act directly and specifically on the womb and thereby superinduce uterine contraction, or by the administration of such drugs as, operating on the general system of the mother, tend to the destruction of her energy and strength and the diminution of her vitality and health and make miscarriage possible, provided always such drugs are administered with the intent to produce miscarriage. *People v. Carmichael*, 5 Mich. 21. In the attempts made at abortion, the health of the mother is more frequently ruined than the life of the child is destroyed, and believing that the legislature in the enactment of this humane law designed to protect both from injury, we believe with the judge who charged the jury below, that "It will be sufficient if, upon the consideration of all the testimony, it shall appear to the jury that such drug so administered (if any) is unwholesome and might probably occasion injury or derangement of the system to a woman pregnant with child." If any doubt could exist as to the correctness of the foregoing views, still the evidence clearly shows that the substance administered by the prisoner, which was a compound of boneset and some other unknown drugs, was a noxious substance. It made the woman sick and injured her back. Taking the hurtful consequences resulting from the administration of it, together with the intent with which it was given, there can be no question that it fell clearly within the meaning of the words "noxious or destructive."

On the trial, the prisoner's counsel asked the court to give an instruction on the subject of reasonable doubt. This instruction was little else than a transcript of C. J. Shaw's definition of reasonable doubt in the celebrated Webster case. The court declined to give this instruction as drawn by prisoner's counsel, but, in lieu thereof, charged the jury that a reasonable doubt is that state of the mind on which, upon consideration of all the facts proved, the jury cannot say I am satisfied of the prisoner's guilt. A reasonable doubt is not a mere conjectural doubt, but one that arises

out of the evidence, by fair inference, upon consideration of all the testimony.

Had the court refused to give the instruction as prayed for by the defendant, and declined to give the jury one on the same subject, it would have been error. The court itself may give instructions. The refusal to give a proper instruction cannot be assigned for error, when the court gives others embracing the correct principle of law involved in the instruction asked. *Bland v. People*, 3 Scam. 365 ; 12 Ill. 261 ; 6 Pet. 628.

It is further claimed that the verdict of the jury cannot be sustained, for the reason that no *corpus delicti* is proved. What is the *corpus delicti* in this case? The pregnancy of Maria Casey, and the administration of the drugs by the defendant. It is said, by the counsel for the prisoner, and very justly, too, that confessions made by a prisoner, unsupported by corroborating circumstances, are not, of themselves, sufficient to prove the *corpus delicti*. There should always be something more than a mere naked confession of one accused, to justify a verdict of guilty. The sad examples furnished in judicial annals, should make courts and juries extremely cautious about basing convictions on foundations of this kind alone. We have carefully considered the evidence in this case, and set it out substantially.

The testimony of Harder is as follows: States he had repeated conversations with defendant, in reference to administering drugs to Maria Casey, with the purpose of procuring abortion. The conversation was at my hotel, in the office thereof, in Idaho. The first conversation was had in July. or August, 1870. The defendant applied to me, in July, to know what medicines might be used to procure an abortion. I told him I heard that tansy would do it. He stated to me his object in wanting to know ; did not mention Maria Casey's name.

I told him to marry the girl ; said he would see her in hell first ; he said the girl was pregnant ; he said he had had connection with her not only at that time, but in the spring of 1870.

The next conversation I had with defendant was shortly after ; he said he was going to Central City to obtain medicine to procure an abortion ; he did not mention the name of Maria Casey ; told me that in the spring he had had intercourse with Maria Casey ; in all the other conversations he did not mention her by name, but said "she ;" part of the time of these conversations Maria Casey was living with defendant's mother ; the other part at Lewis' ; she, Maria, went to Mrs. Dougherty's house in July ; we never talked about any other woman being pregnant, or about abortion in connection with any other woman ; he told me he had procured medicine and had given it to Maria, and that she had taken it ; that it made her sick at the stomach ; that it did not have the desired result ; this was in August ; at this conversation Maria was living at Mr. Lewis' ; defendant said he had been over and given her the medicine ; in another conversation defendant told me that Maria was going home with Ed. Bowden ; that she fell in the water, and he hoped to God it had knocked the young one out of her. My reason for believing that, in his conversations, he was alluding to Maria Casey are as follows : After Maria left my house he told me he was having connection with her, and in his conversations he told me he used to go in at her window, and that he declined to take her to the dances because he was having carnal intercourse with her.

Dr. Holland. Defendant made application to me in reference to procuring abortion ; it was the last of August or first of September ; he said he had a girl in a fix and he wished to know what to do in order to get rid of it ; I told him I could not give him any thing ; when I refused he said it was not sure his girl was in the family way, but that she had not had her monthly sickness for two months, and he wanted to know then what it would be best to take to set her in good health ; I told him his mother or any other old lady could do as well as I could ; know the nature of the drug called boneset ; in large doses it is a violent purgative and an emetic ; it is peculiar in this respect ; it is used by females to make them regular in their monthly periods ; it

is peculiar because it both vomits and purges at the same time when taken in large doses, like a person with the cholera morbus; I do not think it has any direct effect on the womb to produce abortion; the profession has no class of medicines that produce abortions, but we receive it as a general law that any thing that disturbs the female economy seriously, while she is pregnant, will produce the death of the child and its expulsion from the womb; this medicine seriously disturbs the female economy; I should be afraid, as a medical man, to administer boneset very largely to a woman with child; any thing that disturbs the economy would be likely to produce abortion, but boneset has no direct tendency specially to that purpose; the administration of boneset, with any other drug, would be likely to increase the tendency of the other drug or substance to produce abortion; boneset is not considered a poison in popular sense, and yet I think an ounce of the leaves would produce abortion; I regard it as I do all other drugs, hurtful and noxious to a certain extent, beneficial in disease, but hurtful in health.

Mrs. Swartz. In August or September, the defendant asked me if I knew of any thing by which an abortion could be procured, and told me that Maria Casey was pregnant, and said he was going to get medicine for her to take; he said he was going to Dr. Holland to ask him; he told me that the medicine he gave contained boneset, and the other ingredients he could not remember; he also told me that Maria said the medicines she took hurt her back. He further said: That Maria could take the medicine, or go to hell; this was after he had given her the medicine, which she said hurt her back. I told him Maria told me her back was lame, and he said, that she said it was from the effects of the medicine; he then said, she could take it, or go to hell. This was in August or September.

Dr. Edmundson. I was subpoenaed before coroner's inquest to examine body of Maria Casey; this was in the month of October; made post mortem examination with other physicians. The woman had been pregnant previous

to her death ; know this from the size and shape of the womb, and the marks of after-birth still in the womb ; I should judge she had been pregnant fully four months ; I should judge more, rather than less than that time ; the womb had been deprived of its foetus before her death ; she must have conceived about four months before her death ; can't say positively how long before her death her womb had been deprived of the fetus, but it was not long, because the womb had not contracted any on itself ; should judge it was not more than two or three days before her death that the womb was deprived of its contents. The post mortem was twenty-four hours after her death.

Dr. Justice. Know the drug called boneset. Don't think it has any quality to produce abortion ; it is not given for that purpose ; it is a domestic remedy, rarely, if ever, prescribed by the profession. I suppose it might be given in poisonous doses ; it might be given in sufficient doses to produce harm ; never heard of its being given to produce abortion ; there are medicines given for that purpose, which have a violent effect on the whole system, or medicines which operate directly on the womb, and produce a contraction of the womb ; have known an active cathartic to produce that result ; boneset is not classed as an active cathartic, in the quantities in which it is usually given ; I can't say what its effect would be in extreme quantities.

Dr. Williams. Boneset is given ordinarily as an emetic ; sometimes it acts on the bowels. No record of its having the effect to produce a miscarriage ; it is a remedy usually applied in domestic practice ; given in large doses it acts freely on the bowels ; don't know of its having properties that would tend to produce miscarriage.

From an examination of the foregoing evidence it will be seen that, in the spring and during the summer of 1870, the defendant Dougherty was having illicit intercourse with Maria Casey. That, in the month of July, he applied to Harder with a view to obtain information that would enable him to produce an abortion. These conversations were

frequent, and made at times when no criminal charge was pending. The declarations of the defendant were neither superinduced by hope of mercy or fear of punishment. True, he was contemplating the commission of a crime, and was endeavoring to obtain information whereby he could perpetrate it. In his conversation with Mrs. Swartz, he declares his intention to consult Dr. Holland, which he afterward did. It further appears that he went to Central City to procure medicine, and afterward stated to Mrs. Swartz that he had given the same to Maria, and that it contained boneset; that it made her sick, but did not produce the desired result. When Mrs. Swartz communicated to defendant the conversation she had with Maria, wherein she stated that the medicines given by Dougherty to Maria had hurt her back, the prisoner remarks, "Yes; Maria told me her lame back resulted from the taking of the medicines, and that she could take the medicines or go to hell." He told Harder that he had procured the medicines and given the same to Maria, and that it made her sick. Then we have the evidence of Dr. Edmundson, who, with other physicians, made a post mortem examination of the body of Maria Casey, and who swears that Maria must have conceived some four months before her death. This took place in October. We then have the fact of pregnancy established by Dr. Edmundson. We have the fact of the administration of drugs by the confession made by the defendant, and by the evidence of Mrs. Swartz. We are of the opinion that the *corpus delicti* is sufficiently shown by the evidence, and we, therefore, will not disturb the verdict on that account. After the most careful and exhaustive examination of the whole case, we are all of the opinion that the judgment below should be affirmed, and it is accordingly so ordered.

Affirmed.

POWRIE v. KANSAS PACIFIC RAILWAY CO.

AGENT — *authority of engineer of railway company.* An engineer of a railway company, as such, has no authority to pledge the company to pay indebtedness due from a contractor, who is engaged in building the road, to one of his employees.

PRINCIPAL — *not bound where agent exceeds his authority.* P., who was employed by R., a contractor on a railroad, proposed to discontinue work on account of R.'s inability to pay him. There upon G., an engineer of the railway company, stated that if the men, of whom P. was one, would go on and complete the work, the company would see them paid. There being nothing to show that the engineer was authorized to make such promise, an action against the company will not lie thereon.

Error to Probate Court, Arapahoe County.

It appeared in evidence that the plaintiff, with others, was employed by one Rice, to work on the Kansas Pacific Railway. Some of the men employed by Rice, distrusting his ability to pay, had an interview with Col. Greenwood, an engineer of the company, who told them to go on and complete the work, and the company would pay; that the Kansas Pacific Railway Company would not see any laboring man come short of his pay.

The action was against the railway company, upon this promise. The cause was tried to the court without a jury, and judgment for the defendant.

Messrs. BROWNE & PUTNAM, for plaintiff in error.

Mr. ALFRED SAYRE, for defendants in error.

WELLS, J. It is pretty clearly established by the evidence heard in the court below, that Col. Greenwood, the chief engineer of the defendant, did promise, as the plaintiff claimed, that the company should respond for the wages of Rice's employees upon section seventeen of the grade; that this promise was made to one whom the employees had deputed to represent them; that it was intended to be communicated to the men, and was so communicated; and that

the plaintiff, among others, continued their employment and completed the work.

The plaintiff may therefore have his action, provided these three things concur: 1st. It must appear that the promise was upon a consideration sufficient to support it. 2d. The promise not having been reduced to writing, it must appear to have been an original promise, and not a promise to answer upon the default of another merely, for, otherwise, it is void within the statute of frauds. 3d. It must appear that the engineer who made the promise was the agent of the defendant in that behalf.

As to the first of these requisites, the evidence is clearly sufficient. Rice's employees, doubting their employer's solvency, had abandoned the work, and their resuming and completing it was a good and adequate consideration, for it involved both advantage to the company and loss to the men.

As to the second, the testimony is not free of uncertainty; for though, if we consider only the testimony of the witnesses who speak of it, the promise appears to have been, that the company should pay in any event, and not that they should pay upon Rice's default or the like, yet the subsequent conduct of all parties tends, in some degree, to negative the idea that either the company or Rice, or Rice's employees, understood the company to be directly and in the first instance liable to the men; for, down to the completion of the work, so far as we can ascertain by the testimony, Rice remained in immediate charge of the working party; they looked to him for directions, and it was upon his order alone that they received what they did receive from the company. As to the third requisite, there is nothing in the testimony which affords any light whatever as to the nature or extent of the engineer's authority, except the circumstance that Borst, the paymaster, whom it may be presumed was informed of the nature and scope of the duties and powers of his associates in office, paid Rice's employees upon the direction and authority of the engineer's orders merely.

Herefrom might, if the testimony were more complete than it is, arise an inference of more or less weight, that the engineer had in fact the authority which he assumed, else the paymaster must have disregarded his orders. But here it is to be observed that, so far as appears, Borst never was informed of the promises alleged to have been made by Greenwood, but paid the money accruing upon Rice's contract to the employees directly, instead of to Rice, in pursuance of what he understood to have been an arrangement between Rice and the company, to which the men were not party, for the convenience of Rice, and not in discharge of any liability of the company to the employees; and it would seem that the acts of Borst ought not to be received to found an inference of authority in Greenwood to do that which Borst did not know Greenwood had done.

It appears to us, therefore, that there was no evidence whatever of the agency of Greenwood to make the promise relied upon; his official designation does not, we conceive, imply an authority in such matters, and the plaintiff's proofs were therefore defective in a material point.

The judgment of the probate court is affirmed.

Affirmed.

UNION GOLD MINING CO. v. ROCKY MOUNTAIN NATIONAL BANK.

CORPORATION — dissolution in collateral proceeding. A corporation cannot be dissolved in a collateral proceeding; and in a suit by a national bank to recover money loaned, if the corporation has not been dissolved in a direct proceeding to that end, the defendant cannot question its existence.

CORPORATION — dissolution of a national bank. According to section 53 of the act relating to national banks (18 Stat. at Large, 99), a forfeiture of the rights and privileges of a banking association must be determined and adjudged in a suit instituted by the comptroller of the currency in his own name, and an association organized under that act must stand until dissolved in that way.

PLEADING — must answer all that it professes to meet. A plea which goes to the whole declaration and contains an answer to but one count, is bad on demurrer.

CONTRACT PROHIBITED BY LAW, *when void*. A contract to do a thing prohibited by statute is not necessarily void, if the statute visit the unlawful act with a penalty. If the thing prohibited is *malum in se*, the contract cannot be enforced, but as to things not immoral or against public policy, it may be sufficient to enforce the statutory penalty only. If it was not the intention of congress to make void a contract made contrary to the provisions of the act it will be enforced, and for the violation of law the penalty which the statute gives may be applied. Whatever consequences are to follow the violation of the act are expressed in the act itself, and one penalty being given, the court is not at liberty to add another.

CONSTRUCTION of section 29, of National Bank Act. Section 29, of the act relating to national banks, contains a direction respecting the management of associations organized under the act, and it is not a limitation upon the powers of such associations.

CONTRACT — *prohibited by law — recovery on*. An action may be maintained by a national bank to recover money loaned exceeding in amount one-tenth part of its capital stock, notwithstanding the prohibition of section 29 of the act under which it was organized.

AGENT OF MINING COMPANY — *authority*. A superintendent of a mine, with authority to take ore therefrom, and crush it for the purpose of obtaining gold, cannot upon such authority borrow money in the name of his principal.

CORPORATION — *presumption as to officer's acts*. The president of a corporation cannot put off his official character at will and deny to those who have business with the corporation, access through him. While acting upon the business of the corporation, all his acts, within the scope of his authority as president, must be regarded as official.

EVIDENCE of agent's authority to bind his principal. In an action against a mining company for money borrowed by its agent without authority, where evidence is offered of admissions made by the president of the company, such president may be examined as to his authority to bind the company in relation to the matter in suit.

CORPORATION — *power of president*. The president of a corporation has power to convene the board of directors for the purpose of laying before them any matter affecting the business of the corporation.

AGENT — *authority of president of a corporation*. An undertaking of the president of a corporation to bring before the board of directors, at a time specified, a demand against the corporation for money borrowed by an agent of the corporation, is within the scope of his authority as president, and the corporation is bound to consider the demand at the time specified.

AGENT — *ratification of unauthorized act of*. Where an agency exists, and the agent exceeds his authority, the silence of the principal may give rise to a presumption of an intentional ratification of the unauthorized act.

The circumstances must have been fully understood by the principal before any inference can be drawn from his silence, and they must have been such as not only afforded an opportunity to act or speak, but such, also, as

would properly and naturally call for some action or reply from men similarly situated.

In an action against a corporation to recover money borrowed by its agent without authority, it appeared that the company was notified of the indebtedness on the 16th December, 1868; fifteen days later, the president undertook to present the claim to the board of directors at a meeting to be held in February following, and the corporation disavowed the act of its agent in the spring following. *Held*, that upon these facts, the jury would have been warranted in finding a ratification of the agent's acts.

PRACTICE — *ratification of unauthorized act of agent — how determined.*

Where the position of the parties remains the same, whether ratification of the unauthorized act of an agent shall be inferred from the delay of the principal to disavow such act, is a question for the jury.

EVIDENCE of *ratification of agent's acts.* In an action against a mining company to recover money borrowed by its agent without authority, the circumstance that the company retained the ore taken from the mine by the use of the money is not material to the question of ratification.

Nor is it competent to show that the money was expended in the mine or that the expenditure was advantageous to the company, unless it is also shown that the company had knowledge of the loan and of the expenditure. These circumstances are in no way connected with the authority of the agent, or the ratification of his acts by the company.

EVIDENCE — *as to witness' bias or prejudice.* A witness cannot be asked whether he is indebted to one of the parties to the suit for the purpose of showing the disposition of his mind toward such party. The question does not tend to elucidate the point.

EVIDENCE — *as to corrupt agreement between witness and party.* Where it is alleged that a witness refused to testify until the party who called him had made an arrangement concerning certain indebtedness, the character and terms of the arrangement must be made known in order that the court may determine whether it would go to his credibility.

Appeal from District Court, Jefferson County.

THE declaration contained a count for money loaned; a count for goods sold and delivered; a count for money had and received by defendant; a count for money paid, laid out and expended; a count for interest, and a count on an account stated.

The defendant pleaded non assumpsit, and also specially that the plaintiff is a body corporate, with a capital of \$50,000, and that, under and by virtue of a law of the United States, entitled "An act to provide national currency," etc., it had no power, right or authority to loan

and advance to defendant the sum of money in the declaration mentioned.

In another special plea the defendant alleged that the plaintiff was a body corporate, organized under the act entitled "An act to provide a national currency," etc., reciting the provisions of the act, and averring "that certain persons did, at the time specified, form an association, with a capital stock of \$50,000," which was the plaintiff, and that the plaintiff had no power, authority or right to loan and advance to defendant the sum of money in the declaration mentioned.

In another plea the defendant averred that the plaintiff was a body corporate, etc., and had no right, power or authority to loan or advance to defendant a greater sum than \$5,000. Another plea was substantially the same, except that it averred that only \$30,000 of the plaintiff's capital stock had been paid in. A demurrer to the special pleas was sustained.

The testimony at the trial was voluminous. Plaintiff introduced evidence tending to prove that George K. Sabin was appointed superintendent of the defendant's mine, in the year 1865; that he remained such superintendent until December, 1868; that, during the years 1867 and 1868, Sabin kept a deposit account with plaintiff in defendant's name, and that he drew money from time to time in the name of defendant, and deposited other money to the credit of the account; that the balance against defendant in December, 1868, was \$21,217.06; that Sabin worked defendant's mine in the years 1867 and 1868, taking therefrom a large quantity of valuable gold-bearing ore, and crushing a portion thereof for the purpose of obtaining gold; that the gold thus obtained was deposited in plaintiff's bank to the credit of defendant; that the money obtained by Sabin from plaintiff's bank was expended in operating the mine and in crushing the ore. Several letters were introduced by plaintiff, which were written by Becker, the president of defendant, some of which were addressed to Sabin as superintendent. One of the letters was signed by Becker as president.

There was evidence of several interviews between Becker and the officers of the bank, in relation to the indebtedness, in December, 1868. A communication from Becker, to the president of the bank, which was given in evidence, is as follows :

ROCKY MOUNTAIN NATIONAL BANK,
CENTRAL CITY, COLORADO, Jan. 1, 1869. }

To the President of the Rocky Mountain National Bank :

SIR — In regard to the overdraft of our company on your bank, permit me to say that, although I am the president of the Union Gold Mining Co., and the owner of a majority of all its stock, Mr. Sabin will do me the justice to state that I had no knowledge of any overdraft, until on or about the middle of December last. I hope you will not feel uneasy about the payment. We have an abundance of ore already broken in the mine, to pay all indebtedness of the company. In fact, this is the only indebtedness I have any knowledge of the company owing, and if it is not paid off out of the mine, I propose to call a meeting of our directors, and submit your claim, and make an assessment at our February meeting (in New York city), to pay off your claim, and any other that the company may owe. I will also state to you clearly and plainly, that there shall be no sales, transfers, mortgages, assignments, deeds of trust, or any other incumbrance put on the property of company in Colorado, or elsewhere, by myself, or by the company, until all the liabilities of the said company are fully paid.

Very respectfully,

Your obedient servant,

THEODORE H. BECKER.

On cross-examination of the witness, Sabin, the defendant offered to show by him that he was indebted to plaintiff in a large sum of money, and that, at a previous term of the district court, he absented himself from the court, and that, when he appeared as a witness, he refused to testify till the indebtedness was arranged in some way,

and such arrangement put into writing and signed by the plaintiff, and that, since the last term of court, the said matter of indebtedness had been arranged according to the terms required by the witness.

Upon the plaintiff's objection, the testimony was excluded.

The defendant introduced testimony tending to prove that Sabin resigned his agency in April, 1866, and that in the fall of that year he made an arrangement with the defendant, by which he was to work the mine upon his own account, and lay up the first-class ore for the company for the use of the mine.

T. H. Becker testified: That, on the 16th of December, 1868, he wrote the company of the indebtedness to the bank, and that was the first knowledge the company had of the indebtedness.

The defendant offered to prove by Mr. Becker, the nature of his authority from the defendant in respect to the indebtedness due the plaintiff. Upon plaintiff's objection this evidence was rejected.

The charge of the court to the jury was as follows:

If the jury believe that George K. Sabin entered into an arrangement or agreement with the defendant, whereby he was to enter into possession and work the mines of the defendant, at his own expense, and not at the expense of the defendant, and pay to the defendant a certain portion of the ore taken from the mines for the use of the mines, and pay himself and all the expenses of working the mines from the balance of the ore taken from the mines, and that, under the arrangement so made with the defendant, the said Sabin entered into and worked the mines of the defendant; then, the relation existing between the said Sabin and the defendant was not that of principal and agent, but that of landlord and tenant, and is governed by the same law as in case of working land for a share of the crops. And the said Sabin became the lessee of the defendant, and the said defendant is in no way liable for any sum of money borrowed by the said Sabin, and cannot be made liable without a special

promise in writing, made and signed by the defendant. That a corporation is bound by the contracts and acts of its agent, so far as the agent acts within the scope of the authority conferred upon him by the corporation, but no further.

If the jury believe, from the evidence, that George K. Sabin made an agreement or arrangement with the defendant, whereby he was to enter into the mines of defendant and work the same on his own account, and was to mine and deliver to the defendant, on the top of the ground, all the first-class or smelting ore, as rental or tribute for the use of the mines of the defendant, and was to receive no salary from the defendant for his services, but was to pay himself and all expenses of working the mine from the proceeds of the balance of the ore mined from said mines, and that the defendant was not to furnish any money for the working of said mines, and that Sabin was to contract no debts chargeable to the defendant, but was to quit work on said mines whenever he could not pay all expenses and pay himself from the lower grades of ore, then the jury must find for the defendant in this case.

If the jury believe, from the evidence, that Becker was president and general manager of the defendant in 1868 and 1869, and that the defendant had, by George K. Sabin, claiming to be the superintendent or agent of defendant, obtained money of the plaintiff, and that Becker, while acting as president of defendant, with full knowledge of the facts, admitted that such money so obtained was due from the defendant to plaintiff, such admission may be taken by the jury in considering whether the defendant is or is not indebted to the plaintiff.

If the jury believe, from the evidence, that the defendant employed George K. Sabin as its superintendent, in April, A. D. 1865, and that instructions were, at that time, sent in a letter to said Sabin by the president of the defendant, and that Sabin, under said appointment, proceeded to work the mine and mill of the defendant in Central City, where the plaintiff is located, and to make contracts for the defendant from the fall of 1865 until the spring or summer of 1866,

and then stopped working until the fall of 1866, and then resumed said work, and continued said work until December, 1868; and that, during the time from the fall of 1866 until December, 1868, George K. Sabin contracted the debt sued for in this case on behalf of the defendant, and used the money received from the plaintiff in working defendant's mine, and for the defendant, and the defendant received the benefits of the work, knowing that the money had been so applied, then the plaintiff is entitled to recover, unless the defendant has shown that the plaintiff had notice of the change of his agency as sworn to by witnesses Becker, Potts, Bennell, Jr., and Brevoort, in this case.

The court is asked to instruct the jury that the plaintiff is not compelled to prove the appointment of Sabin as superintendent or agent of defendant, by resolution of the board of directors, but the jury may take into consideration all the testimony on that subject, including the acts of the witness Sabin in and about the property of the defendant, and the manner in which the business was carried on, and the opportunities the officers of the defendant had to know how the business was conducted.

The court is asked to instruct the jury that, if Sabin, claiming to be the agent of the defendant, purchased goods on credit in the name of the defendant, and afterward defendant, with full knowledge of all the facts, paid said debt, such payment is a ratification of such agency of said Sabin in making such debts.

If the jury believe, from the evidence, that Theodore H. Becker was president of the defendant in years 1867, 1868 and 1869, and that while he was president he had the active charge or management of defendant's affairs, and while acting in that capacity he recognized George K. Sabin as superintendent or agent of the defendant, then the jury may take such recognition into consideration in determining whether Sabin was the agent of defendant, or defendant had allowed him to assume that he was agent. If the jury find for the plaintiff they will allow interest on the balance due at ten per cent per annum, from the first of January, 1869,

up to this time, except on the item included in plaintiff's account as interest.

If the jury believe, from the evidence, that, during the years 1867 and 1868, George K. Sabin was in the actual charge of the defendant's property, and while in charge of the defendant's property he represented to the plaintiff that he was the agent and superintendent of the defendant, and on the strength of that representation he borrowed money of the plaintiff, the mere fact that he stated to Hense, Smith & Davison that he was working said property on his own account, cannot affect the defendant's liability to the plaintiff, unless the plaintiff knew of these statements at the time the money was loaned.

The court instructs the jury that when one has the actual charge and management of the business of a corporation, with the knowledge of the members and directors, this is evidence of his authority, without any vote or other corporate act constituting him agent of the corporation, and the company will be bound by his contracts, made on their behalf, within the apparent scope of the business intrusted to him. Power to act generally in a particular business or a particular course of trade, in a particular business, however limited, would constitute a general agency.

In general, when an agent is authorized to do an act, and transcends his authority, it is the duty of the principal to repudiate it as soon as he is fully informed of what has been done in his name, by the agent, else he is bound by the act as having ratified it by implication.

The court instructs the jury that, if they believe from the evidence that Sabin held himself out as agent of the defendant, and, while so holding himself out, drew money out of the plaintiff's bank and used the same in working and mining the property of the defendant, and the defendant retained and kept the profits arising and growing out of such working and mining, with the knowledge that the money was so borrowed and applied, then the defendant is liable to the plaintiff for such money, unless it is proved

that the plaintiff knew that Sabin had no authority to draw money out of plaintiff's bank.

If the jury find, from the evidence, that George K. Sabin was the agent of the defendant, and the extent of his authority was defined in a private letter of instructions, then no duty existed on the part of the bank to make inquiries as to any private letter of instructions from the principal to the agent, for such instructions may well be presumed to be of a secret and confidential nature, and not intended to be divulged to other persons.

If the jury believe, from the evidence, that Sabin was not the agent of the defendant, but that the defendant allowed him to work its mine and hold himself out as agent for some considerable time, and Sabin, while so holding himself out as agent of defendant, obtained money of the plaintiff in the name of the defendant, and used the money in mining the property of the defendant, and that the ore taken out by Sabin, by the use of such money, was retained and kept by the defendant with the knowledge of the fact that the money was so used, then the defendant is liable.

The court instructs the jury that if they believe, from the evidence, that George K. Sabin was the agent of the defendant, and, while acting as agent, borrowed the sum of money in controversy of the plaintiff, and expended the same in the business of the defendant and in paying its debts; that the money so advanced by the plaintiff, though so applied, creates no debt against the defendant, but that the jury must further find, from the evidence, before they can find for the plaintiff, in addition to the mere fact of the loan from the plaintiff to Sabin, and the application of the money for the benefit of the defendant, that the defendant had authorized the plaintiff to loan the money to Sabin, or Sabin to borrow the money in controversy from the plaintiff, or had afterward ratified and adopted the act. And the court instructs you that, if the money so borrowed from the plaintiff was applied by Sabin to the taking ore out of the defendant's mine, and that said ore, when thus taken

out, was kept by the defendant, the said defendant having knowledge that the money had been so applied, that that would amount to an adoption of Sabin's acts, and knowledge to the president would be knowledge to the corporation.

The jury returned a verdict for the plaintiff for \$27,034.96.

A motion for new trial was made and overruled, and judgment was rendered on verdict.

Mr. E. WAKELEY, Mr. G. B. REED and Mr. HUGH BUTLER, for appellant.

Messrs. JOHNSON & TELLER, Messrs. CHARLES & ELBERT and Mr. W. R. GORSLINE, for appellee.

HALLETT, C. J. Appellant is a mining corporation organized in New York, which owns and operates mines in this territory. T. H. Becker, at first a trustee, and more recently president of the corporation, was in the territory during a portion of the time mentioned in this record, but the evidence does not show that any other officer or shareholder was ever in the territory. In 1865, George K. Sabin was appointed superintendent of the company's mine in Gilpin county, and conducted its affairs until October of that year, when work was discontinued. At the trial, appellant contended, and introduced testimony to prove, that Sabin resigned his agency in the spring of 1866, and that, in the fall of that year, he entered into an agreement with the company by which he was to work the mine on his own account and render to the company the first-class ore. Appellee's testimony on this point tended to prove that Sabin's agency continued until December, 1868, and so the jury found the fact to be. In the years 1867-68, Sabin kept a deposit account in the bank in appellant's name, which, by frequent overdrafts, he increased to the large amount for which, with interest, judgment was rendered against appellant.

In four special pleas appellant alleged that the bank was not able to contract an indebtedness exceeding in amount ten per cent of its capital stock, setting forth the amount of

the stock and other facts to show the alleged incapacity, and, in another plea, the organization and capital stock of the bank is set out, apparently with a view to claim a forfeiture of the charter of the bank, pursuant to section fifty-three of the act under which it was organized. 13 Stat. 99. As to the forfeiture of the charter, it is well settled that a corporation cannot be dissolved in a collateral proceeding, and I do not think that appellant can question the existence of the bank in this way. Angell & Ames on Corporations, § 777; *Robinson v. London Hospital*, 11 Hare (44 Eng. Ch.) 24. Section fifty-three provides that the violation of the provisions of the act, which shall work a forfeiture of the rights and franchises of the association, shall be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought by the comptroller of the currency, in his own name, before the association can be declared dissolved, and the bank must stand until dissolved in this way.

The special pleas, in which incapacity of the bank to contract the indebtedness is asserted, go to the whole declaration, and at best answer only the count for money loaned, and therefore the demurrer was properly sustained. In another trial the question may possibly arise on the evidence, and for this reason it may be necessary to make some suggestions as to the true meaning and effect of section 29 of the National Bank Law. That section was obviously intended to protect the shareholders and creditors of a bank organized under the act against an unwise use of its funds, and to this end it was necessary that the duties of the officers of the bank should be defined. I do not perceive that it was equally necessary that the power of the corporation, in relation to loans, should be circumscribed, for the mischief would arise out of the conduct of the officers, rather than the power of the bank. In section 8 the powers of the bank are enumerated, that of loaning money among others. If section 29 is to be regarded as limiting this power, the bank would be unable to recover that which rightfully belonged to it, and this section would tend to accomplish

the ruin which it was designed to prevent. In the well-considered case of *Harris v. Runnels*, 12 How. 79, it was said that a contract to do a thing prohibited by statute, is not necessarily void if the statute visit the unlawful act with a penalty. If the thing prohibited is *malum in se*, the contract cannot be enforced, but as to things not immoral or against public policy it may be sufficient to enforce the statutory penalty only. Accordingly it was recently decided in Maryland that a provision in the charter of a bank prohibiting any director or other officer under penalty of fine or imprisonment from borrowing money from the bank, does not exempt a director from liability for money loaned to him in violation of the prohibition. *Lester v. Howard Bank*, 33 Md. 558.

If it was not the intention of congress to make the contract void, it will be enforced, and for the violation of law the penalty which the statute gives may be applied. That penalty attends every violation of the act, and is found in section 53. Another and additional penalty is attached to some of the acts prohibited by the statute, as for instance in section 30, it is provided that taking illegal interest shall work a forfeiture of the entire interest, and failure to comply with the provisions of sections 31 and 32 may result in the appointment of a receiver to wind up the business of the bank. This may show that, whatever consequences were to follow the violation of the act are expressed in the act itself, and where one penalty is given I do not think we are at liberty to attach another. We are not to give to section 29 a construction which will defeat the purpose for which it was enacted, and such will be the effect if we deny the right of the bank to recover money which it has paid out. I am persuaded that this section is to be regarded as a direction respecting the management of the bank, and not as a limitation of its powers, and that the rule *pari delicto* is not applicable to this case.

It will not be necessary to consider whether Sabin was agent of the company at the time of the transactions with the bank. The evidence was conflicting, and for the pur-

poses of this discussion I accept the finding of the jury on that point. As to the nature and extent of his agency, it has not been contended that his dealings with the bank were within the scope of his authority. It would be difficult to maintain that a superintendent of a mine, with authority to take ore therefrom and crush it, for the purpose of obtaining gold, can, upon such authority, borrow money in the name of his principal, even if the money be used in carrying on the mine. Undoubtedly, the transactions with the bank were beyond Sabin's authority as agent, and we are now to consider whether there is evidence to show a ratification of his acts by the company.

It does not appear that the company was informed of the indebtedness to the bank prior to December 16, 1868, at which time Becker, the president, communicated such information by mail. There is some testimony to the effect that Becker had earlier information of the indebtedness, but he denies it, and as we cannot know how a jury may determine the fact, we must assume that his statement is correct. At this time the officers of the bank were pressing Becker for payment of the indebtedness, and, although he denied Sabin's authority to contract the indebtedness, he did not repudiate the demand, but expressed a willingness to pay it. On the 1st of January following, he executed to the president of the bank a paper, in which he speaks of the indebtedness as "the over-draft of our company on your bank," and says, "I hope you will not feel uneasy about the payment; we have an abundance of ore already broken in the mine to pay all indebtedness of the company. In fact, this is the only indebtedness I have any knowledge of the company's owing, and if it is not paid off out of the mine, I propose to call a meeting of our directors and submit your claim, and make an assessment at our February meeting (in New York city) to pay off your claim and any others that the company may owe."

Becker states that he wrote this letter under an impression that the company had made some different arrangement with Sabin, and that he refused to sign it as president,

not wishing to bind the company—but this will not affect the character of the letter. The president of a corporation is presumed to know something of its affairs, and the evidence in this case shows that Becker was better acquainted with the business of the company than any other of its officers. He does not state the nature of the arrangement which he supposed the company had made with Sabin, or from what source he derived his impression that such arrangement existed. He had been in communication with his company in regard to Sabin's dealings with the bank, and was at that time its only representative in the territory. If he was acting upon false information he ought to have stated by whom and how he was misled. Nor can the president of a corporation put off his official character at will and deny to those who have business with the corporation, access through him. If an officer of a corporation may, at pleasure, assume the status personal and deny his relations with his principal, it will be impossible to deal with a corporation except at the will of the officers. He was acting upon the business of the company, and all his acts within the scope of his authority as president must be regarded as official. In the evidence it is shown that the president exercised a very general authority in the management of the affairs of the company. When Sabin was appointed superintendent in April, 1865, Creswell, then president, gave him instructions as to the manner of working the mine, and in the fall of that year the work was discontinued by order of the president. Sabin's reports of affairs at the mine were always made to the president, and in December, 1868, Becker, then president, stopped the work and took charge of the mine, and proceeded to adjust the unsettled accounts of the company. Becker states that he used his own funds in paying the debts incurred by Sabin for labor and supplies, but it may be fairly inferred that he was acting for the company in taking possession of the mine. If we regard the payment of the bills as the exuberance of a generous heart, there are other acts of his presidency and of his predecessors in office, done appar-

ently with the knowledge and approval of the directors of the company, which go far to establish the general authority of the president to manage and control the affairs of the company. But this evidence of the authority of the president was not directly to the point, that he was authorized to settle and adjust the debts of the company, and appellant was not allowed to interrogate Becker as to his authority in this matter.

Under our statute Becker was competent to testify, and his authority to bind the company was in issue before the jury, and therefore the evidence should have been received. If, however, Becker had no authority to pledge the company to the payment of any indebtedness, he certainly had authority to convene the board of directors and lay before them the claim of the bank, and this he agreed to do. In the usual course of business a corporation is addressed through its president, and it is an important duty of the executive officer to bring to the knowledge of the board of directors any matter affecting the interest of the corporation.

In *Fulton Bank v. New York and Sharon Canal Co.*, 4 Paige, 137, the court said: "It is well settled that notice to an agent of a party whose duty it is, as such agent, to act upon the notice or to communicate the information to his principal in the proper discharge of his trust as such agent is legal notice to the principal; and this rule applies to the agents of corporations as well as others." So, also, in *National Bank v. Norton*, 1 Hill, 578, it was said that notice given to the directors of a bank, for the purpose of being communicated to the board of directors, would be sufficient to charge the corporation with knowledge of the fact stated in the notice. This is upon the rule that the principal shall be responsible for the acts and omissions of his agent within the line of the agent's duty. Upon this rule it appears to me that Becker's undertaking to bring the claim of the bank before the board of directors of his company at the February meeting, bound the company to consider the claim at that time. The undertaking was an

exercise of the executive function, and we are at liberty to presume that it was performed. Upon the evidence it seems that notice of the indebtedness was given to the company December 16, 1868. Fifteen days later Becker undertook to present the claim to the board of directors at the February meeting in New York. If the matter was acted on by the company, it does not appear that any notice of the result was given to the bank. Becker states that he told appellee's attorney, in the spring of 1869, that the company refused to pay, but the exact time is not fixed. Upon these facts the jury would have been warranted in finding that the company had ratified Sabin's dealings with the bank, for, where an agency exists, and the agent exceeds his authority, the silence of the principal may give rise to a presumption of an intentional ratification of the unauthorized act. Story's Agency, 256, *et seq.* The circumstances must have been fully understood by the party before any inference can be drawn from his silence, and they must have been such as not only afforded an opportunity to act or speak, but such also as would properly and naturally call for some action or reply from men similarly situated. 1 Greenl. Ev., § 197.

The matter of Sabin's dealings with the bank appears to have been fully explained to Becker, and by his statement the company was equally well informed. The circumstances called for an answer from the company. Money had been obtained by its agent and upon its credit, and the bank was demanding payment. The president of the company acknowledged the justice of the demand, and if the company had any objection to it, it was reasonable to believe that such objection would be made known. Where the delay on the part of the principal to disavow the agency will result in loss, and where the transaction may turn out a profit or loss according to circumstances, the principal must disavow the act of the agent within a reasonable time after notice. *Culver v. Ashley*, 1 Am. L. C. 719, note; *Hortons v. Townes*, 6 Leigh. 47.

In *Corser v. Paul*, 41 N. H. 24, it is said: "There is a

class of admissions which may be either express, or implied from silence or acquiescence. Such are admissions which have been acted upon, or those which have been made to influence the conduct of others or to derive some advantage to the party, and which, therefore, cannot be denied without a breach of good faith."

Upon this it would seem that if the appellant, with knowledge that Sabin was obtaining money from the bank, had stood by and allowed him to go on without objection, it would have been estopped to deny his authority. There is, however, nothing of this kind in the evidence, nor does it appear that the position of the parties would have been different if the company had promptly disavowed the acts of its agent. The question is as to the intention of the company respecting Sabin's dealings with the bank, to be determined upon evidence of its conduct and the declarations of its authorized agents, within the scope of their authority. If at any time the company assented to the acts of its agent, it is as much bound by those acts as it would have been if the agent had been clothed with authority to perform them. The negotiations with Becker, the notice to the company of the indebtedness, the agreement to consider the matter at the February meeting of the board of directors, and the delay of the company to disavow Sabin's acts are facts to be considered by the jury, whose province it is to determine the question of ratification. *Hortons v. Townes*, 6 Leigh. 47; *Corser v. Paul*, 41 N. H. 24.

Further discussion of the principal points in the case is unnecessary, and it remains to consider some questions which may arise upon another trial.

The circumstance that the company retained the ore taken from the mine is not material to the question of ratification. It is not like the purchase of a chattel by an agent without authority, which, if retained by the principal, affords evidence of his intention to ratify the purchase. In such case the principal acquires, by the act of the agent, property which he had not otherwise; and if he disaffirms the contract he ought to restore the property to its rightful owner.

But here the ore belonged to the company, both before and after it was taken from the mine, and the bank never had any right to it whatever. If any inference is to be drawn from the fact that the ore ~~was~~ retained by the company, it arises out of an obligation to deliver it to some other party, and I do not perceive that any such obligation existed. Nor is it material that the money was expended in the mine, or that the expenditure was advantageous to the company, unless it is shown that the company had knowledge of the loan and of the expenditure. Whether the money was expended in the mine, and whether it resulted in gain or loss to the company, are matters in no way connected with the authority of the agent or the ratification of his acts by the company. If Sabin had authority to obtain money from the bank on behalf of the company, the liability of the latter is not affected by the use to which he appropriated it. A ratification has a retrospective effect, and takes effect as a prior command according to the maxim *omnis ratihabitio retrotrahitur, et mandato priori acquiparatur*. Therefore, if the act of the agent is ratified by the principal, the use of the money is equally foreign to the issue.

A witness may be interrogated as to his relations with the parties to the suit for the purpose of affecting his credibility. Obviously the testimony which it is proposed to draw out must have a tendency to prove the state and disposition of the mind of the witness toward one of the parties to the suit, and I do not see that proof of indebtedness to one of the parties has any such tendency. Upon our experience of human nature we cannot say that, as a rule, debtors are friendly or hostile to their creditors. Doubtless, in many cases, the circumstances of the debtor may lead him to seek the favor of his creditor, but it is impossible to lay down any general rule upon the subject. A matter of this kind may be safely left to the discretion of the judge sitting at the trial. Appellant also proposed to show that Sabin refused to testify until the bank had made an arrangement with him respecting his indebtedness to the latter, but we are not told what the arrangement was. If Sabin asked

favorable terms of payment, or that all or a portion of the indebtedness should be remitted to him, as a condition upon which alone he would testify, evidence of the fact would go to his credibility. A witness ~~who~~ demands compensation other than that which is given by law, for his testimony, is certainly to be regarded with suspicion. The offer, as made, however, did not disclose a corrupt bargain, or any circumstance which could influence Sabin's testimony, and hence it was rightly rejected.

Various questions are presented in the record, which it is deemed unnecessary to discuss. The issues were not presented to the jury upon the views here expressed, and therefore the judgment must be reversed, and the cause remanded with a *venire facias*. *Reversed.*

AGENCY—RATIFICATION BY SILENCE.—Where an agency exists, and the agent exceeds his authority, the silence of the principal may give rise to a presumption of intentional ratification of the unauthorized act: *Higgin v. Armstrong*, 9 Colo. 54; *King v. Rea*, 13 Colo. 75, 76; and the principal case on a second appeal, *Union G. M. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 268, 269.

WISE et al. v. BROCKER.

WRIT OF ERROR—*new suit*. A proceeding by writ of error to reverse a decree of a district court is a new suit.

PRACTICE in suit against representative of deceased party to decree. Error may be brought against the executrix and sole devisee of a deceased party to a decree, without preliminary proof of the death of such party or of the appointment of the person sued.

ABATEMENT—*what is matter for*. If the person sued is not executrix and devisee, as charged, she may plead the fact in abatement.

Error to District Court, Arapahoe County.

WILLIAM A. WISE and Anna Wise sued out a writ of error to the district court of Arapahoe county, to bring up the record of a decree in a cause wherein Franz A. Brocker was complainant, and the said William and Anna were respondents. Amelia L. Brocker was summoned as executrix of the last will and testament, and sole devisee of the estate of Franz A. Brocker.

Messrs. BROWN & PUTNAM, for the said Amelia, now moved to dismiss the writ, for the reason that it did not

appear that the said Franz A. Bocker was dead, and that the said Amelia had any interest in the record aforesaid or in the property therein described.

Mr. M. BENEDICT, *contra*.

PER CURIAM. Franz A. Bocker obtained a decree foreclosing a mortgage given by plaintiffs in error, and defendant in error is summoned as executrix of his will and sole devisee of his estate. As plaintiffs in error were parties to the decree, and directly affected by it, of course they may prosecute this writ; but it is said that Franz A. Bocker is dead, and we have no evidence that defendant in error is executrix as charged. If it were necessary to furnish evidence of the death of the person against whose estate relief is sought, and of the appointment of an executor or administrator of the estate, before suing the representative, there would be some force in the objection. This is a new suit and defendant in error is charged as executrix of an estate. If she is not the representative of the estate she may plead the fact in abatement, but we cannot assume the fact upon motion to dismiss. If there is no further appearance by defendant, probably we shall require evidence of the death of Franz A. Bocker, and of the appointment of defendant as executrix, in order that we may know that the proper party has been summoned; but we cannot dismiss the writ upon motion.

Motion denied.

WRIT OF ERROR IS NEW SUIT: *Webster v. Gaff*, 6 Colo. 478; *Stout v. Gully*, 13 Colo. 606.
WRIT OF ERROR LIES TO ALL DECREES in equity, both at the suit of a sole defendant and at the suit of those aggrieved, however numerous: *Vance v. Rockwell*, 3 Colo. 243.

YUNKER v. NICHOLS.

EASEMENT — *right to convey water over land for irrigation.* In this territory lands are held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands.

May exist without grant or prescription. A right to convey water over the land of another for the purpose of irrigating one's land may be acquired under the statute (Rev. Stat. 363), and such right needs not a grant from the owner of the servient estate to support it.

Error to District Court, Arapahoe County.

YUNKER brought an action of trespass on the case against Nichols, for diverting water from an irrigating ditch leading from Bear Creek to the plaintiff's farm. It appeared that the ditch was constructed in the spring of the year 1871, by the plaintiff, the defendant and one John Bell, under an agreement that they would share equally in the water conveyed thereby, such water to be used in irrigating the lands of the several parties respectively. After the ditch had been constructed to and across the defendant's land, so as to communicate and supply water to plaintiff's land, the defendant diverted the water from the ditch and caused the same to flow upon his own land, so that none passed down to the plaintiff, whose lands were below those of the defendant, by means whereof the plaintiff's growing crop was greatly injured and diminished in value. It did not appear that there was any memorandum in writing of the agreement in respect to the ditch between the plaintiff, the defendant and Bell. The court instructed the jury that, if the plaintiff's right to have water flow over the lands of the defendant was conferred by verbal agreement of the plaintiff, the defendant and a third person, which agreement was never reduced to writing, that the plaintiff could not recover. The jury found for the defendant.

Mr. H. R. HUNT, for plaintiff in error.

Messrs. BROWNE & PUTNAM, for defendant in error.

Separate opinions were filed by the members of the court.

HALLETT, C. J. In England, and in this country, it is considered that the right of one person to conduct water over the land of another is an interest in real estate, which must be conveyed by deed in compliance with the terms of the statute of frauds. In countries where the humidity of the climate is sufficient to supply moisture to plants, there can be no reason for distinguishing this from other ease-

ments in the soil, and therefore the law of England, and of most of our States on this point will be found in the general rules relating to real property.

The principles of the law are undoubtedly of universal application, but some latitude of construction must be allowed to meet the various conditions of life in different countries. The principles of the decalogue may be applied to the conduct of men in every country and clime, but rules respecting the tenure of property must yield to the physical laws of nature, whenever such laws exert a controlling influence.

In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law. The value and usefulness of agricultural lands, in this territory, depend upon the supply of water for irrigation, and this can only be obtained by constructing artificial channels through which it may flow over adjacent lands. These artificial channels are often of great length, and rarely within the lands of a single proprietor. A riparian owner must usually get his supply of water from some point on the stream above his own land, and he is compelled to enter upon the lands of others in order to obtain it. Irrigating ditches cannot be made available at or near the head or point of divergence from the stream, and, while a riparian owner may be able to construct a ditch upon his own territory which shall overflow a portion of his land, he can never make it serviceable to the entire tract. Of course, lands situated at a distance from a stream cannot be irrigated without passing over intermediate lands, and thus all tilled lands, wherever situated, are subject to the same necessity. In other lands, where the rain falls upon the just and the unjust, this necessity is unknown, and is not recognized by the law. But here the law has made provision for this necessity, by withholding from the land-owner the absolute dominion of his estate, which would enable him to deny the right of others to enter upon it for the purpose of ob-

taining needed supplies of water. It was enacted by the first legislative assembly, that persons owning claims on the bank, margin or neighborhood of any stream, should have the right of way over adjacent lands for purposes of irrigation (Laws 1861, p. 67), and this law is still of force. (Rev. Stat. 363.) So, also, the common law recognizes an easement in certain cases, and will imply a grant of such easement where it is especially necessary to the enjoyment of the dominant estate. Phear on Rights of Water, 71.

If one having a close, surrounded with his own land, grants the close to another in fee for life or years, the grantee shall have a way to the close over the grantor's land as incident to the grant, for, without it, he cannot derive any benefit from the grant. So it is, also, where he grants the land and reserves the close to himself. 1 Wm. Saund. 323, note D; *Pennington v. Galland*, 9 Ex. D; *Snyder v. Warford*, 11 Mo. 513.

And if one erect a house and build a conduit thereto in another part of his land, and convey water by pipes to the house, and, afterward, sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is *necessary* and *quasi* appendant thereto. Phear on Rights of Water, 72; *Pheysey v. Vicary*, 16 M. & W. 484; *Ryer v. Carter*, 1 H. & N. 916. In these cases, it is true, the dominant and servient estates were derived from a common source, but in this they are analogous to the case at bar. All the lands in this territory which are now held by individuals were derived from the general government, and it is fair to presume that the government intended to convey to the citizens the necessary means to make them fruitful.

"Into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself. They are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong. They are

always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force." *West River Bridge Co. v. Dix*, 6 How. 532.

When the lands of this territory were derived from the general government, they were subject to the law of nature, which holds them barren until awakened to fertility by nourishing streams of water, and the purchasers could have no benefit from the grant without the right to irrigate them. It may be said, that all lands are held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands, and this servitude arises, not by grant, but by operation of law.

In this case there was evidence tending to prove that defendant consented to the construction of the ditch, which, with the aid of the law, was sufficient to maintain the action. If defendant had refused his consent, the statute prescribed the method of proceeding to perfect plaintiff's right. But, in any event, it was not necessary that defendant should convey to plaintiff the right of way for the ditch, and therefore the charge to the jury was erroneous.

I think that the judgment should be reversed, and that a new trial should be awarded.

BELFORD, J. Yunker sued Nichols in the court below, in an action on the case to recover damages for cutting a certain ditch which had theretofore been constructed on Nichols' land, and for diverting the water therefrom. The declaration contains three counts. It is averred that Yunker, at the commencement of this action, and for a long time anterior thereto, was the owner of a certain tract of land lying from one to two miles distant from a certain stream known as Bear Creek. It is further averred that plaintiff had no facilities on said land for irrigating purposes. It is further alleged that the defendant and one John Bell, John McBroom and Peter Olsen, respectively, claimed cer-

tain tracts of land lying between the land of the plaintiff and the stream above mentioned. That, on the first day of March, 1871, the plaintiff and the said defendant and Bell, not having water facilities on their lands for the purpose of irrigation, built and constructed a dam in said stream of water, adjacent to the land of McBroom, and procured from McBroom and Olsen the right of way across their land, and dug and constructed a certain ditch, and conducted water therein from the dam to the respective lands of Bell and Nichols and the said plaintiff, for the purpose of using the same in irrigating and making said lands available for agricultural purposes. That, by mutual agreement, the water running through the ditch was to be used share and share alike by the parties, each of the parties having the right to divert from said ditch on to their respective tracts one-third of the water. It is further alleged that, notwithstanding this agreement, and after the ditch was constructed and the water let in, the defendant wrongfully and unjustly intending to injure the plaintiff and deprive him of the use of the water not only diverted a larger quantity of it than he was entitled to, but prevented any portion of it from reaching plaintiff's land and prevented the plaintiff from using the ditch, wherefore great damage had accrued, etc. The defendant filed the general denial. The cause was submitted to the jury for trial, who returned a verdict for the defendant. There was no evidence introduced on the part of the defendant, and that of the plaintiff fully sustained the allegations of the declaration. The court gave the jury the following instructions, which are assigned for error:

“If the jury believe, from the evidence, that the right to have water flow over the lands of the defendant and to the lands of the plaintiff, for the interruption of which this action is brought, was conferred by a verbal agreement of the parties or the verbal agreement of the plaintiff and defendant and a third person, which agreement was never reduced to writing, and that the plaintiff had no other right to such flow of water than such verbal agreement; then,

although they should believe from the evidence that the plaintiff actually constructed said ditch, and expended labor and money on the faith of such agreement, and that the defendants actually diverted the water, as charged in the declaration, they must find defendant not guilty."

"The jury cannot find for the plaintiff unless they believe from the evidence that the right which plaintiff claims to have water flow over the land of defendant, and for the obstruction of which right this action is brought, was given by deed of the defendant to plaintiff. If plaintiff's only title to the flow and use of the water was a verbal agreement or consent of the defendant, the plaintiff has no case."

The principle involved in this case has certainly received a large degree of attention, both in this country and in England, and it is to be deeply regretted that those courts which appear to have given it the greatest consideration have failed to preserve any rule of uniformity in their decisions. A broad distinction seems to be taken between a license which is executory, and one that has been executed, and, in many instances, the principle of estoppel has been made available in avoiding the recognized force of the statute of frauds. In some of the States a license to dig a ditch and flow water therein over the land of another is held not to be such an interest in the realty as requires the right to be evidenced by deed; in others, a contrary rule is expressly announced, and licenses of this character are held to be always revocable at the will of the licensor. I apprehend that much of the confusion which obtains on this subject arises from a failure to keep steadily in view the distinction which unquestionably exists between a mere license and a grant. In speaking of this subject, VAUGHAN, C. J., says: "A dispensation or license properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful which, without it, had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license

to hunt in a man's park, and carry away the deer killed to his own use ; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to acts of hunting and cutting down the tree, but as to carrying away of the deer killed and the tree cut down, they are *grants*."

In courts where this distinction has been taken, it has been held that the right to overflow the land of another is an easement, an incorporeal hereditament, and it is an interest in real estate. Title to such easement must be conveyed by grant and established by proof of an actual grant, or by proof of a prescription, from which a grant will be inferred. And if the mode of proof adopted be the showing of an actual grant, the grant must, at least, under the statute of frauds, be in writing, by deed ; and the same doctrine has been specially applied to a ditch constructed through the land of another. *Morse v. Copeland*, 2 Gray, 305 ; *Selden v. Delaware and Hudson Canal Co.*, 29 N. Y. 635 ; *Foster v. Browning*, 4 R. I. 47 ; *Foster v. N. H. and N. Co.*, 23 Conn. 228. Our attention, however, has been particularly called to the decisions which have been made on this subject in Maine, New Hampshire, Ohio, Iowa and Indiana, and I have endeavored to give them a most careful and critical examination. *Ricker v. Kelly*, 1 Greenl. 117, was an action of trespass for cutting down and destroying part of a wooden bridge, the property of the plaintiffs. The defendant, in justifying, pleaded that the bridge was erected on the land of Kelly without his license and against his will, and that he removed it, as he lawfully might do.

The plaintiffs replied that, on a certain day, in consideration of their promise to perform certain work, which was accordingly performed for Kelly, he gave them a license and authority to erect a bridge on his land, and to have a right of way over the same to the bridge ; that, by virtue of said license, they erected the bridge, etc. To this replication the defendants demurred, because the plaintiffs had not set out any legal conveyance of title to them to build their

bridge, nor to enter upon or pass over the land for any other purpose, and because it did not appear that said license was in writing, nor how long it was to continue in force. *Held* by the court, that the replication was good and the action maintainable. MELLEEN, C. J., after referring to the allegation of the defendant, that the claim of the plaintiffs was an interest in the close within the meaning of the statute of frauds, and the proof of *this interest* not being in writing, the permission of the defendant to the plaintiffs to enter upon the close and build said bridge and enjoy a right of way over the close to the said bridge, is void and ineffectual, says: "In the present case the plaintiffs placed their own materials in the form of part of a bridge on the defendant's land, by their express consent, and if a right of way over the close to the bridge did not pass by parol, *still the defendant had no right* to seize and carry away the plaintiff's property and destroy its value. As well might the owner of a ship-yard permit another to build a ship in it, and when the ship was on the stocks, cut it in pieces and carry it away with impunity," and this really appears to be the controlling principle in that decision. True, the judge holds that the permission having been acted upon, the case was thereby taken out of the operation of the statute of frauds. But if we concede that this decision is made to rest on this latter ground, then the case can no longer be regarded as authority in that State, for the reason that *Pitman v. Poor*, 38 Me. 237, silently overrules it, and holds that no permanent interest in real estate can be acquired by a parol agreement, and that the parol license that the plaintiff or his grantor may build a dam on the land of another, to raise a reservoir of water for the use of his mill, will confer no right upon the plaintiff to maintain such dam after it is built, or control the water raised by means of it. This is the last utterance on the subject by that court, so far as I am informed, and must be taken as the established doctrine of that State.

The first case in New Hampshire is that of *Woodbury v. Parshley*, 7 N. H. 237. That was an action on the case

The declaration alleged that the plaintiff was seized of a meadow adjoining a certain pond, and that the defendant, by means of a dam erected by him upon his own land, caused the water to overflow and injure the meadow of the plaintiff. The defendant introduced evidence showing that the dam had been erected by the mutual agreement of the parties. The plaintiff objected to the admission of parol evidence to prove such agreement, but the evidence was admitted. The court, after holding that the evidence was rightly admitted, says: "The dam was erected by the defendant at his own expense, with the assent of the plaintiff, for the benefit of both. And here the first question is, whether, under the circumstances, the license was revocable at the will of the plaintiff? The defendant had incurred expenses in erecting the dam. The license had been executed and acted upon. Certainly the plaintiff could not revoke it without tendering to the defendant the expenses that had been incurred in the project."

In *Ameriscoggin Bridge v. Bragg*, 11 N. H. 108, the court say: "It is contended further, that the license to erect a bridge on defendant's land cannot be shown by parol testimony, on the ground that it is a permanent easement in the land, with a right at all times to enter and enjoy it, and that such an easement is within the statute of frauds, and can be sustained only by evidence in writing. The distinction between a privilege or easement carrying an interest in land and requiring a writing within the statute of frauds to support it, and a license which may be by parol is said, by Chancellor KENT, to be quite subtle, and that it is difficult in some of the cases to discern a substantial difference between them. A license to an individual to do an act beneficial to him, but requiring an expenditure upon another's land, is held not to be revocable after it has once been acted upon. Such a license is a direct encouragement to expend money, and it would be against conscience to revoke it as soon as the expenditure begins to be beneficial." In *Sampson v. Burnside*, 13 N. H. 264, it is held that a parol license to enter on land and lay down aqueduct logs for the pur

pose of carrying water from a spring to adjoining land, with license to enter from time to time to examine and repair the same, is not a sale of land or an interest in land within the statute of frauds. Whether the license in such a case is revocable or not, is regarded as an open question. In the case of *Houston v. Laffer*, 46 N. H. 507, which very strongly resembles the case at bar, the earlier decisions on this subject in that State are all noticed, and, if not directly overruled, their authority is greatly impaired. After alluding to these cases the court say: "But we think the more recent decisions, however, sustain the doctrine that the license is, in all cases, revocable, so far as it remains unexecuted, *or so far as any future enjoyment* of the easement is concerned. To hold otherwise would be giving to a parol license the force of a conveyance of a permanent easement in real estate; such a doctrine cannot be sustained. No such right or interest in real estate can be created by parol." It is evident, therefore, from the later cases, both in Maine and New Hampshire, that a clear departure has been taken from the doctrines announced in the earlier reports, and a tendency has set in to conform to the line of decision pursued in a majority of the States. In Ohio the court has steadily adhered to the doctrine that a parol license, when executed, is irrevocable, and that an action of trespass is maintainable against the licensor for any unjust interference with the rights of the licensee. *Wilson v. Chalfant*, 15 Ohio, .

In Iowa, *Wickersham v. Orr*, 9 Iowa, 260, the irrevocability of an executed parol license is made to rest on the ground that when money or labor has been expended on the land of another, upon the faith of a promise given by him, the owner shall not assert his legal right to the soil so as to interfere with that use or enjoyment of the thing which has resulted from such promise by the money and labor of the licensee.

In *Bently v. Gregory*, 17 Iowa, , it is held that a parol license which has been acted upon, and which has led to the expenditure of money and labor, cannot be revoked until compensation for such expenditure has been made. Taking

this last case as modifying the principle announced in the former, we have the courts of two States, Ohio and Pennsylvania, adhering strictly to the doctrine of the irrevocability of an executed license, while in all the other States, as well as in England (*Wood v. Leadbetter*, 13 M. & W.), licenses of this character are held to be revocable at will, as being in contravention of the statute of frauds. Viewing the instructions given by the judge below, to the jury, as the announcement of doctrines which should govern a court of law in the administration of purely legal principles, I am not prepared to dissent from them, but, while I yield to them that measure of homage so fully accorded by others, I cannot shut my eyes to the fact that it is doing violence to every principle of justice, to allow a statute designedly passed to cut off and prevent frauds, to be converted into an instrument whereby they may be practiced and fostered. That which was originally intended as a shield and defense for rights should never be permitted to become a means of assault for their overthrow. Courts of equity which constantly adapt themselves to the progress of society and civilization, and whose principles accumulate with the experience of ages, have certainly blunted the sharper edges of the statute of frauds, and evolved a doctrine in every respect more consonant with the interest of society, namely, that he who by his admissions or conduct induces another to act, cannot afterward be permitted to assert the contrary to the injury or prejudice of the party who has already acted upon the faith and in the belief created by him ; and all the courts concur in holding that an estoppel *in pais* exists, when a party makes a statement to another, which that other relies and acts upon, and which it would be a fraud in the party making the statement to afterward controvert, so far as the statement affects the other's pecuniary rights. It cannot be denied that the common law has, in a great measure, accommodated itself to this doctrine of estoppel, especially so far as it affects personal property, and its application in matters of that nature is constant ; nor is it wanting in examples in relation to real estate. So great a jurist as Lord MANSFIELD

would not suffer a man to recover even in ejectment, when he had stood by and seen the defendant build on his land. And, in the case of *Hearn v. Rogers*, 9 B. & C. 577, Mr. Justice BAILEY said, that under the same circumstances he would apply the same doctrine. Mr. Justice BULLER, in the case of *Farr v. Newman*, 4 D. & E. 636, remarks: "That when a rule of property is settled in a court of equity, and there are no decisions against it at law, I am as ready as any man to follow the line of equity, for I think it absurd and injurious to the community, that different rules should prevail in different courts on the same subject." And to the same effect is the language of Lord ELDEN in *Smith v. Doe*, 7 Price, 509. In the case of *Shaw v. Bebee*, 35 Vt. 208, the principle of estoppel was applied. That was an action of ejectment. The court say, "We are aware that there have been decisions questioning the extension of this doctrine of estoppel *in pais* to affect the title to lands. But a review of the decisions shows that the great weight of authority is consonant with the views we have here expressed. All concur that such facts constitute an estoppel as to personal property, and upon reason and principle to prevent fraud and promote justice the same rule should be extended to real property." It is also true, that the common-law courts of Pennsylvania have adopted it; and they have adopted many other principles which had first received their sanction in courts of equity. *Wents v. De Haven*, 1 Serg. & Rawle, 312. The same principle was applied in *Corbet v. Norcron*, 35 N. H. 115, and in *Heard v. Hall*, 16 Pick. 457, and in *White v. Perkins*, 24 id. 324.

In the State of Nevada they have yielded to the force of the same doctrine, as will be seen from the case of *Sharan v. Mennick*, 6 Nev. 389; so also in California. *Kelly v. Taylor*, 23 Cal. 11; 5 id. 84, and 3 id. 44.

In *Snowdon v. Wilds*, 19 Ind. 14, the court say: "But though a parol license amounting, in terms, to an easement, is revocable as to future enjoyment at law, and is determined by a conveyance of the estate upon which it was enjoyed, this is not the rule in all cases, in courts of equity. In these

courts the future enjoyment of an executed parol license, granted upon a consideration, or upon the faith of which money has been expended, will be enforced, at all events when adequate compensation in damages could not be obtained. This will be done upon the two grounds of estoppel and fraud, and the specific performance of a partly executed contract to prevent fraud. And in those States where law and equity are administered in the same court, relief is afforded in any given suit when the pleadings present the necessary averments." When courts of law so freely apply this principle, in regard to personalty, it is difficult to comprehend why any hesitation should exist in its application to real estate. What would be justice in one case would be equally so in the other; and in equity it is accordingly admitted, and why should it not be so at common law. It may be said, however, that the distinction between law and equity is maintained in this territory. That is true only in a qualified sense. The same officer administers both, and at the same term of court, and to me it seems strange and preposterous for the same judge to turn the party out of his court one day to enable him to avail himself of a well-known, well-defined and well-settled rule in jurisprudence, as applicable in a rational point of view to proceedings in one tribunal as in those of another, especially when, as in this territory, the very court which is to decide in equity is the same tribunal. It cannot be controverted that, under the facts set forth in the declaration, Yunker would be entitled, in a court of equity, to a remedy, that would secure him in the enjoyment of the ditch and the water flowing therein. Would a court of equity also compensate him for the damages which he has sustained by reason of the unjust interference of Nichols? then it would be invading the domain of the law, and setting itself up as the admeasurer of damages; a comfortable and assuring spectacle indeed, when the same judge had, the day before, declined, for reasons of grave public policy, to invade the domain of equity. If the court should, however, feel unable to award compensatory damages, Yunker would be remediless, for the affirmance of the

judgment below would bar his right of action, although the deed which the court of equity would require Nichols to make might be adjudged to take effect from the date of the construction of the ditch.

In the notes to Smith's Leading Cases, vol. 2, p. 762 (6th Am. ed.), the learned annotators say : " It would, therefore, seem too late to contend that the title to real estate cannot be barred by matter *in pais* without disregarding the statute of frauds, and the only room for dispute is as to the forum in which relief must be sought. The remedy in such cases lay originally in chancery, and no redress could be had in the courts of common law unless under rare and exceptional cases. But the common law has been enlarged and enriched with the principles and maxims of equity, which are constantly applied at the present day in this country and in England for the relief of sureties, the protection of mortgagors and the benefit of purchasers by a wise adaption of ancient forms to the more liberal spirit of modern times. The doctrine of equitable estoppel is derived from the courts of equity, and as those courts apply to every species of property, there would seem no reason why its application should be restricted in courts of law. Protection against fraud is equally necessary, whatever be the nature of the interest at stake, and it would seem that, whether the controversy be in equity or at law, there is nothing in the nature of real estate which should deprive it of the benefit of those wise and salutary principles which are now applied without scruple, in both jurisdictions, in case of personalty. And whatever may be the wisdom of the change which has broken the barriers by which the doctrine of equitable estoppel was formerly excluded from legal tribunals, it has now gone too far to be confined within any limits less than the whole field of jurisprudence." *Buckholler v. Edwards*, 16 Ga. 593.

It seems to me, after the doctrine has received the sanction of such courts as those of Maine, New Hampshire, Pennsylvania, Georgia, Ohio, Indiana, Iowa, Nevada and California, we can run no serious risk in applying its bene-

fits to the property within our borders. If the foregoing views are in any measure open to objection, still another reason exists which imperatively demands the reversal of the judgment below. At an early period in our territorial history, the legislature, keenly alive to the wants and necessities of our people, enacted a law on the subject of irrigation, the provisions of which were designed to secure to all persons who claim, own or hold a possessory right or title to land within the boundary of Colorado, when those claims are on the bank, margin or neighborhood of any stream of water, the use of the water of said stream for the purposes of irrigation and making said claims available, to the full extent of the soil, for agricultural purposes. And further providing that, when the land so held or owned is removed from said stream of water, the owner or claimant shall be entitled to a right of way through the farms or tracts of land, which lie above and below him on said stream, for the purposes above stated. The constitutionality of this law is, however, assailed, and it becomes necessary to pass upon it. To avoid acknowledging the fact that constitutions sometimes surrender to the force of necessity, the general opinion obtains that courts and legislatures are justified in presuming that, within the scope and spirit of wise, august instruments, every power may be found, the exercise of which is essential to the public welfare.

If the warrant for performing an act, justly esteemed indispensable to the public prosperity, is not found in an express grant, then the authority finds lodgment in the implied powers of the constitution; for whenever the end is required the means are authorized, and whenever a general power to do a thing is given, every particular power necessary for doing it is included. It would be almost impracticable, if it were not useless, to enumerate the various instances in which congress, in the progress of the government, has made use of incidental and implied means to execute its powers. They are almost infinitely varied in their ramification and details. 2 Story on Const., § 1258. One of the most important interests of this territory is the

agricultural interest. This can only be fostered and nourished by a system of irrigation, and the right to legislate on this subject seems to me clear and unquestionable. If, then, the agriculture is essential to the well-being of this territory, and can only be developed by a system of irrigation, it seems to me a matter of absolute necessity, that the legislature should have power to pass needful laws whereby the great body of land lying within our boundaries should be made available—and that necessity confers a right to pass such laws, I will endeavor to demonstrate. No such power as that of selling lands for the non-payment of taxes is to be found in the revealed, natural, civil or common law. But there are analogous powers to be found in the common-law code and in the statute law of every civilized nation; for example, the power to condemn land for public uses, and the other cases where power is exercised over the estates of citizens, such as the sale of lands for the payment of the debts of owner. The taxing power has no existence in a state of nature. It is the creature of civil society, government begets its necessity. There must be interwoven in the frame of every government a general power of taxation. Money is with propriety considered as the vital principle of the body politic, as that which sustains its life and motion and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must necessarily ensue: either the people must be subjected to continual plunder or the government must perish for want of revenue to support it. It may, therefore, be laid down as a principle of universal constitutional law, that the power to levy taxes is an incident to sovereignty, without which no government could exercise the powers expressly delegated to it. Blackwell on Tax Titles, 8-39; *Pasham v. Decatur County*, 9 Ga. 352.

If, therefore, the right to raise revenue and to sell land

for the payment of taxes are made legal and constitutional by virtue of the necessities of society and government, what tenable objection can be made to the validity of a law, which, taking note of an imposing public necessity and the physical conditions of our territory, accords to all persons engaged in agricultural pursuits a right of way over lands lying between their possessions and a stream of water.

Is not the necessity in this particular instance quite as imperative as in the other?

Every member of society is presumed to have assented to the public law by which his right of property is subjected to the dominion of strangers. The manner in which this power is to be exercised is specified in the law. The same law which creates this powerbridles its execution. You may take my property to pay my debts, but you must ascertain that debt by judgment and a sheriff must execute the power. You may take my land to build a railroad, but you must pay me the value of it. And hence, while it may justly be said that a party has an unquestionable right, owing to the necessities of the country, to construct a ditch over the land of another, independent of any special law on the subject, yet the legislature, as the representative of that society into which each citizen enters, and in the entering of which he sacrifices so much of his rights for the purchase of social protection, may prescribe the method, terms and means whereby that right to construct the ditch shall be exercised. Of course these legislative provisions may be waived by the parties, as was done in this case. The construction of a ditch for irrigating purposes seems to me to rest on principles analogous to those which sustain the right of a private way over the land of another.

In *Parker v. Webster*, 2 Sid. 39, decided in Cromwell's time, it appeared that A had three parcels of land and there was a private way out of the first parcel to the second and out of the two first parcels to the third, and B purchased all these parcels and sold the two first to C. There was no way to the land not sold but through the other two parcels, and the court adjudged that the way continued from neces-

sity, and that the party was not liable in trespass for using it. In the case of *Snyder v. Warford*, 11 Miss. 513, the court held that a right of way of necessity exists in all cases in which an individual owns land surrounded by other lands excluding it from any public highway, and the case is made to rest upon the good and salutary principle that the right of a man in the use of his property is restricted by a due regard to the equal rights of others. The judge says: "It would seem to be no more than a principle of natural justice that his right of way should exist, although its existence may, to some extent, interfere with the absolute dominion of the coterminous proprietors. If not a principle of natural law, it is at least one which could not long be omitted in the code of a civilized people." See 3 Kent's Com. 423, marginal; *Holmes v. Seely*, 19 Wend. 506; *Capers v. Wilson*, 3 McCord, 170; *Cook v. Nearing*, 27 N. Y. 306.

I am fully aware that courts should be slow to justify their decisions on the ground of necessity; but I am equally conscious of the fact that they will betray their trust if, in the administration of law or in the expounding of constitutional principles, they shut their eyes and refuse to recognize those conditions of society which call into force and operation principles whose existence and recognition cannot be disregarded without bringing ruin on all. As has been well said by another, the law is not a system marked by folly, based on bald sentences, without reason; it is a grand code, founded on the necessities of men, erected by mature judgment, gradually expanding in beneficence and wisdom as time progresses, and regulating with care the interests of society and civilization. And so believing, I think the instructions given were erroneous, and that the judgment should be reversed and the cause remanded.

WELLS, J. I concur in the conclusion that the judgment given in the court below must be reversed, but, in so far as this conclusion is based upon a supposed estoppel, I dissent from what my brother BELFORD has said; and, in so far as

it is sought to rest it upon the statute concerning the irrigation of lands, I dissent from both my associates.

I conceive that, with us, the right of every proprietor to have a way over the lands intervening between his possessions and the neighboring stream for the passage of water for the irrigation of so much of his land as may be actually cultivated, is well sustained by force of the necessity arising from local peculiarities of climate; as in other countries, out of a like necessity, every proprietor has a way of right to his own close over the premises which shut it from the highway. But it appears to me that this right must rest altogether upon the necessity rather than upon the grant which the statute assumes to make. For in other countries, where the necessity does not exist, the right has not been recognized in the courts nor attempted to be confirmed by statute, and, where similar legislation has been attempted, in the instance of private ways, by statute, it has been held to be either void as an appropriation of private property to individual uses (*Taylor v. Porter*, 4 Hill, 140; *Osborn v. Hart*, 24 Wis. 89), or else has been sustained as the regulation of an existing right, and not as conferring one. *Snyder v. Warford*, 11 Mo. 513.

It seems to me, therefore, that the right springs out of the necessity, and existed before the statute was enacted, and would still survive though the statute were repealed.

If we say that the statute confers the right, then the statute may take it away, which cannot be admitted.

Doubtless the exercise of the right may be regulated by statute, but that is not the question here; and it appears to me unnecessary to determine the validity or effect of the existing legislation.

Reversed.

WATER RIGHTS — PRIOR APPROPRIATION. — To make such appropriation valid, there must be a manifest beneficial use of the water designed or accompanied by some physical demonstration of intent to take the same for such use; *Platte W. Co. v. North Colo. L. Co.* 12 Colo. 531.

EASEMENT — RIGHT OF WAY TO CONVEY WATER. — In Colorado, lands were formerly held in subordination to the dominant rights of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands; *Schilling v. Rominger*, 4 Colo. 164, 165; *Branagan v. Dulancy*, 8 Colo. 413. But since the adoption of the constitution, the taking of private property for private use (which this amounts to) is prohibited unless compensation be made, and the legislature has provided proceedings for this purpose; *Stewart v. Stevens*, 11 Colo. 445.

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NOTES

ON THE

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CASES IN 1 COLORADO.

1 COLO. 1, GARDNER v. DUNN.

Followed without discussion in *Lynn v. Merricle*, 1 Colo. 3.

1 COLO. 3, LYNN v. MERRICLE.

1 COLO. 3, WILCOX v. FIELD.

When judgment nil dicit should be rendered.

Cited in *Gomer v. Shiner*, 4 Colo. 246, holding that in default of plea, where defendant appears, judgment should have been nil dicit.

1 COLO. 5, LEE v. RALSTON.

1 COLO. 7, ARMOR v. LYON.

Finality of judgment sustaining demurrer.

Cited in *Andrews v. Loveland*, 1 Colo. 8, holding judgment sustaining demurrer not final.

1 COLO. 7, GIBSON v. SMITH.

Right to take default judgment while demurrer is pending.

Cited in *Taylor v. McLaughlin*, 2 Colo. 375, holding judgment nil dicit could not have been entered with issues of fact existing and undisposed of; *San Juan & St. L. Min. & Smelting Co. v. Finch*, 6 Colo. 214, holding it error to rule the plaintiff to plead cross-bills while demurrers thereto were pending and undisposed of; *McDonald v. Hallicy*, 1 Colo. App. 303, 29 Pac. 24, holding order of court essential to eliminate issue of law before new issue of fact could be presented by amendment to answer; *Fischer v. Hanna*, 8 Colo. App. 471, 47 Pac. 303, holding it error to proceed to trial upon merits without judgment upon demurrers.

1 COLO. 8, ANDREWS v. LOVELAND.**1 COLO. 10, TOWNSEND v. WILD.****1 COLO. 12, McNASSER v. SHERRY.**

Power of Supreme Court on appeal upon overruling of demurrer.

Cited in Gammon v. Bunnell, 22 Utah, 421, 64 Pac. 958, holding that Supreme Court has power on appeal to order judgment entered for plaintiff on demurrer overruled in court below, where parties elect to stand on pleadings and judgment entered for defendant with execution.

When judgment nil dicit should be rendered.

Cited in Gomer v. Shiner, 4 Colo. 246, holding that in default of plea by an appearing defendant judgment nil dicit should be rendered.

Finality of judgment on demurrer.

Cited in Hammer v. Hermann, 11 Okla. 173, 65 Pac. 841, holding submission of case and judgment thereon final where defendant elects to stand upon and abide by overruled demurrer.

1 COLO. 14, WIER v. BRADFORD.

Who may maintain action for forcible entry.

Cited in Potts v. Magnes, 17 Colo. 364, 30 Pac. 58, on necessity of actual possession to support action for forcible entry; Mageon v. Alkire, 41 Colo. 338, 92 Pac. 720, holding that forcible entry disturbing tenant's possession can be complained of by tenant or by lessee entitled to possession.

Cited in note in 121 A. S. R. 382, 383, on right to civil action for forcible entry and detainer.

1 COLO. 18, DORSETT v. CREW.

Necessity that instructions be in writing.

Cited in Bradway v. Waddell, 95 Ind. 170, holding violation of statute requiring all instructions to be written out in full, substantial error; State v. Potter, 15 Kan. 302, holding failure to comply with statute requiring written charge to jury in criminal offenses reversible error.

Cited in Abbott's Civ. Tr. 2d ed. 425, on inability of court to explain or change its written charge, orally.

Cited in note in 99 A. D. 121, 124, on necessity that instructions or modifications thereof be in writing.

Necessity that verdict follow undisputed proof.

Cited in Smyth v. Lynch, 7 Colo. App. 383, 43 Pac. 670, holding that verdict should be for sum shown by undisputed proof.

1 COLO. 23, TURNER v. HAHN.

Sufficiency of evidence of conversion.

Cited in Carper v. Risdon, 19 Colo. App. 530, 76 Pac. 744, holding proof of demand and refusal in action by tenant against landlord for

value of machinery attached to premises, necessary only for purpose of showing conversion; *Sylvester v. Craig*, 18 Colo. 44, 31 Pac. 387, holding evidence sufficient to show demand and also conversion of property.

Alienage of juror as ground for reversal.

Cited in *Jones v. People*, 2 Colo. 351, holding that verdict will not be set aside on account of alienage of one of jurors to whom no objection was made at trial; *State v. Pritchard*, 15 Nev. 74 (dissenting opinion), on waiver of statutory right of exclusion of alien juror by failure to object at trial.

1 COLO. 29, SMITH v. CISSON.

Presumption in support of verdict in court below.

Cited in *Barker v. Hawley*, 4 Colo. 316, holding that verdict not manifestly against weight of evidence will not be disturbed when evidence conflicting.

Proof of identity of parties.

Cited in *Denver, S. P. & P. R. Co. v. Driscoll*, 12 Colo. 520, 13 Am. St. Rep. 243, 21 Pac. 708, holding evidence sufficient to support finding that appellee was engaged in employ of appellant although no witness used technical name given defendant in its articles of incorporation.

Mining partnerships.

Cited in note in 83 A. D. 108, on mining partnerships.

1 COLO. 33, MURDOCK v. TOWNSEND.

1 COLO. 33, ANDERSON v. SLOAN.

Necessity for bill of exceptions.

Cited in *Wike v. Campbell*, 5 Colo. 126, holding that papers filed in progress of trial at nisi prius, and not intrinsically parts of record, cannot become such by being incorporated therein; *Whitney v. Teichfuss*, 11 Colo. 555, 19 Pac. 507, holding that motion to strike out amended answer and exceptions to ruling of court thereon cannot be considered on appeal when not preserved by bill of exceptions; *Rowe v. People*, 26 Colo. 542, 59 Pac. 57, holding motion for new trial not preserved in bill of exceptions not subject to consideration on appeal; *Heermans v. Jacksonville, St. A. & I. River R. Co.* 40 Fla. 85, 23 So. 587, holding that affidavits used in condemnation proceedings to set aside award must be preserved in bill of exceptions to be available upon appeal; *Higginbotham v. State*, 42 Fla. 573, 89 Am. St. Rep. 237, 29 So. 410, holding that appellate court cannot consider affidavits used in support of motion for new trial, unless they are evidenced to it by bill of exceptions; *Blyth & F. Co. v. Swenson*, 15 Utah, 345, 49 Pac. 1027 (dissenting opinion), on necessity of affidavits used on motion for motion for new trial being preserved in record by bill of exceptions.

Allowance of amendments to officer's return.

Cited in *McClure v. Smith*, 14 Colo. 297, 23 Pac. 786, holding amend-

ments to officer's return upon process to correspond with fact liberally allowed.

Who may take affidavit of merits.

Cited in *Martin v. Skehan*, 2 Colo. 614, holding that affidavit of merit cannot be sworn before attorney of defendant.

1 COLO. 35, FRANKLIN v. UNITED STATES.

Power of territorial legislature to define and provide punishment of crimes.

Cited in *Territory v. Burgess*, 8 Mont. 57, 1 L.R.A. 808, 19 Pac. 558, holding that District Court of Territory had jurisdiction to try man for murder committed on military reservation situated within Territory; *Reynolds v. People*, 1 Colo. 179, holding power of congress over territory exerted in establishing government to which is delegated authority to legislate upon all rightful subjects; *Territory v. Yarberry*, 2 N. M. 397, holding that Congress has erected territorial governments and delegated to them authority to enact municipal laws; *Re Murphy*, 5 Wyo. 297, 40 Pac. 398, 9 Am. Crim. Rep. 122, holding that territorial legislature might define and provide punishment for bigamy although Congress had enacted a law defining and punishing same in territories.

1 COLO. 43, CASS v. DAVIS.

Power of legislature to change judicial system.

Cited in *Ex parte Cox*, 44 Fla. 537, 61 L.R.A. 734, 33 So. 509, holding that the constitutional judicial system cannot be changed by action of legislature in absence of express power.

Validity of acts allowing appeal from probate to district courts.

Cited in *McClure v. Sanford*, 3 Colo. 514, holding all acts relating to appeal from probate to district courts previous to 1872 void; *Vance v. Rockwell*, 3 Colo. 240, holding act allowing appeal from probate court to district court valid; *Russell v. Daniels*, 5 Colo. App. 224, 37 Pac. 726, holding that in 1874 there was right of appeal from probate to district court.

Distinguished in *Re Rogers*, 14 Colo. 18, 22 Pac. 1053, holding that appeals may be taken from county to district court under state constitution.

Jurisdiction of probate and district courts.

Cited in *Cody v. Raynaud*, 1 Colo. 272, holding that probate courts are of limited, but not inferior, jurisdiction; *Loveland v. Sears*, 1 Colo. 194, holding district and probate courts within limits prescribed to latter are of concurrent jurisdiction.

When writ of error lies to supreme court.

Cited in *Liss v. Wilcoxon*, 2 Colo. 7, holding that proceedings of probate court in unlawful retainer may be removed into supreme court by writ of error.

1 COLO. 49, CHRISTIAN v. TUCKER.

1 COLO. 51, COOK v. HUGHES.**Necessity for bill of exceptions.**

Cited in *Marlow v. Kuhlenbeck*, 2 Colo. 602, holding excessiveness of damages awarded in judgment not considered on review if evidence not set out in record; *Freas v. Truitt*, 2 Colo. 489, holding bill of particulars attached to declaration and inserted in transcript of record by clerk no part of record; *Rutter v. Shumway*, 16 Colo. 95, 26 Pac. 321, holding that motions and exceptions cannot be considered on review unless duly authenticated by bill of exceptions; *Fryer v. Breeze*, 16 Colo. 323, 26 Pac. 817, holding bill of particulars not part of record proper and cannot be reviewed on error unless preserved by bill of exceptions; *Hoagland v. Cole*, 18 Colo. 426, 33 Pac. 151, holding cause not reviewable upon evidence unless whole evidence properly certified to appellate court.

1 COLO. 52, CLARK v. RUSSELL.**1 COLO. 53, REMINGTON v. SMITH.****Jurisdiction of probate courts in equity.**

Cited in *Vance v. Rockwell*, 3 Colo. 240, holding limited equity jurisdiction conferred upon probate courts by amendment of 1863 to Organic Act.

Effect of repeal of statute upon pending proceedings.

Cited in *Harrison v. Smith*, 2 Colo. 625, holding that pending judicial proceedings based upon statute of all on its repeal.

1 COLO. 54, TODD v. SIMONTON.**1 COLO. 56, FITZGERALD v. PEOPLE.****Sufficiency of petition for change of venue.**

Cited in *Black v. Bent*, 20 Colo. 342, 38 Pac. 387, holding petition for change of venue upon ground of prejudice of inhabitants of county insufficient, where another county is attached to such county for judicial purposes, unless prejudice shown to extend to former county.

1 COLO. 60, GILE v. PEOPLE.**Necessity that instructions be written.**

Cited in *Hopt v. Utah*, 104 U. S. 631, 26 L. ed. 873, 4 Am. Crim. Rep. 365; *State v. Potter*, 15 Kan. 302,—holding failure to comply with statute requiring written charge to jury in criminal offenses reversible error; *Bradway v. Waddell*, 95 Ind. 170,—holding violation of statute requiring all instructions to be written out in full substantial error; dissenting opinion in *Boggs v. United States*, 10 Okla. 424, 65 Pac. 927 (re-reported in 11 Okla. 139), an oral statement of court calling attention to written instructions as coming within prohibition against oral instructions.

Cited in note in 99 A. D. 121, on necessity that instructions be written.

1 COLO. 62, FORD GOLD MIN. CO. v. LANGFORD.

Sufficiency of complaint to foreclose mechanics' lien.

Cited in *Arkansas River Land, R. & Improv. Co. v. Flinn*, 3 Colo. App. 381, 33 Pac. 1006, holding that complaint to foreclose mechanic's lien must allege everything essential to existence and establishment of plaintiff's claim, and bring literally within terms of statute.

1 COLO. 67, JONES v. STEVENS.

Appearance as waiver of defects in summons.

Cited in *Union P. R. Co. v. DeBusk*, 12 Colo. 294, 3 L.R.A. 350, 13 Am. St. Rep. 221, 20 Pac. 752, holding that filing of answer to merits is waiver of all former objections to summons and return; *Loveland v. Union Nat. Bank*, 25 Colo. 499, 56 Pac. 61, holding that voluntary appearance of administrator in action waives service of notice or summons; *Keyser v. Pollock*, 20 Utah, 371, 59 Pac. 87, holding general appearance of defendant by demurrer and answer waiver of all objections to summons.

Who may assess damages on default.

Cited in *Foster v. People*, 1 Colo. 293, holding that damages must be assessed by jury in trespass de bonis upon defaulting defendant; *Taylor v. McLaughlin*, 2 Colo. 375, holding that jury should assess damages where defendant failed to appear after filing his pleas; *Colorado Springs Co. v. Hewitt*, 3 Colo. 275, holding that inquisition, upon judgment by default in probate court when damages do not rest in computation, should be by jury of twelve men; *Ruth v. Smith*, 29 Colo. 154, 68 Pac. 278, holding that testimony must be taken in action for unliquidated damages, upon which to base amount of damage, where defendant fails to answer.

1 COLO. 70, KURTZ v. SIMONTON.

Necessity for bill of exceptions.

Cited in *Rowe v. People*, 26 Colo. 542, 59 Pac. 57, holding that motion for new trial must be preserved in record by bill of exceptions.

1 COLO. 71, LANGLEY v. GRILL.

Validity of joint judgment against party not served.

Cited in *Wilbur v. Abbot*, 60 N. H. 40, holding joint judgment against two defendants void where only one had notice of suit.

Distinguished in *Teller v. Hartman*, 16 Colo. 447, 27 Pac. 947, holding that error in judgment, affecting only defendant not appearing, will not be considered upon appeal by part of defendants.

1 COLO. 73, CHENEY v. BARBER. 2 MOR. MIN. REP. 697.

Necessity that contract be proved as laid.

Cited in *Robinson Consol. Min. Co. v. Johnson*, 13 Colo. 258, 5 L.R.A. 769, 22 Pac. 459, holding that defendant had right to be advised by pleadings of substantial terms and conditions of contract sued on.

1 COLO. 74, KINNEAR v. TUCKER.**1 COLO. 75, ANTHONY v. ESTABROOK, 91 AM. DEC. 702.**

Effect of declarations of agent after transaction on principal.

Cited in *Ryan v. Gilmer*, 2 Mont. 517, 25 Am. Rep. 744, holding declarations of driver after accident, that he could have prevented it if he had not been careless, inadmissible against employer.

Cited in note in 131 A. S. R. 315, 335, on declarations and acts of agents.

1 COLO. 77, PATON v. PEOPLE.

Municipal license as defense to prosecutions under general law.

Cited in *Heinssen v. State*, 14 Colo. 228, 23 Pac. 995, holding fact that tippling-house is licensed by city, which has authority to license such houses under certain conditions, no defense to prosecution under general state law.

Distinguished in *Hetzer v. People*, 4 Colo. 45, holding town license to sell spirituous liquors complete protection, where town has exclusive authority to grant such license.

What is a license.

Cited in *Parsons v. People*, 32 Colo. 221, 76 Pac. 666, holding license a permit to do certain thing; *Schwartz v. People*, 46 Colo. 239, 104 Pac. 92, holding license not a contract.

1 COLO. 81, ORMAN v. KEITH.

Power of absent judge to consent to clerk's unauthorized approval of appeal bond.

Cited in *State Bank v. Plummer*, 46 Colo. 71, 102 Pac. 1082, denying power of judge to consent while in another county, to previous unauthorized approval of appeal bond by clerk.

1 COLO. 82, ORMAN v. KEITH.

Time to file bill of exceptions.

Cited in *Packard v. Spellings*, 3 Colo. 109, holding that exceptions taken at trial cannot be recorded, after term has passed, when no order was allowed for that purpose; *Davis v. People*, 23 Colo. 495, 48 Pac. 513, holding that bill of exceptions filed after term constitutes no part of record unless order made during term extending time.

1 COLO. 83, POLLOCK v. PEOPLE.

Appealability of judgment of ouster from office.

Distinguished in *Londoner v. People*, 15 Colo. 246, 25 Pac. 183, holding that no appeal lies from judgment of ouster entered by district court in action for usurpation of public office.

1 COLO. 86, FREAS v. TOWNSEND.**Time to pray for appeal.**

Cited in *Dusing v. Nelson*, 6 Colo. 39, holding pendency of motion for new trial no relief from statutory requirement that appeal must be prayed within three days after entering decree; *Best v. Rocky Mountain Nat. Bank*, 31 Colo. 474, 73 Pac. 845, holding that appeal must be prayed for within five days after judgment appealed from is rendered.

1 COLO. 88, SEARS v. ANDREWS.**Sufficiency of verdict in replevin.**

Cited in *Sholes v. Norris*, 15 Colo. App. 475, 63 Pac. 124, holding verdict in replevin for plaintiff and assessing damages at fixed sum sufficient.

Presumption on appeal as to regularity of trial.

Cited in *Bitter v. Mouat Lumber & Invest. Co.* 10 Colo. App. 307, 51 Pac. 519, holding presumption in favor of proceedings in trial court in case of failure to present full record or bill of exceptions.

1 COLO. 89, SOPRIS v. TRUAX.**Necessity for specially pleading fraud in replevin.**

Cited in *Benesch v. Wagner*, 12 Colo. 534, 13 Am. St. Rep. 254, 21 Pac. 706, holding that fraud need not be specially pleaded in action for claim and delivery of property; *Conner v. Knott*, 8 S. D. 304, 66 N. W. 461, to the point that in replevin, all that is necessary in order to enable defendant to prove any defense which he may have, is to deny all allegations of plaintiff's petition; *Plano Mfg. Co. v. Person*, 12 S. D. 448, 81 N. W. 897; *Bailey v. Swain*, 45 Ohio St. 657, 16 N. E. 370,—holding proof of fraud in action of replevin admissible under general denial; *Phenix Iron Works v. McEvony*, 47 Neb. 228, 53 Am. St. Rep. 527, 66 N. W. 290, holding it unnecessary to specially plead fraud as defense in replevin.

Distinguished in *Seeleman v. Hoagland*, 19 Colo. 231, 34 Pac. 995, holding that defendant in replevin must specially plead facts relied on as constituting plaintiff's title fraudulent.

Instructions on the evidence.

Cited in note in 72 A. D. 545, on commenting upon evidence.

1 COLO. 91, WORRALL v. HARE.**1 COLO. 95, CLAYTON v. SMITH.****Necessity for exceptions.**

Cited in *Whitehead v. Jessup*, 7 Colo. App. 460, 43 Pac. 1042, holding exception to judgment unnecessary to enable appellate court to pass upon sufficiency of evidence, where facts agreed upon; *George v. Tufts*, 11 Colo. 162, holding exception to judgment unnecessary where cause heard on agreed state of facts.

1 COLO. 99, DUNTON v. MONTOMO.**Necessity that judicial proceedings be in English.**

Distinguished in *Trinidad v. Simpson*, 5 Colo. 65, holding inability of

juror to speak and understand English language not necessarily disqualifying him from serving as juror.

1 COLO. 100, WOODBURY v. GRIMES.

Effect of repeal of statutory lien act.

Cited in *Purmort v. Tucker Lumber Co.* 2 Colo. 470, holding that mechanics' liens fell upon repeal of act under which they exist in absence of saving clause; *Gull River Lumber Co. v. Lee*, 7 N. D. 135, 73 N. W. 430, holding lien of taxes destroyed by repeal of statute creating it; *Wilson v. Simon*, 91 Md. 1, 80 Am. St. Rep. 427, 45 Atl. 1022, holding that repeal of mechanic's lien law without saving clause as to pending case destroyed lien on file on which proceedings had been commenced but judgment had not been rendered.

Disapproved in *Garneau v. Port Blakely Mill Co.* 8 Wash. 467, 36 Pac. 463, holding statutory lien of loggers unaffected by repeal of statute pending enforcement of lien.

Power of legislature to repeal or amend mechanics' lien act.

Cited in *National Bank v. Williams*, 38 Fla. 305, 20 So. 931, holding that mechanics' lien law forms no part of obligation of contract of employment and may be repealed by legislature; *John S. Hanes & Co. v. Wadey*, 73 Mich. 178, 2 L.R.A. 498, 41 N. W. 222, holding mechanics' law no part of contract and entirely within power of legislature which gave it life; *State ex rel. Brown v. McPeak*, 31 Neb. 139, 47 N. W. 691, holding that statutory judgment lien may be taken away; *Lester v. Houston*, 101 N. C. 605, 8 S. E. 366, to the point that mechanics' lien act assumes existence of contract but does not create it; *Mack v. Degraff & R. Quarries*, 57 Ohio St. 463, 63 Am. St. Rep. 729, 49 N. E. 697, holding statutes relating to mechanics' and materialmen liens remedial.

Disapproved in *Waters v. Dixie Lumber & Mfg. Co.* 106 Ga. 592, 17 Am. St. Rep. 281, 32 S. E. 636, holding that legislature cannot destroy lien of materialman, which has become fixed, by repeal or modification of act under which it became fixed; *Handel v. Elliott*, 60 Tex. 145, holding lien of mechanic part of obligation of contract which legislature cannot impair.

1 COLO. 106, CRANDALL v. STERLING GOLD MIN. CO.

Judicial notice.

Cited in note in 89 A. D. 675, on judicial notice.

1 COLO. 111, MALONEY v. GRIMES.

Effect of sale of attached property upon contemporaneous liens.

Cited in *Claslin v. Doggett*, 3 Colo. 413, holding effect of sale of attached property transfer of lien of attachment from property to fund.

1 COLO. 117, HOWARD v. SHERWOOD.

1 COLO. 121, SMITH v. PEOPLE.**Bill of exceptions in criminal cases.**

Cited in *Van Houton v. People*, 22 Colo. 53, holding that act of 1865 in relation to bills of exceptions applies to criminal cases; *Davis v. People*, 23 Colo. 495, 48 Pac. 513, holding that bill of exceptions in criminal case may be signed and sealed at any time during trial term or thereafter within time to be fixed by court; *Packer v. People*, 26 Colo. 306, 57 Pac. 1087, holding bill of exceptions necessary to preserve exceptions to rulings complained of; *Bergdahl v. People*, 27 Colo. 302, 61 Pac. 228, holding motion to quash information can only be preserved by bill of exceptions.

Instructions on abstract point.

Cited in *Carpenter v. People*, 31 Colo. 284, 72 Pac. 1072, holding that jury should not be instructed as to lower grade of crime where there is no evidence tending to establish such grade.

Sufficiency of verdict of guilty.

Cited in *Territory v. Perkins*, 2 Mont. 467, holding verdict "we, the jury, find defendant guilty as charged in indictment" sufficient, under indictment for assault with intent to commit murder.

Criminal responsibility of conspirators.

Cited in *Bowlby's Homicide*, 3d ed. 63, on responsibility of alleged aider or abetter, who provoked difficulty to end that killing might be accomplished, where he took no part in killing; *Bowlby's Homicide*, 3d ed. 675, on joint acts of execution in carrying out conspiracy to assault another rendering each criminally responsible for death of victim; *Bowlby's Homicide*, 3d ed. 670, on conspiracy to commit unlawful assault, with weapons calculated to endanger life, constituting murder on part of all, where death results from act of one conspirator; *Bowlby's Homicide*, 3d ed. 644, on criminal responsibility of members of conspiracy to do unlawful act.

Cited in note in 68 L.R.A. 193, 213, 218, on homicide in carrying out unlawful conspiracy.

What will reduce murder to manslaughter.

Cited in *Bowlby's Homicide*, 3d ed. 322, on test as to sufficiency of provocation to mitigate homicide from murder to manslaughter; *Bowlby's Homicide*, 3d ed. 271, on necessity of serious and highly provoking injury to reduce offense from murder to manslaughter.

Cited in note in 5 L.R.A.(N.S.) 816, on heat of passion which will mitigate or reduce degree of homicide.

Jury as judges of weight of evidence.

Cited in note in 87 A. D. 102, on jury as judges of facts and weight of evidence.

1 COLO. 148, ARMOR v. FISK.**1 COLO. 160, ARAPAHOE COUNTY v. KOONS.**

1 COLO. 161, HOEHNE v. TRUGILLO, 91 AM. DEC. 703.

What constitutes a judgment.

Cited in McKnight v. Ballif, 45 Colo. 138, 100 Pac. 433, holding findings of court not judgment.

—Final judgment.

Cited in Skinner v. Beahar, 2 Colo. 383, holding writ of error lies where record carries upon its face adjudication between parties; Corning v. Ryan, 3 Colo. 525, holding formal entry of judgment resulting from refusal of probate court to allow definite claim against estate unnecessary before appeal will lie; O'Brophy v. Fra Gold Min. Co. 36 Colo. 247, 85 Pac. 679, holding judgment void for irregularity reviewable on error.

1 COLO. 164, KURTZE v. McCORD.

Appearance as waiver of objection to jurisdiction of person.

Cited in Smith v. District Ct. 4 Colo. 235, holding voluntary appearance of parties in appellate court, which might have original jurisdiction of subject-matter, waiver of objection as to jurisdiction of person; Hall v. Jones, 45 Colo. 228, 100 Pac. 418, holding appearance of parties and empaneling of jury waiver of failure of justice to file transcript in county court; Loveland v. Union Nat. Bank, 25 Colo. 499, 56 Pac. 61, holding that administrator may waive service of notice or summons by voluntary appearance.

1 COLO. 165, GOOD v. MARTIN, 91 AM. DEC. 706, Reaffirmed on later appeal in 2 Colo. 218.

When indorser held as joint maker.

Cited in Best v. Hoppie, 3 Colo. 137, holding indorser not charged as maker in absence of specific proof that he put his name upon back of note before delivery to payee; Kiskadden v. Allen, 7 Colo. 206, 3 Pac. 221, holding party indorsing note at time of execution with understanding that note would not be accepted unless so indorsed, joint maker; Court Valhalla No. 16 F. A. v. Olson, 14 Colo. App. 243, 59 Pac. 883, holding third person who writes his name upon back of note and who participates in consideration, original promisor; Fisk v. Reser, 19 Colo. 88, 34 Pac. 572, holding parol evidence admissible to show circumstances under which persons other than payee, and apparently not otherwise connected with note, have indorsed it; Edmonston v. Ascragt, 43 Colo. 55, 95 Pac. 313, sustaining the rule that one signing note before delivery to give maker credit with payee is joint maker.

Cited in Brandt, Suretyship, 3d ed. 394, as to when stranger to note who indorses it in blank, is guarantor.

Cited in note in 72 A. S. R. 677, 684, on effect of indorsement by stranger before delivery.

Jury taking pleadings on retiring.

Cited in Abbotts, Civ. Tr. 2d ed. 480, on jury not being allowed to take pleadings with them on retiring.

1 COLO. 171, HAX v. LEIS.**Computation of time.**

Cited in *Evans v. Bowers*, 13 Colo. 511, 22 Pac. 812, holding day on which application to county court for writ of habeas corpus is made, excluded in computing time between that date and sitting of district court.

Cited in note in 49 L.R.A. 229, 231, on first and last days in computation of time.

1 COLO. 172, CRARY v. BARBER.**What constitutes an appearance.**

Cited in *Law v. Nelson*, 14 Colo. 409, 24 Pac. 2, holding motion to dismiss appeal not general appearance; *Talpey v. Doane*, 3 Colo. 22, holding order of court continuing case made without objection by defendants, not appearance by them; *Anderson v. Agnew*, 38 Fla. 30, 20 So. 766, holding mere recitation by clerk in transcript upon writ of error, that defendant entered appearance by some unnamed attorney, insufficient to show actual appearance.

Irregularities avoiding attachment.

Cited in note in 79 A. D. 174, on irregularities and defects avoiding attachment.

1 COLO. 176, SMITH v. SALOMON, 91 AM. DEC. 711.**1 COLO. 177, DOSS v. CRAIG.****Necessity for demand for possession in action for unlawful detainer.**

Cited in notes in 120 A. S. R. 50, on unlawful detainer; 121 A. S. R. 403, on right to civil action for forcible entry and detainer.

Distinguished in *Farncomb v. Stern*, 18 Colo. 279, 32 Pac. 612, holding plaintiff in action for forcible entry and detainer not required to demand possession, when entry forcible and illegal; *Wolfer v. Hurst*, 47 Or. 156, 82 Pac. 20, 8 A. & E. Ann. Cas. 725, holding giving of notice by landlord to tenant to quit no part of procedure by landlord to recover possession.

1 COLO. 179, REYNOLDS v. PEOPLE.**1 COLO. 182, WESTERN U. TELEG. CO. v. GRAHAM.****Writ of error as commencement of new suit.**

Cited in *Webster v. Gaff*, 6 Colo. 475, holding writ of error commencement of new suit; *Ohio-Colorado Min. & Mill. Co. v. Elder*, 47 Colo. 63, 99 Pac. 42, holding suing out of writ of error commencement of new suit.

Requisites on suing out of writ of error by nonresident.

Cited in *Filley v. Cody*, 3 Colo. 221, holding non-resident suing out writ of error required to give security for costs as provided in statute;

Edgar Gold & S. Min. Co. v. Taylor, 10 Colo. 110, 14 Pac. 113, holding tender of cost bond by non-resident after action brought but before motion to dismiss, too late.

Right of telegraph company to stipulate against liability for negligence.

Cited in **Dorgan v. Western U. Teleg. Co.** Fed. Cas. No. 4,004, holding that telegraph company cannot protect itself by contract from liability for negligence.

1 COLO. 187, HAX v. LEIS.

Effect of dismissing writ of error.

Cited in **Western U. Teleg. Co. v. Graham**, 1 Colo. 182, holding voluntary dismissal by plaintiff of writ of error, when his cause is regularly before court, affirmance of judgment below; **Freas v. Engelbrecht**, 3 Colo. 377, holding dismissal of appeal for want of prosecution in supreme court not affirmance of judgment appealed from.

1 COLO. 191, KINNEY v. WILLIAMS.

Exemplary damages.

Cited in **Murphy v. Hobbs**, 7 Colo. 541, 49 Am. Rep. 366, 5 Pac. 119, on subject of exemplary damages.

1 COLO. 192, SCUDDER v. CLARKE.

1 COLO. 194, LOVELAND v. SEARS.

Certiorari from district to county court.

Distinguished in **Re Rogers**, 14 Colo. 18, 22 Pac. 1053, holding that certiorari lies from district to county courts.

1 COLO. 196, CAROTHERS v. JONES.

Validity of general verdict on two causes of action.

Cited in **Kent v. Abeel**, 12 Colo. 547, 21 Pac. 718, holding that general verdict for gross amount sued for cannot be sustained, where plaintiff sues on two causes of action, but produces no evidence to support second.

1 COLO. 200, PATTERSON v. GILE.

Effect of absence of revenue stamp on admissibility of deed.

Cited in **Trowbridge v. Addoms**, 23 Colo. 518, 48 Pac. 535, holding that absence of revenue stamp from deed does not render it inadmissible in evidence.

Cited in note in 84 A. S. R. 189, 197, on failure to comply with statute requiring stamping of writings; 48 L.R.A. 310, 319, on effect of omission to stamp an instrument or to cancel stamps.

Necessity for pleading failure of consideration.

Cited in **Fairbanks v. Irwin**, 15 Colo. 366, 25 Pac. 701; **Munro v. King**,

3 Colo. 238, 12 Mor. Min. Rep. 160,—holding that failure or want of consideration must be specially pleaded in action on promissory note.

Cited in Abbott's Pleading, 2d ed. 1384, on evidence of want of consideration as not admissible under general issue if contract is so pleaded as to import consideration.

1 COLO. 205, LONGAN v. CARPENTER, Reversed in 16 Wall 271, 21 L. ed. 313.

Rights of bona fide assignee of debt secured by mortgage.

Disapproved in Cowing v. Cloud, 16 Colo. App. 326, 65 Pac. 417, holding that bona fide assignee of note secured by mortgage took mortgage free from defenses existing between maker and payee; McGorney v. Gwillim, 16 Colo. App. 284, 65 Pac. 346, holding security only incident to debt.

1 COLO. 225, MACHETTE v. WANLESS, Later appeal in 2 Colo. 169.

Sufficiency of verdict or finding in replevin.

Cited in Phipps v. Taylor, 15 Or. 484, 16 Pac. 171, holding that no judgment can be rendered for plaintiffs in replevin; claiming to be owners of lumber and entitled to possession, where verdict silent as to ownership.

Distinguished in Freas v. Lake, 2 Colo. 480, holding that a finding for defendant in replevin sufficiently determines issues joined on not guilty and title in stranger.

Pre-existing debt as consideration.

Cited in Laubenhimer v. McDermott, 5 Mont. 512, 6 Pac. 344, holding pre-existing debt sufficient consideration for chattel mortgage; Westerly Sav. Bank v. Stillman Mfg. Co. 16 R. I. 497, 17 Atl. 918, to the point that mortgage securing existing debts without specifying them is good as against subsequent purchasers and incumbrancers.

Certainty in description of mortgage debt.

Cited in Curtis v. Flynn, 46 Ark. 70, holding that mortgage need not state amount of debt to be secured, or that it is evidenced by note or other instrument; Clark v. Hyman, 55 Iowa, 14, 39 Am. Rep. 160, 7 N. W. 386, holding mortgage stating indebtedness secured as certain gross sum sufficient.

Cited in note in 49 A. S. R. 208, on description of indebtedness in mortgage.

Measure of recovery in replevin.

Cited in Stevenson v. Lord, 15 Colo. 131, 25 Pac. 313, holding recovery in replevin by chattel mortgagee against attaching creditor of mortgagor, properly for full amount, even though plaintiff's interest is less.

Right to first object on appeal.

Cited in Salida v. McKinna, 16 Colo. 523, 27 Pac. 810, holding objections to evidence raised for first time in this court considered, if at all, with much allowance.

1 COLO. 230, WESTERN U. TELEG. CO. v. GRAHAM, 9 AM. REP. 136.

Degree of care required of telegraph companies.

Cited in *Fowler v. Western U. Teleg. Co.* 80 Me. 381, 6 Am. St. Rep. 211, 15 Atl. 29, holding telegraph companies bound to use ordinary care, which is to be measured with reference to business in which they are engaged.

Cited in note in 45 A. R. 491, 496, on liability of telegraph company for mistake, or in delay or non-delivery of telegram.

Failure of sender to have telegram repeated as defense.

Cited in *Western U. Teleg. Co. v. Fenton*, 52 Ind. 1; *Gulf, C. & S. F. R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653; *Barnes v. Western U. Teleg. Co.* 24 Nev. 125, 77 Am. St. Rep. 791, 50 Pac. 438,—holding failure of sender to have message repeated no defense to action for failure to deliver.

Cited in note in 9 A. R. 152, on liability for mistake in unrepeatd telegram.

Right of telegraph companies to contract against liability for negligence.

Cited in *Johnston v. Western U. Teleg. Co.* 33 Fed. 362, holding regulations by telegraph company which contravene constitutional law or public policy of place where set up, unreasonable; *Western U. Teleg. Co. v. Crall*, 38 Kan. 679, 5 Am. St. Rep. 795, 17 Pac. 309; *Western U. Teleg. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339; *Marr v. Western U. Teleg. Co.* 85 Tenn. 529, 3 S. W. 496,—denying telegraph company's right to stipulate against liability for their own negligence or bad faith.

Cited in *Sutherland*, Dam. 3d ed. 2823, on right of telegraph companies to limit their liability; *Cooley*, Torts, 3d ed. 1485, on validity of restrictions of liability by telegraph companies.

Cited in notes in 81 A. D. 613, on telegraph company's power to limit liability; 71 A. D. 465, on power of telegraph company to make regulations as to telegrams; 71 A. D. 468, 473, on validity of conditions limiting liability of telegraph company; 24 A. R. 284, on limitation of liability of telegraph company.

—As to unrepeatd messages.

Cited in *Sutherland*, Dam. 3d ed. 2824, on validity of limitation of telegraph company's liability to repeated messages; *Sutherland*, Dam. 3d ed. 2827, on stipulation by telegraph company for non-liability for unrepeatd message as no defense for failure to deliver after its receipt at receiving office.

Cited in note in 11 L.R.A.(N.S.) 567, on validity of limitation of liability for unrepeatd telegrams.

Distinguished in *Birkett v. Western U. Teleg. Co.* 103 Mich. 361, 33 L.R.A. 404, 50 Am. St. Rep. 374, 61 N. W. 645, holding regulation by telegraph company limiting liability if message not repeated valid.

Measure of damages for telegraph company's breach of contract.

Cited in *Western U. Teleg. Co. v. Wilson*, 32 Fla. 527, 22 L.R.A. 434, 37 Am. St. Rep. 125, 14 So. 1, holding telegraph company's liability for breach of contract limited to such damages as fairly and naturally arise from breach or reasonably supposed to have been contemplated; *Postal Teleg. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252, holding consequential damages recoverable for breach of contract by telegraph company if they are proximate consequence of breach; *Rio Grande Western R. Co. v. Rubenstein*, 5 Colo. App. 121, 38 Pac. 76, holding profits of certain descriptions and under certain circumstances recoverable in action for damages; *Sweet v. Western U. Teleg. Co.* 139 Mich. 322, 102 N. W. 850, 5 A. & E. Ann. Cas. 732, holding damages to attorney for non-delivery of message instructing him to attend hearing too remote, where hearing adjourned and claim compromised and his interest contingent on success.

Cited in *Sutherland*, Dam. 3d ed. 157, on inability to consider consequential damages for breach of contract which was made under special circumstances unknown to party breaking it.

Cited in notes in 10 A. S. R. 711, on measure of damages against telegraph companies for negligence; 10 A. S. R. 779, 780, 782, on elements of damages in action against telegraph companies; 117 A. S. R. 288, on elements of damages recoverable for failure to transmit and deliver telegrams; 53 L.R.A. 35, 44, 45, 95, on loss of profits as element of damages for breach of contract.

1 COLO. 246, BERRY v. HART.

Sufficiency of defendant's pleadings in replevin.

Cited in *McCraw v. Welch*, 2 Colo. 284, holding that plaintiff in attachment sued in replevin by stranger to proceeding need not aver ground upon which attachment issued.

1 COLO. 256, CHENEY v. BARBER, 3 MOR. MIN. REP. 66.**1 COLO. 261, SULLIVAN v. CLEMENTS.**

Necessity of actual possession to maintain trespass quare clausum.

Cited in *Huginin v. McCunniff*, 2 Colo. 367, 14 Mor. Min. Rep. 463, holding constructive possession sufficient to maintain trespass, quare clausum fregit; *Patrick v. Brown*, 36 Colo. 298, 85 Pac. 325, holding that plaintiff in action for trespass on land without title must prove actual possession.

Sufficiency of complaint for trespass to real property.

Cited in *Randall v. Sanders*, 71 Ark. 609, 77 S. W. 56, holding complaint in trespass to real property not insufficient for failure to contain particular description of the close.

1 COLO. 263, HASKINS v. TUCKER.

1 COLO. 264, GALLUP v. WILDER.

1 COLO. 265, FORD v. BROWN.

1 COLO. 266, SOPRIS v. LILLY. Overruled on later appeal in 2 Colo. 496.

Sufficiency of declaration on replevin bond.

Cited in *Hayes v. New York Gold Min. Co.* 2 Colo. 273, holding each breach assigned in action on bond, conditioned to perform certain specific act separate count.

Right to damages for detention of property pending replevin.

Overruled on later appeal in 2 Colo. 496, holding damages for detention of property pending replevin suit unrecoverable unless awarded in replevin suit.

1 COLO. 268, LITCHFIELD v. DANIELS.

Right to remit part of claim to give court jurisdiction.

Cited in *Davis v. Wannamaker*, 2 Colo. 637, to the point that obligee of penal bond may remit whole or any part of damages due him upon bond; *Cramer v. McDowell*, 6 Colo. 369, holding that creditor had right to remit part of his demand and sue for balance; *Ferguson v. Byers*, 40 Or. 468, 67 Pac. 1115, as to whether party can waive part of his claim so as to bring it within jurisdiction of inferior court.

Cited in notes in 21 A. S. R. 621, on mode of determining jurisdiction as to values; 28 L.R.A. 222, on voluntary credits to bring debt within jurisdiction of court.

Sufficiency of plea denying partnership.

Limited in *Rogers v. Nuckolls*, 2 Colo. 281, holding that general issue by one of two partners, sued in assumpsit for breach of oral contract to deliver stock, without oath, operates to deny partnership.

Duty of applicant for continuance for absence of witness.

Cited in *Shiver v. State*, 41 Fla. 630, 27 So. 36, holding applicant for continuance because of absence of witness bound to show due diligence to procure latter's attendance or his deposition.

1 COLO. 272, CODY v. RAYNAUD.

Jurisdiction of court to issue process to foreign county.

Cited in *Western U. Teleg. Co. v. Claymore*, 2 Colo. 32, holding that process in action against corporation may be served in foreign county; *Phelps v. Spruance*, 1 Colo. 414, holding that probate court has jurisdiction to issue process to foreign county.

Right of agent to abandon contract upon breach by principal.

Cited in *Duffield v. Michaels*, 97 Fed. 825, holding agent justified on breach of contract of agency by principal in abandoning contract and repudiating agency.

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Necessity of showing sufficient cause for abandoning special contract.

Cited in *Cochran v. Balfe*, 12 Colo. App. 75, 54 Pac. 399, holding that one suing upon quantum meruit for partial services performed under entire contract must show rescission of contract, or impossibility of performance by wrongful act of defendant, or its prevention by act or default of defendant; *Lombard v. Overland Ditch & Reservoir Co.* 41 Colo. 253, 92 Pac. 695, holding plaintiff who bases his action upon full and complete performance of written contract required to prove such performance on his part.

Necessity for full performance of contract.

Cited in *Sutherland*, Dam. 3d ed. 2061, on necessity of full performance of entire contract for services.

1 COLO. 278, TANNATT v. ROCKY MOUNTAIN NAT. BANK, 9 AM. REP. 156.**Parol evidence to explain latent ambiguity in negotiable instrument.**

Disapproved in *Hager v. Rice*, 4 Colo. 90, 34 Am. Rep. 68, holding that real nature of transaction between original parties to bill of exchange containing latent ambiguity may be investigated.

What signature will bind principal.

Cited in *Guthrie v. Imbrie*, 12 Or. 182, 53 Am. Rep. 331, 6 Pac. 664, to the point that one executing note by merely adding to signature of his name word "sec.," "agent," "pres.," without disclosing name of principal is personally bound; *Exchange Bank v. Lewis County*, 28 W. Va. 273, holding agent maker of note signed "J. B., Agent for Lewis County."

Cited in note in 4 Eng. Rul. Cas. 283, on liability of one signing bill or note as agent.

Personal liability of agent.

Cited in note in 57 A. R. 537, on personal liability of agent on contract.

1 COLO. 287, ALLEN v. ELDRIDGE.**Necessity of proving married woman's ownership of chattels.**

Cited in *Burchinell v. Butters*, 7 Colo. App. 294, 43 Pac. 459, holding presumption that household furniture belongs to husband, where wife is living with him; *Austin v. Terry*, 38 Colo. 407, 88 Pac. 189, holding presumption that chattels belonged to estate of wife's deceased husband rather than to her individually, she being administratrix thereof.

Distinguished in *Rachofsky v. Benson*, 19 Colo. App. 173, 74 Pac. 655, holding no presumption in action of replevin by married woman to recover chattels levied on by husband's creditors that her title was acquired fraudulently.

Abstract instructions as error.

Cited in *Hunter v. Ferguson*, 3 Colo. App. 287, 33 Pac. 82, holding it error to give instructions in regard to fraud where there is no evidence upon which they can be predicated.

1 COLO. 291, JONES v. CARRUTHERS.**1 COLO. 293, GALLUP v. WILDER.**

Admission by default in action for unliquidated damages.

Cited in *Ruth v. Smith*, 29 Colo. 154, 68 Pac. 278, holding default by defendants in action for unliquidated damages no admission of value or amount of damages.

1 COLO. 293, FOSTER v. PEOPLE.

Necessity that indictment negative exception in statute.

Cited in *Territory v. Burns*, 6 Mont. 72, 9 Pac. 432, holding that indictment need not negative exception contained in statute, unless it be necessary to complete definition of offense.

Right to submit to jury grade of crime not shown by evidence.

Cited in *Carpenter v. People*, 31 Colo. 284, 72 Pac. 1072, holding that lower grade of crime should not be submitted to jury where there is no evidence tending to establish such grade.

1 COLO. 299, DEITSCH v. WIGGINS, Reversed in 15 Wall. 539, 21 L. ed. 228.

Sufficiency of officer's plea of justification in trespass.

Cited in *Williams v. Mellor*, 12 Colo. 1, 19 Pac. 839, holding that officer pleading justification must allege and prove existence and validity of judgment as well as writ.

Effect of joining issue on defective plea.

Distinguished in *Berry v. Hart*, 1 Colo. 246, holding plea which would have been obnoxious to demurrer sufficient after issue joined; *Wilson v. Hawthorne*, 14 Colo. 530, 20 Am. St. Rep. 290, 24 Pac. 548, holding that under code joint equitable may be sufficient as to single defendant though insufficient as to others.

Aiding defective answer by proof.

Cited in *Johnson v. Bailey*, 17 Colo. 59, 28 Pac. 81, holding that answer defective as justification under legal process may be aided by proof.

1 COLO. 309, FARNUM v. UNITED STATES, 4 MOR. MIN. REP. 192.**1 COLO. 317, PAUL v. LUTTRELL.****1 COLO. 322, ROACH v. BINDER.****1 COLO. 323, DEITZ v. CENTRAL CITY.**

Effect of change of official title of justice of the peace.

Distinguished in *People v. Jobs*, 7 Colo. 589, 4 Pac. 1124, holding that it is of no consequence that existence of office was sustained, under organic act, by virtue of powers conferred upon justices of the peace,

while under constitution it is upheld because authorized by provision relating to judicial officers of cities and towns; *People ex rel. Howell v. Curley*, 5 Colo. 412, holding person assuming as police judge to exercise judicial functions under no other license than that conferred by municipal authority guilty of usurpation.

Power of legislature over municipalities.

Cited in *Schwartz v. People*, 46 Colo. 239, 104 Pac. 92, to the point that legislature has power to confer upon county and town power to prohibit sale of intoxicating liquors; *Denver v. Hallett*, 34 Colo. 393, 83 Pac. 1066, holding that general assembly has plenary power with respect to municipal corporations except as limited by constitution; *Wagner v. Harris*, 1 Wyo. 194, holding that territorial assembly has power to create municipal corporations.

Appeal from justice of peace as waiver of objections to service.

Cited in *Saner v. People*, 17 Colo. App. 307, 69 Pac. 76, holding that appeal to county court from judgment of police magistrate cured any defects in complaint so far as they affected procedure before magistrate; *Paul v. Rooks*, 16 Colo. App. 44, 63 Pac. 711, holding appeal from judgment of justice waiver of all defects in summons or service; *School Dist. No. 38 v. Waters*, 20 Colo. App. 106, 77 Pac. 255, holding appeal from judgment of justice to county court waiver of irregularities and defects form or service of summons, or want of process; *Colorado C. R. Co. v. Caldwell*, 11 Colo. 545, 19 Pac. 542, holding appeal from judgment of justice waiver of all defects in service of process or even want of process.

Distinguished in *White House Mountain Gold Min. Co. v. Powell*, 30 Colo. 397, 70 Pac. 679, holding filing of appeal bond by defendant in county court upon overruling of motion to quash service of summons, not such appearance as would waive objection to service of summons.

When mandamus is proper remedy.

Cited in *Harding v. People*, 10 Colo. 387, 15 Pac. 727, holding mandamus remedy when board of examiners arbitrarily refuse application for certificate to practice.

Province of jury on appeal to county court.

Distinguished in *Walton v. Canon City*, 13 Colo. App. 77, 56 Pac. 671, holding province of jury on appeal to county court from judgment of police magistrate imposing fine for violation of city ordinance to assess fine in case defendant is found guilty.

Limit of amount of license fees.

Cited in note in 30 L.R.A. 423, 437, on limit of amount of license fees.

1 COLO. 334, MILLS v. ANGELA.

1 COLO. 336, DENVER v. KENT.

Right and duties of trustee under Town Site Act.

Cited in *McCloskey v. Pacific Coast Co.* 22 L.R.A.(N.S.) 673, 87 C.

C. A. [568](#), [160](#) Fed. 794, holding that legal title vested in trustee, on establishment of town site, in his official capacity, and, that absolute right in trust vested in beneficiaries simultaneously with entry; Hall v. Ashby, [2](#) Mont. [489](#), holding that trustee of town site of Helena had no judicial power and could not dedicate any part of town site as alley; State ex rel. Hicklin v. Webster, [28](#) Mont. [104](#), [72](#) Pac. [295](#), denying district judge jurisdiction to issue deed for unsurveyed portion of town site to person not claiming to be occupant at time town site was entered.

Who may bring suit for trustee's abuse of trust under Town Site Act.

Cited in Georgetown v. Glaze, [3](#) Colo. [230](#), holding that municipal corporation cannot interfere, under Town Site Act between individual applicants where no claim in behalf of public is sought to be asserted; Murray v. Hobson, [10](#) Colo. [66](#), [13](#) Pac. 921, holding town of Pueblo proper party to maintain suit to set aside sales of unclaimed lots made by trustee without authority of law.

Who are beneficiaries of trust under Town Site Act.

Cited in Robertson v. Martin, [8](#) Ariz. [422](#), [76](#) Pac. [614](#), holding occupant required to be claimant and to file statement, and pay purchase price to trustee, to be entitled to deed; Aspen v. Rucker, [10](#) Colo. [184](#), [15](#) Pac. 791, holding entire town site required to be held in trust until finally disposed of as trust property; Pueblo v. Budd, [19](#) Colo. [579](#), [36](#) Pac. [599](#), holding Town Site Act in so far as it attempts to vest title to unclaimed lands directly in town, in contravention of act of Congress creating the trust and void; Cofield v. McClellan, [1](#) Colo. [370](#), as to whether any several beneficial interests in town site of Denver could, under any circumstances, arise subsequent to entry; Scully v. Squier, [13](#) Idaho, [417](#), [90](#) Pac. [573](#), denying surveyor right to make paper street in incorporated town and deprive actual occupants of vested rights.

Method of disposition of unclaimed town site lots.

Cited in Martin v. Hoff, [7](#) Ariz. [247](#), [64](#) Pac. [445](#), holding that unoccupied lots undisposed of after trust has been primarily performed for benefit of those in occupation at time of entry can be disposed of only by methods prescribed by legislature; Jackson v. Winfield Town Co. [23](#) Kan. [542](#), as to whether unoccupied lots in town site become property of city.

[1](#) COLO. [352](#), PEOPLE EX. REL. BAXTER v. HALLETT.

Jurisdiction of supreme court to issue writ of mandamus.

Cited in Chumasero v. Potts, [2](#) Mont. [242](#), holding that supreme court has original jurisdiction to issue writ of mandate; Terrell v. Greene, [88](#) Tex. [529](#), [31](#) S. W. [631](#), holding that supreme court has original jurisdiction to grant writ of mandamus against district judge to recognize county attorney.

Cited in notes in [12](#) Am. Dec. [28](#), on mandamus to restore to or

determine title to office; 51 L.R.A. 44, on superintending control and supervisory jurisdiction of superior over inferior or subordinate tribunal. Construction of acts in pari materia.

Cited in *Dunton v. People*, 36 Colo. 128, 87 Pac. 540, holding that all acts in pari materia are to be taken together as if one law.

Suspension of attorney.

Cited in note in 95 A. D. 344, on disbarment or suspension of attorneys.

1 COLO. 365, THACKARAY v. HANSON.

Continuance of civil causes.

Cited in *Abbott's Civ. Tr.* 2d ed. 36, on refusal of postponement where desired evidence is inadmissible under the pleadings.

Cited in note in 74 A. D. 147, on continuance of civil causes.

Admissibility of evidence under pleadings.

Cited in *Abbott's Pleadings*, 2d ed. 1438, on unsworn denial as not letting in extrinsic evidence that defendant signed merely as agent.

Personal liability on corporate note.

Cited in note in 19 L.R.A. 681, on personal liability of officers on note made for corporation.

Negotiability of promissory notes.

Cited in *Cowan v. Hallack*, 9 Colo. 572, 13 Pac. 700, holding all promissory notes in writing for payment of money negotiable whether so expressed or not.

Alteration of instruments.

Cited in note in 86 A. S. R. 85, 89, on unauthorized alteration of written instruments.

1 COLO. 367, SCHOOL DIST. NO. 8 v. ERSKIN.

1 COLO. 370, COFIELD v. McCLELLAN, Affirmed in 16 Wall. 331, 21 L. ed. 339.

Effect of failure to file claim to town site within statutory period.

Cited in *Tucker v. McCoy*, 3 Colo. 284, holding that failure of claimant to quiet title to lot within site of Georgetown, under Law of 1870, to file statement within time prescribed bars forever right of claimant; *Territory v. Deegan*, 3 Mont. 82, holding that failure of claimant to comply with Town Site Act in not filing proof before expiration of six months from publication of notice bars right to assert title.

Distinguished in *Pueblo v. Budd*, 19 Colo. 579, 36 Pac. 599, holding that failure to comply with provision of Town Site Act limiting time in which beneficiary of trust must deliver statement of his claims does not work forfeiture of equitable interest of one in possession; *Schnepel v. Mellen*, 3 Mont. 118, holding that Town Site Act of this state provides for no forfeiture for failure to file statement of claim within time limited in notice of entry.

1 COLO. 374, CLEAR CREEK, COLORADO GOLD & S. MIN. CO. v. ROOT.

Nature of proceedings to enforce rights under mechanic's lien law.

Cited in *Williams v. Uncompahgre Canal Co.* 13 Colo. 469, 22 Pac. 806; *Bradbury v. Butler*, 1 Colo. App. 430, 29 Pac. 463; *San Juan & St. L. Min. & Smelting Co. v. Finch*, 6 Colo. 214,—holding proceedings to enforce rights under mechanics' lien law equitable in their nature.

Enforcibility of agreement to pay interest upon claim secured by mechanics' lien.

Cited in *Hurd v. Tomkins*, 17 Colo. 394, 30 Pac. 247, holding agreement to pay interest upon claim secured by mechanic's lien enforceable where rights of third parties not affected.

Sufficiency of specification of error.

Cited in *Goldberger v. Leibowitz*, 42 Colo. 99, 93 Pac. 1108, holding assignment of error stating generally that court erred in rendition of judgment not in compliance with rule of court.

1 COLO. 377, CODY v. BUTTERFIELD.

Continuance of civil causes.

Cited in *Glenn v. Brush*, 3 Colo. 26, holding motion for continuance in replevin action properly refused where affidavit fails to state single fact which would tend to establish ownership of property in plaintiffs.

Cited in note in 74 A. D. 147, on continuance of civil causes.

Necessity of stating specific ground of objection to evidence.

Cited in *Cowell v. Colorado Springs Co.* 3 Colo. 82, holding that objections to evidence must be made on trial and ground of objection particularly stated; *McCraw v. Welch*, 2 Colo. 284; *Webber v. Emerson*, 3 Colo. 248; *Tracey v. People*, 6 Colo. 151; *Percy Consol. Min. Co. v. Hallam*, 22 Colo. 233, 44 Pac. 509,—holding that specific ground of objection to evidence must be stated where evidence susceptible of being made admissible by introduction of further testimony.

Necessity of proving use when alleged in action by one for use of another.

Cited in *Pueblo County v. Sloan*, 5 Colo. 38; *Patton v. Coen & T. B. Carriage Mfg. Co.* 3 Colo. 365,—holding that use need not be proved if alleged in action by one for use of another.

1 COLO. 385, WATSON v. HAHN.

Release of indorser.

Cited in note in 18 L.R.A.(N.S.) 546, on release of indorser of note by failure to enforce liability of maker.

1 COLO. 393, LEIS v. HODGSON.

1 COLO. 394, TIGER v. LINCOLN.

1 COLO. 402, HIRSCH v. FERRIS.

1 COLO. 404, SHIPTON v. NORRID.

Who may maintain replevin.

Cited in *Messenger v. Northcutt*, 26 Colo. 527, 58 Pac. 1090, to the point that bailee of personal property having special interest therein may maintain replevin; *Illinois Sewing Mach. Co. v. Harrison*, 43 Colo. 362, 96 Pac. 177, holding general allegation of ownership of property sufficient in complaint for claim and delivery.

Possession as agent.

Cited in *Abbott's Pleadings*, 2d ed. 1815, on rights to amend allegation of right to possession as agent so as to state absolute ownership.

1 COLO. 405, HOEHNE v. RUPEAR.

Service of process to warrant default.

Distinguished in *Hoyt v. Macon*, 2 Colo. 113, holding that judgment of default cannot be entered on first day of second term, upon service of process within ten days of return day.

1 COLO. 406, GOOD v. MARTIN, REAFFIRMED ON LATER APPEAL IN 2 COLO. 218.

Necessity that default judgment precede final judgment.

Cited in *Streeter v. Marshall Silver Min. Co.* 4 Colo. 535, 7 Mor. Min. Rep. 660, holding it error to render final judgment against all defendants without first entering judgment by default against non-appearing defendant.

Default preceding final judgment.

Cited in note in 33 L.R.A. 517, on power of defendant's attorney to withdraw answer or appearance and permit default judgment.

1 COLO. 410, KLOPPER v. KELLER.

Authority of supreme court to appoint terms of district court.

Distinguished in *Campbell v. Shivers*, 1 Ariz. 161, 25 Pac. 540, holding judges of supreme court authorized to appoint regular terms of district courts for several districts of territory.

Jurisdiction of district court.

Cited in *Beery v. United States*, 2 Colo. 186, holding that but one court in each judicial district can entertain pleas to jurisdiction.

Relation of landlord and tenant.

Cited in *Moen v. Lillestal*, 5 N. Dak. 327, 65 N. W. 694, holding no relation of landlord and tenant under executory contract for sale of land, where purchaser is let into possession and bound to pay stipulated price; each year to pay "so much as one-half of all crops shall amount to."

1 COLO. 414, PLELPS v. SPRUANCE.

Necessity of exception to judgment in cause tried without jury.

Cited in *Liss v. Wilcoxson*, 2 Colo. 85; *Atkinson v. Atkinson*, 2 Colo. 381; *Brown v. People*, 3 Colo. 113; *Martin v. Force*, 3 Colo. 199; *Law*

v. Brinker, 6 Colo. 555; Whitehead v. Jessup, 7 Colo. App. 460, 43 Pac. 1042; Patton v. Coen & T. B. Carriage Mfg. Co. 3 Colo. 265,—holding exception to judgment in cause tried without jury necessary to question sufficiency of evidence in this court; Barker v. Hamilton, 3 Colo. 291, on necessity of exception to judgment in cause tried without jury to entitle one to review in this court; Tubbs v. Roberts, 40 Colo. 498, 92 Pac. 220, holding that evidence in equitable action tried to court may be examined as whole, when exception reserved to judgment and properly preserved even though no objection interposed to its reception.

1 COLO. 417, DOANE v. GLENN.

What is a final judgment.

Cited in McKercher v. Green, 13 Colo. App. 270, 58 Pac. 406, holding judgment in habeas corpus proceeding decreeing custody of infant to one of contesting parties final; Hennessey v. Reed, 15 Colo. App. 56, 60 Pac. 955, holding judgment in favor of intervening parties, claiming property, in attachment suit in county court, in which defendant traversed affidavit, final judgment.

1 COLO. 421, PEDDIE v. DONNELLY, 2 MOR. MIN. REP. 157.

Contemporaneous agreement as defense to note.

Cited in Cooper v. German Nat. Bank, 9 Colo. App. 169, 47 Pac. 1041, holding promissory note not subject to impeachment preceding or contemporaneous with its execution.

Cited in note in 43 L.R.A. 467, on contemporaneous agreements and their breach as defense to note.

1 COLO. 423, NACHTRIEB v. STONER.

Exemplary damages.

Cited in Murphy v. Hobbs, 7 Colo. 541, 49 Am. Rep. 366, 5 Pac. 119, on subject of exemplary damages.

1 COLO. 433, LOVELAND v. SEARS.

Right to amend return of service after judgment.

Cited in Gauley Coal Land Asso. v. Spies, 61 W. Va. 19, 55 S. E. 903, holding that return of service may be amended in lower court pending appeal; McClure v. Smith, 14 Colo. 297, 23 Pac. 786, holding amendments to officer's return upon process to correspond with fact liberally allowed in absence of complainant being deceived or misled.

Duty of judge to refer assessment of amounts due creditors to clerk.

Cited in Rawles v. People, 2 Colo. App. 501, 31 Pac. 941, holding that judge need not order clerk to make assessment of several amounts due each attaching creditor where he is ex officio clerk of court.

Proceeding against person under full christian name.

Cited in note in 132 A. S. R. 579, on proceedings against persons by less or other than full Christian names.

1 COLO. 436, HILL v. PEOPLE.

Sufficiency of indictment for murder in first degree.

Cited in *Redus v. People*, 10 Colo. 208, 14 Pac. 323, holding indictment charging unlawful, felonious, willful, and purposely killing and murder, with malice aforethought, sufficient to warrant finding of commission with deliberation and premeditation; *Jordan v. People*, 19 Colo. 417, 36 Pac. 218, holding that indictment for murder need not set out mode or manner of its perpetration, or instrument or agency employed to accomplish result; *Holt v. People*, 23 Colo. 1, 45 Pac. 374, holding it sufficient in information for murder in first degree to charge offense in language of statute.

Cited in *Bowlby's Homicide*, 3d ed. 872, on absence of word "deliberate" in indictment for murder not affecting its validity where synonymous term is used; *Bowlby's Homicide*, 3d ed. 832, on regularity of indictment in common law form where statute divides murder into different degrees; *Bowlby's Homicide*, 3d ed. 871, on sufficiency of charge of murder in first degree where words expressing same meaning as "deliberate and premeditated" are used.

Cited in note in 3 A. S. R. 282, on sufficiency of indictment for murder.

Meaning of words "malice aforethought."

Cited in *Taylor v. People*, 21 Colo. 426, 42 Pac. 652, holding words "malice aforethought" coextensive in meaning with "deliberation and premeditation."

Cited in *Bowlby's Homicide*, 3d ed. 101, on malice aforethought being equivalent to malice with premeditation.

Premeditation and deliberation as matter of inference.

Cited in *Van Houton v. People*, 22 Colo. 53, 43 Pac. 137, holding premeditation and deliberation matters of inference and presumption to be drawn by jury from facts and circumstances leading to, surrounding and explanatory of homicide.

Cited in *Bowlby's Homicide*, 3d ed. 231, on inference of deliberation and premeditation from preparation.

Duration of intent to kill.

Cited in *Bowlby's Homicide*, 3d ed. 205, on duration of intent to kill; *Bowlby's Homicide*, 3d ed. 164, on intention to commit murder not necessarily being required to have been conceived for any particular period of time.

What determines character of killing.

Cited in *Bowlby's Homicide*, 3d ed. 131, on attendant circumstances determining character of killing.

Deliberate and premeditated intent as element of murder in first degree.

Cited in *Bowlby's Homicide*, 3d ed. 214, on deliberate and premedi-

tated intent to take life as distinguishing feature between murder in first and second degree.

Presumption of malice or criminal intent.

Cited in Bowlby's Homicide, 3d ed. 116, on right of jury to infer malice from homicidal act; Bowlby's Homicide, 3d ed. 143, on province of jury to draw implication of malice from facts in homicide case; Bowlby's Homicide, 3d ed. 143, on existence of formed intent to kill as question for jury to determine from evidence.

Cited in note in 4 L.R.A.(N.S.) 935, on presumption of malice from killing.

—From use of deadly weapon.

Cited in Ratcliff v. People, 22 Colo. 75, 43 Pac. 553; Power v. People, 17 Colo. 178, 28 Pac. 1121,—holding that inference that killing was willful, deliberate or premeditated may be warranted from use of deadly weapon under certain circumstances; State v. Carver, 22 Or. 602, 30 Pac. 315, holding deliberate use of weapon alone insufficient proof of state of mind necessary to constitute murder in first degree.

Cited in Bowlby's Homicide, 3d ed. 125, on inference of ordinary and probable result of act from use of deadly weapon; Bowlby's Homicide, 3d ed. 134, on duty of court to call jury's attention to presumption of fact arising from use of deadly weapon; Bowlby's Homicide, 3d ed. 124, on inference of malice in homicide case from character of weapon.

Sufficiency of instruction in murder case.

Cited in Moynahan v. People, 3 Colo. 367, holding instruction in murder case correct in so far as it required jury to find premeditation, if specific intent to kill existed at time of giving fatal wound.

Distinguished in Babcock v. People, 13 Colo. 515, 22 Pac. 817, holding that statutory provisions may be given as instructions in murder cases when killing is in open manner and plea of self-defense relied on.

Necessity for finding of premeditation or intent to take life.

Cited in Kent v. People, 8 Colo. 563, 9 Pac. 852, 5 Am. Crim. Rep. 406, holding finding of premeditation or specific intent to take life essential to verdict of murder in first degree.

Proof beyond reasonable doubt.

Cited in Bowlby's Homicide, 3d ed. 128, on necessity for establishing malice in homicide cases beyond reasonable doubt.

Cited in note in 19 L.R.A.(N.S.) 486, on applicability of rule of reasonable doubt to self-defense in homicide.

1 COLO. 454, DOANE v. GLENN.

Power of court to amend record after judgment.

Cited in Breene v. Booth, 6 Colo. App. 140, 40 Pac. 193, holding that correction of judgment by trial court may be made upon any satisfactory evidence; People ex rel. Schmidt v. Arapahoe County Ct. 9 Colo. App. 41, 47 Pac. 469, holding that trial court may proceed on evidence satisfactory to itself to correct entry and make it speak judgment which court in fact rendered; Pleyte v. Pleyte, 15 Colo. 44, 24

Pac. 579, holding that clerical errors in judicial records may be corrected at any time; Seeley v. Taylor, 17 Colo. 70, 28 Pac. 461, holding that fact of personal service might be shown by amendment of record upon proper notice, where judgment prematurely rendered as upon constructive service, and legal time for answering under personal service had expired; Long v. Eisenbeis, 18 Wash. 423, 51 Pac. 1061, holding that equity cannot be invoked for correction of errors involved in express judgment pronounced by court in exercise of its judicial discretion.

Cited in note in 14 Am. Dec. 518, on amendments after appeal.

— At subsequent term.

Cited in Beckwith v. Talbot, 2 Colo. 604, holding that mistake in recording testimony in bill of exceptions may be corrected by amendment at subsequent term; Wolfley v. Lebanon Min. Co. 3 Colo. 296, holding court authorized to correct misprision of clerk at subsequent term, and make entry of judgment and other proceedings correspond with facts; State ex rel. Beckman v. Estes, 34 Or. 196, 52 Pac. 571, holding that bill of exceptions may be amended at subsequent term, by order of court entered nunc pro tunc, upon proper notice, so as to accord with real facts.

— Upon whom notice may be served.

Cited in Beach v. Beach, 6 Dak. 371, 43 N. W. 701, holding that attorney whose duty it was to enter judgment properly entitled to be served with notice of motion that it be corrected; Pease v. Bartlett, 97 Ill. App. 492, holding notice after judgment to attorney of record sufficient notice of motion to correct record upon which judgment was based; Krieger v. Krieger, 120 Ill. App. 634, holding notice to solicitor of party over whom court has acquired jurisdiction notice to him; Phelps v. Heaton, 79 Minn. 476, 82 N. W. 990, holding that motion to vacate judgment in favor of nonresident plaintiff may be served on his attorney of record; Sturgiss v. Dart, 23 Wash. 244, 62 Pac. 858, holding that motion to vacate judgment may be served on attorney of adverse party.

Amendment or vacation of judgment.

Cited in notes in 12 Am. Dec. 353, on amendment of judgment after term; 60 A. S. R. 660, on vacation of judgments on motion when not specially authorized by statute.

1 COLO. 460, HOLLADAY v. DAILEY, Affirmed in 10 Wall. 606, 22 L. ed. 187.

Validity of direct conveyance from husband to wife.

Cited in Craig v. Chandler, 6 Colo. 543, holding bona fide conveyance from husband directly to wife valid in equity.

Validity of unacknowledged deed.

Cited in Owers v. Olathe Silver Min. Co. 6 Colo. App. 1, 39 Pac. 980, holding mortgage on real estate of foreign corporation not acknowledged as required by our statutes admissible in evidence; Knight v. Lawrence,

19 Colo. 425, 36 Pac. 242, holding deed duly executed by person sui juris valid as conveyance though not acknowledged and certified as provided by conveyance statute.

Liability of separate estate of married woman.

Cited in note in 5 Am. Dec. 593, on liability of wife's separate estate.

1 COLO. 467, MURPHY v. CUNNINGHAM.

When bill of exceptions should be signed.

Cited in Eldred v. Malloy, 2 Colo. 20, holding that record should show that bill of exceptions was signed and sealed during term or at time allowed by court; Packard v. Spellings, 3 Colo. 109, denying right to record exceptions taken at trial, after term has passed, when no order allowed for that purpose; Van Duzer v. Towne, 12 Colo. App. 4, 55 Pac. 13, holding order made by judge in vacation extending time within which bill of exceptions should be filed, void.

—Effect of stipulation of counsel extending time.

Cited in Rhoades v. Drummond, 3 Colo. 374, holding that stipulation between counsel that bill of exceptions might be signed out of term applies absence of order of court; Crowe v. Charlestown, 62 W. Va. 91, 57 S. E. 330, 13 A. & E. Ann. Cas. 1110, holding that consent of parties cannot confer jurisdiction to sign bills of exceptions after expiration of time allowed by statute.

Waiver of objection to bill of exceptions.

Cited in Greig v. Clement, 20 Colo. 167, 37 Pac. 960, holding that objection on ground of failure to give notice of motion for extension of time in which to tender bill of exceptions, after joinder in error and submission of case upon merits comes too late; Ritchey v. People, 23 Colo. 314, 47 Pac. 384, holding delay of four months, in criminal case, in filing motion to strike bill of exceptions from files fatal to motion.

Sufficiency of evidence to support verdict.

Cited in Matthews v. Glines, 1 Colo. 472, holding that new trial will not be granted where evidence conflicting, and question is upon credibility of witnesses; Kinney v. Wood, 10 Colo. 270, 15 Pac. 402, holding rule that verdict will not be disturbed where evidence conflicting, and not manifestly against weight of evidence, applicable where jury waived; Denver Fire Brick Co. v. Platt, 11 Colo. 509, 19 Pac. 536; Barker v. Hawley, 4 Colo. 316,—holding that verdict will not be disturbed when evidence conflicting and verdict not manifestly against weight of evidence.

1 COLO. 472, MATTHEWS v. GLINES.

Sufficiency of evidence to support verdict.

Cited in Denver Fire Brick Co. v. Platt, 11 Colo. 509, 19 Pac. 536; Barker v. Hawley, 4 Colo. 316,—holding that verdict will not be disturbed when evidence conflicting and verdict not manifestly against weight of evidence.

1 COLO. 475, CENTRAL CITY WATER Co. v. KIMBER.**1 COLO. 479, GILPIN v. WATTS.****1 COLO. 484, ANDERSON v. SLOAN.****Right of surety in appeal bond to require obligee to sue.**

Cited in *Davis v. Patrick*, 6 C. C. A. 632, 12 U. S. App. 629, 57 Fed. 909, holding liability of surety on appeal bond so absolute that he cannot require issuance of execution against principal debtor; *Bolles v. Bird*, 12 Colo. App. 78, 54 Pac. 403, holding surety on appeal bond principal debtor, rendering demand before action unnecessary; *Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2, holding demand upon principal not necessary to be alleged or proved in order to sue sureties on bond for possession in eminent domain proceedings; *Rockwell v. District Ct.* 17 Colo. 118, 31 Am. St. Rep. 265, 29 Pac. 454, holding judgment debtor primarily liable, though as between obligors and obligees all obligors are equally liable upon appeal bond itself; *Day v. McPhee*, 41 Colo. 467, 93 Pac. 670, holding obligee in appeal bond not required to exhaust his remedy against principal before proceeding against surety; *Bingham v. Mears*, 4 N. D. 437, 27 L.R.A. 257, 61 N. E. 808, holding issuance of execution upon judgment affirmed not condition precedent to liability on part of surety on appeal bond; *Flannagan v. Cleveland*, 44 Neb. 58, 12 N. W. 297, holding issuance of execution and its return unsatisfied not condition precedent to right of creditor to sue signers of appeal bond; *Palmer v. Caywood*, 64 Neb. 372, 98 N. W. 1034, holding issuance of execution and return nulla bona not required as condition precedent to maintenance of suit on supersedeas undertaking.

Waiver of demurrer by going to trial.

Cited in *Danielson v. Gude*, 11 Colo. 87, 17 Pac. 283, holding waiver of demurrer by defendants entering upon and proceeding to trial upon merits without demanding ruling upon demurrer.

Waiver of issue of fact by going to trial.

Cited in *Bader v. Schult*, 118 Mo. App. 22, 94 S. W. 834, to the point that parties proceeding to trial without answer being filed raising issues of fact and without objecting thereto waive such irregularity.

Effect of sureties' names not appearing in body of bond.

Cited in *Brandt, Suretyship*, 3d ed. 991, on liability of sureties who sign appeal bond although their names do not appear in body of bond.

1 COLO. 489, ANDRE v. JONES.**How joint appeal maintained.**

Cited in *Fuller v. Swan River Placer Co.* 5 Colo. 123; *Diamond Tunnel Gold & S. Min. Co. v. Faulkner*, 14 Colo. 438, 24 Pac. 548,—holding joint appeal not maintainable unless each appellant entitled to appeal; *Tanquary v. Howard*, 35 Colo. 125, 83 Pac. 647, holding that joint appeal by all defendants must be prosecuted by all.

1 COLO. 490, CLEMENTS v. HAHN.

1 COLO. 491, PAUL v. LUTTRELL.

1 COLO. 493, SHALLCROSS v. KRETSCHMER.

1 COLO. 494, WATSON v. HAHN.

Presumption as to regularity of verdict.

Cited in *Houglan v. Cole*, 18 Colo. 426, 33 Pac. 151, holding verdict presumed to be warranted where it clearly appears that material evidence given at trial is not before appellate court.

1 COLO. 495, DOANE v. GLENN, Reversed in 21 Wall. 33, 22 L. ed. 476.

Presumption of ownership from possession of personalty.

Cited in *Tibbetts v. Terrill*, 44 Colo. 94, 96 Pac. 978, holding that one purchasing property with funds of another, or holds property for use of another, commits fraud upon creditors of such party.

Misnomer.

Cited in note in 132 A. S. R. 567, on proceedings against persons by less or other than full Christian names.

1 COLO. 507, SOPRIS v. WEBSTER.

Sufficiency of complaint in replevin.

Cited in *Tucker v. Parks*, 7 Colo. 62, 1 Pac. 427, holding plaintiff in replevin required to prove value of goods and amount of damages sustained.

1 COLO. 508, PEOPLE v. MYERS.

Right to waive objection to jurisdiction of court.

Cited in *Gibbs v. Gibbs*, 26 Utah, 382, 73 Pac. 641 (dissenting opinion), on right to waive objection to jurisdiction of court in county where suit brought.

1 COLO. 509, CREIGHTON v. KERR, Affirmed in 20 Wall. 8, 22 L. ed. 309, 8 Legal Gaz. 383.

Voluntary appearance as waiver of defective service.

Cited in *Union P. R. Co. v. De Busk*, 12 Colo. 294, 3 L.R.A. 350, 13 Am. St. Rep. 221, 20 Pac. 752, holding that general voluntary appearance waives objections to jurisdiction of court over person of defendant; *Loveland v. Union Nat. Bank*, 25 Colo. 499, 56 Pac. 61, holding that administrator may by voluntary appearance in action waive service of notice or summons.

1 COLO. 511, CONSOLIDATED GREGORY CO. v. RABER, 1 MOR. MIN. REP. 405.

Extent of mine superintendent's authority.

Cited in *Mt. Wilson Gold & S. Min. Co. v. Burbridge*, 11 Colo. App. 487, 53 Pac. 826, holding general superintendent of mining company

presumed to have authority to bind company for expense of nursing and caring for injured miner.

Necessity for specific objection to testimony.

Cited in *Cowell v. Colorado Springs Co.* 3 Colo. 82, holding that ground for objection to evidence must be particularly stated if inadmissibility of evidence may be obviated by further introduction of testimony.

Right to remit excess on appeal.

Cited in *Winne v. Colorado Springs Co.* 3 Colo. 155, holding that plaintiff in judgment may remit in this court excess of damages obtained, over those laid in declaration; *F. M. Davis Iron Works Co. v. White*, 31 Colo. 82, 71 Pac. 384, denying right of trial court to order remittitur as to part of verdict in personal injury action it deems excessive and enter judgment for residue.

1 COLO. 514, DOUGHERTY v. PEOPLE.

Necessity for proof of drug used in procurement of abortion.

Cited in *Com v. Sinclair*, 195 Mass. 100, 80 N. E. 799, 11 A. & E. Ann. Cas. 217, holding that name of medicine need be neither averred or proved in prosecution for procuring miscarriage of woman; *State v. Crews*, 128 N. C. 581, 38 S. E. 293, holding no defense to prosecution for procuring abortion that drug would not in fact cause miscarriage.

Malice as essential element of murder in attempted abortion.

Cited in *Johnson v. People*, 33 Colo. 224, 108 Am. St. Rep. 85, 80 Pac. 133, holding malice not essential element of murder committed in attempt to cause miscarriage of woman with child.

Necessity that Judge repeat instructions.

Cited in *Gaynor v. Clements*, 16 Colo. 209, 26 Pac. 324, holding refusal of correct instruction not error if substance thereof otherwise fairly incorporated in charge as given.

Meaning of words "abortion" and "miscarriage."

Cited in *Marmaduke v. People*, 45 Colo. 357, 101 Pac. 337, holding words "abortion" and "miscarriage" synonymous.

Cited in note in 66 A. D. 85-87, on crime of causing abortion.

1 COLO. 529, POWRIE v. KANSAS P. R. Co.

1 COLO. 531, UNION GOLD MIN. CO. v. ROCKY MOUNTAIN NAT. BANK, Later appeal in 2 Colo. 248, and 2 Colo. 565, which is affirmed in 96 U. S. 640, 24 L. ed. 648, 1 Mor. Min. Rep. 432.

Validity of contract to do thing prohibited by law.

Cited in *Casserleigh v. Wood*, 14 Colo. App. 265, 59 Pac. 1024, holding contract to do thing prohibited by statute and for doing of which penalty is provided not necessarily void.

Cited in *Cook, Corp.* 6th ed. 2096, on right of borrower to avoid loan on ground that corporation loaning same exceeded its charter rights.

Power of agent to bind principal.

Cited in *Robert E. Lee Silver Min. Co. v. Omaha & G. Smelting & Ref. Co.* 16 Colo. 118, 26 Pac. 326, holding general manager of mining company empowered to contract for sale and of all ores extracted from mines within period of six months; *Roman Catholic Congregation v. O'Leary*, 24 Colo. 228, 49 Pac. 422, holding church estopped to repudiate indebtedness contracted by priest while accepting benefits derived from expenditure.

Cited in *Cook, Corp.* 6th ed. 2312, on authority of superintendent of mine to borrow money for company.

Cited in note in 29 A. S. R. 96, on agent's power to borrow money. **Presumption of ratification from silence.**

Cited in *Higgins v. Armstrong*, 9 Colo. 38, 10 Pac. 232, holding that long continued silence gives rise to presumption of ratification; *King v. Rea*, 13 Colo. 69, 21 Pac. 1084, holding that circumstances must have been understood by party and such as would naturally call for some action before inference can be drawn from his silence.

Cited in note in 6 L.R.A.(N.S.) 314, on implied ratification of unauthorized loan effected by agent.

1 COLO. 550, WISE v. BROCKER.

Right to writ of error from final decision of probate court.

Cited in *Vance v. Rockwell*, 3 Colo. 240, holding that writ of error will lie from final decision of probate court.

Bringing out of writ of error as commencement of new suit.

Cited in *Webster v. Gaff*, 6 Colo. 475; *Stout v. Gully*, 13 Colo. 604, 22 Pac. 954,—holding writ of error to reverse decree of district court new suit; *Ohio-Colorado Min. & Mill. Co. v. Elder*, 47 Colo. 63, 99 Pac. 42; *Winfield v. Neall*, 60 W. Va. 106, 10 L.R.A.(N.S.) 443, 116 Am. St. Rep. 882, 54 S. E. 47, 9 A. & E. Ann. Cas. 982,—holding writ of error new suit.

1 COLO. 551, YUNKER v. NICHOLS, 8 MOR. MIN. REP. 64.

Easement to convey water over land for irrigation.

Cited in *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669, holding that junior location crossing senior location, where veins are cross-veins, has way of necessity through older location.

Validity of verbal agreement to convey water over land for irrigation.

Cited in *De Graffenried v. Savage*, 9 Colo. App. 131, 47 Pac. 902, holding that license operates as irrevocable grant after entry under it and construction of irrigating ditch; *Oppenlander v. Left Hand Ditch Co.* 18 Colo. 142, 31 Pac. 834, to the point that right to convey water over land of another for purposes of irrigation may be conferred by verbal agreement; *Schilling v. Rominger*, 4 Colo. 100; *North Powder Mill. Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223,—holding that parties by their joint acts may acquire common rights to appropriate water for purposes of irrigation unaffected by statute of frauds; *Maple Orchard Grove & Vineyard Co. v. Marshall*, 27 Utah, 215, 75 Pac. 369, hold-
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ing parol license to enter land to construct pipe line to carry water for irrigation purposes irrevocable grant, after entry.

Cited in Farnham, Waters, 2322, on effect of parol license to overflow land by erection of dam as to past damage; Farnham, Waters, 1976, on validity of parol agreement between landowners by which irrigating ditch is constructed over their land; Farnham, Waters, 2326, on parol license to construct irrigation ditch as irrevocable after construction.

Doctrine of riparian rights.

Cited in Drake v. Lady Ensley Coal, Iron & R. Co. 102 Ala. 501, 24 L.R.A. 64, 48 Am. St. Rep. 77, 14 So. 749, to a point that rights of riparian owners must give way ex necessitate to irrigation uses; Platte Water Co. v. Northern Colorado Irrig. Co. 12 Colo. 525, 21 Pac. 711, holding that appropriation of water from natural streams must be manifested by successful application of water to beneficial use designed; Stowell v. Johnson, 7 Utah, 215, 26 Pac. 290, holding doctrine of riparian rights not recognized.

Distinguished in Hartman v. Tresise, 36 Colo. 146, 4 L.R.A.(N.S.) 872, 84 Pac. 685, holding that necessity does not furnish basis for right of public fishery.

— Right to use water for irrigating purposes.

Cited in Hoge v. Eaton, 135 Fed. 411, holding use of water for irrigation, a natural want in arid region; Nash v. Clark, 27 Utah, 158, 1 L.R.A.(N.S.) 208, 101 Am. St. Rep. 953, 75 Pac. 371, 1 A. & E. Ann. Cas. 300, holding use of water for irrigation, a public use.

Right of landowners as to percolating waters.

Distinguished in Huber v. Merkel, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354, holding that common law right of owners of land to use percolating waters in any way he chose obtains in this state.

Application of rules of estoppel in pais to mining ground.

Cited in Shreve v. Copper Bell Min. Co. 11 Mont. 309, 28 Pac. 315, to point that rules of law relating to estoppel in pais apply to mining ground same as any other real estate claimed under similar title.

Sufficiency of damage to estop owner of estate.

Cited in note in 49 L.R.A. 525, on revocability of license to maintain burden on land, after licensee has incurred expense.

Distinguished in Stewart v. Stevens, 10 Colo. 440, 15 Pac. 786, holding damage to support estoppel against owner of estate must be more substantial than technical consideration in contract.

Necessity for pleading statute of frauds.

Cited in Tynon v. Despain, 22 Colo. 240, 43 Pac. 1039, holding that statute of frauds must be specially pleaded unless contract as set out in complaint shows that it is in violation thereof.

Power of legislature to tax.

Cited in Arapahoe County v. Rocky Mountain News Printing Co. 15 Colo. App. 189, 61 Pac. 494, holding that power of taxation belongs to legislative department.

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